

THE LAWS OF ENGLAND

BEING

A COMPLETE STATEMENT OF THE WHOLE
LAW OF ENGLAND.

BY

THE RIGHT HONOURABLE THE
EARL OF HALSBURY
LORD HIGH CHANCELLOR OF GREAT BRITAIN,
1885-86, 1886-92, and 1895—1905,

AND OTHER LAWYERS.

VOLUME XIII.

EQUITY.

ESTATE AND OTHER

DEATH DUTIES.

ESTOPPEL.

EVIDENCE

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Revising Editors:

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Assistant Managing Editor.

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BARRISTERS-AT-LAW.

The Titles in this Volume have been contributed by the following gentlemen :—

TITLE.	CONTRIBUTED BY
EQUITY . . .	JOHN M. LIGHTWOOD, Esq., M.A., Barrister-at-Law, formerly Fellow of Trinity Hall, Cambridge.
ESTATE AND OTHER DEATH DUTIES.	A. W. SOWARD, Esq., Secretary of the Estate Duty Office, Somerset House; assisted by A. E. SANSOM, Esq., and A. J. H. GREEN, Esq., both of the Estate Duty Office, Somerset House.
ESTOPPEL . .	The late Hon. Sir JOSEPH WALTON, one of His Majesty's Judges of the King's Bench Division; the Hon. J. W. MANSFIELD, M.A.; and BERTRAND W. DEVAS, Esq., M.A., Barristers-at-Law.
EVIDENCE . .	W. E. HUME-WILLIAMS, Esq., K.C., M.P., LL.B., Recorder of Norwich, and one of the Benchers of the Middle Temple; SIDNEY LOVELL PHIPSON, Esq., M.A.; JAMES ROBERT VERNAM MARCHANT, Esq., M.A.; A. CLIVE LAWRENCE, Esq.; MAURICE L. GWYER, Esq., M.A., B.C.L.; H. G. ROBERTSON, Esq., B.A.; and W. A. GREENE, Esq., M.A., Barristers-at-Law.

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See DESCENT AND DISTRIBUTION; REAL PROPERTY AND CHATTELS REAL.

ESTATE TAIL.

See DESCENT AND DISTRIBUTION; REAL PROPERTY AND CHATTELS REAL; SETTLEMENTS.

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See COMMONS.

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REAL; SALE OF LAND.

<i>Admissions for Purposes of Trial</i> - - -	„	PLEADING; PRACTICE AND PROCEDURE.
<i>Character, Evidence of</i> - - -	„	CRIMINAL LAW AND PROCEDURE.
<i>Common Informer</i> - - -	„	CRIMINAL LAW AND PROCEDURE.
<i>Confession and Avoidance</i> - - -	„	PLEADING.
<i>Confessions</i> - - -	„	CRIMINAL LAW AND PROCEDURE.
<i>County Courts</i> - - -	„	COUNTY COURTS.
<i>Criminal Cases, Evidence in</i> - - -	„	CRIMINAL LAW AND PROCEDURE.
<i>Custom</i> - - -	„	CUSTOM AND USAGES.
<i>Deeds, Receipts in</i> - - -	„	DEEDS AND OTHER INSTRUMENTS.
<i>Discovery</i> - - -	„	DISCOVERY, INSPECTION, AND INTERROGATORIES.
<i>Easements</i> - - -	„	EASEMENTS AND PROFITS A PRENDRE.
<i>Estoppel</i> - - -	„	ESTOPPEL.
<i>Foreign Judgments</i> - - -	„	CONFLICT OF LAWS.
<i>Inquests, Evidence at</i> - - -	„	CORONERS.
<i>Inspection of Documents</i> - - -	„	DISCOVERY, INSPECTION, AND INTERROGATORIES.
<i>Interrogatories</i> - - -	„	DISCOVERY, INSPECTION, AND INTERROGATORIES.

<i>For Judgments</i> - - -	1	<i>See title</i> ESTOPPEL ; JUDGMENTS AND ORDERS.
<i>Pleadings</i> - - -	"	PLEADING.
<i>Prescription</i> - - -	"	COMMONS ; EASEMENTS AND PROFITS À PRENDRE.
<i>Presumptions as to Rights of Property</i> - - -	"	PERSONAL PROPERTY ; REAL PROPERTY AND CHATTELS REAL.
<i>Stamps</i> - - -	"	REVENUE ; titles <i>passim</i> .
<i>Title, Abstract of</i> - - -	"	SALE OF LAND.
<i>Usage, Proof of</i> - - -	"	CUSTOM AND USAGES.
<i>Wills, Due Execution of</i> - - -	"	WILLS.

EXAMINERS.

See COURTS ; EVIDENCE ; PRACTICE AND PROCEDURE.

EXCHANGE.

See COMPULSORY PURCHASE OF LAND AND COMPENSATION ; REAL PROPERTY AND CHATTELS REAL ; STOCK EXCHANGE.

EXCHEQUER.

See CONSTITUTIONAL LAW ; REVENUE.

EXCHEQUER BILLS.

See BILLS OF EXCHANGE ETC.

EXCISE.

See INTOXICATING LIQUORS ; REVENUE.

EXCOMMUNICATION.

See ECCLESIASTICAL LAW.

ABBREVIATIONS

USED IN THIS WORK.

A. C. (preceded by date) . .	Law Reports, Appeal Cases, House of Lords, since 1890 (<i>e.g.</i> [1891] A. C.)
A.-G.	Attorney-General
Act.	Acton's Reports, Prize Causes, 2 vols., 1809—1811
Ad. & El.	Adolphus and Ellis's Reports, King's Bench and Queen's Bench, 12 vols., 1831—1842
Adam	Adam's Justiciary Reports (Scotland), 1893—(current)
Add.	Addams' Ecclesiastical Reports, 3 vols., 1822—1826
Adv.-Gen.	Advocate-General
Alc. & N.	Alcock and Napier's Reports, King's Bench (Ireland), 1 vol., 1813—1833
Alc. Reg. Cas.	Alcock's Registry Cases (Ireland), 1 vol., 1832—1841
Aleyn	Aleyn's Reports, King's Bench, fol., 1 vol., 1646—1649
Ambl.	Amblar's Reports, Chancery, 2 vols., 1725—1783
And.	Anderson's Reports, Common Pleas, fol., 1 vol., 1535—1605
Andr.	Andrews' Reports, King's Bench, fol., 1 vol., 1737—1740
Anon.	Anonymous
Anst.	Anstruther's Reports, Exchequer, 3 vols., 1792—1797
App. Cas.	Law Reports, Appeal Cases, House of Lords, 15 vols., 1875—1890
Arkloy	Arkley's Justiciary Reports (Scotland), 1 vol., 1846—1848
Arm. M. & O.	Armsstrong, Macartney, and Ogle's Civil and Criminal Reports (Ireland), 1840—1842
Arn.	Arnold's Reports, Common Pleas, 2 vols., 1838—1839
Arn. & H.	Arnold and Hodges' Reports, Queen's Bench, 1 vol., 1840—1841
Asp. M. I. C.	Aspinall's Maritime Law Cases, 1870—(current)
Ashb.	Ashburner's Principles of Equity, 1902
Atk.	Atkyns' Reports, Chancery, 3 vols., 1736—1754
Ayl. Pan.	Ayliffe's New Pandect of Roman Civil Law
Ayl. Par.	Ayliffe's Parergon Juris Canonici Anglicani •
B. & Ad.	Barnewall and Adolphus' Reports, King's Bench, 5 vols., 1830—1834
B. & Ald.	Barnewall and Alderson's Reports, King's Bench, 5 vols., 1817—1822
B. & C.	Barnewall and Cresswell's Reports, King's Bench, 10 vols., 1822—1830
B. & S.	Best and Smith's Reports, Queen's Bench, 10 vols., 1861—1870
Bac. Abr.	Bacon's Abridgment
Bail Ct. Cas.	Bail Court Cases (Lowndes and Maxwell), 1 vol., 1852—1854
Baild.	Baldon's Select Cases in Chancery (Selden Society, Vol. X.)
Ball & B.	Ball and Beatty's Reports, Chancery (Ireland), 2 vols., 1807—1814
Bankr. & Ins. R.	Bankruptcy and Insolvency Reports, 2 vols., 1853—1855

Bar. & Arn.	..	..	Barron & Arnold's Election Cases, 1 vol., 1843—1846
Bar. & Aust.	..	..	Barron & Austin's Election Cases, 1 vol., 1842
Barn. (CH.)	..	..	Barnardiston's Reports, Chancery, fol., 1 vol., 1740—1741
Barn. (K. B.)	..	..	Barnardiston's Reports, King's Bench, fol., 2 vols., 1726—1734
Barnes	..	..	Barnes' Notes of Cases of Practice, Common Pleas, 1 vol., 1732—1760
Batt.	...	..	Batty's Reports, King's Bench (Ireland), 1 vol., 1825—1826
Beat.	..	..	Beatty's Reports, Chancery (Ireland), 1 vol., 1813—1830
Beav.	..	..	Beavan's Reports, Rolls Court, 36 vols., 1838—1866
Beav. & Wal.	..	..	Beavan and Walford's Railway Parliamentary Cases, 1 vol., 1846
Beaw.	..	..	Beawes's <i>Lex Mercatoria</i>
Bellewe	..	..	Bellowe's Cases <i>temp.</i> Richard II., King's Bench, 1 vol.
Bell, C. C.	..	..	T. Bell's Crown Cases Reserved, 1 vol., 1858—1860
Bell, Ct. of Sess.	..	..	R. Bell's Decisions, Court of Session (Scotland), 1 vol., 1790—1792
Bell, Ct. of Sess. fol.	..	..	R. Bell's Decisions, Court of Session (Scotland), fol., 1 vol., 1794—1795
Bell, Dict. Dec.	..	..	S. S. Bell's Dictionary of Decisions, Court of Session (Scotland), 2 vols., 1808—1833
Bell, Sc. App.	..	..	S. S. Bell's Scotch Appeals, House of Lords, 7 vols., 1842—1850
Belt's Sup.	..	..	Belt's Supplement to Vesey Sen., Chancery, 1 vol., 1746—1756
Benl.	..	..	Benloe's (or Bendloe's) Reports, King's Bench and Common Pleas, fol., 1 vol., 1515—1627
Ben. & D.	..	..	Benloe and Dalison's Reports, Common Pleas, fol., 1 vol., 1357—1579
Bing.	..	..	Bingham's Reports, Common Pleas, 10 vols., 1822—1834
Bing. (N. C.)	..	..	Bingham's New Cases, Common Pleas, 6 vols., 1834—1840
Bitt. Prac. Cas.	..	..	Bittleston's Practice Cases in Chambers under the Judicature Acts, 1873 and 1875, 1 vol., 1875—1876
Bitt. Rep. in Ch.	..	..	Bittleston's Reports in Chambers (Queen's Bench Division), 1 vol., 1883—1884
Bl. Com	..	..	Blackstone's Commentaries
Bl. D. & Osb.	..	..	Blackham, Dundas, and Osborne's Reports, Practice and Nisi Prius (Ireland), 1 vol., 1846—1848
Bli.	..	..	Bligh's Reports, House of Lords, 4 vols., 1819—1821
Bli. (N. S.)	..	..	Bligh's Reports, House of Lords, New Series, 11 vols., 1827—1837
Bos. & P.	..	..	Bosanquet and Puller's Reports, Common Pleas, 3 vols., 1796—1804
Bos. & P. (N. R.)	..	..	Bosanquet and Puller's New Reports, Common Pleas, 2 vols., 1804—1807
Bract.	..	..	Bracton De Legibus et Consuetudinibus Angliæ
Bro. Abr.	..	..	Sir J. Brooke's Abridgment
Bro. C. C.	..	..	W. Brown's Chancery Reports, 4 vols., 1778—1794
Bro. Ecc. Rep.	..	..	W. G. Brooke's Ecclesiastical Reports, Privy Council, 1 vol., 1850—1872
Bro. (N. C.)	..	..	Sir R. Brooke's New Cases, 1 vol., 1515—1558
Bro. Parl. Cas.	..	..	J. Brown's Cases in Parliament, 8 vols., 1702—1800
Bro. Supp. to Mor	..	..	M. P. Brown's Supplement to Morison's Dictionary of Decisions, Court of Session (Scotland), 5 vols.
Bro. Synop.	..	..	M. P. Brown's Synopsis of Decisions, Court of Session (Scotland), 4 vols., 1832—1827
Brod. & Bing.	..	..	Broderip and Bingham's Reports, Common Pleas, 3 vols., 1819—1822

Brod. & F.	..	..	Brodrick and Fremantle's Ecclesiastical Reports, Privy Council, 1 vol., 1705—1864
Broun	..	..	Broun's Justiciary Reports (Scotland), 2 vols., 1842—1845
Brown. & Lush.	..	..	Browning and Lushington's Reports, Admiralty, 1 vol., 1863—1866
Brownl.	..	..	Brownlow and Goldesborough's Reports, Common Pleas, 2 parts, 1569—1624
Bruce	..	..	Bruce's Decisions, Court of Session (Scotland), 1714—1715
Buchan.	..	..	Buchanan's Reports, Court of Session and Justiciary (Scotland), 1806—1813
Buck	..	..	Buck's Cases in Bankruptcy, 1 vol., 1816—1820
Bulst.	..	..	Bulstode's Reports, King's Bench, fol., 3 parts in 1 vol., 1610—1626
Bunb.	..	..	Bunbury's Reports, Exchequer, fol., 1 vol., 1713—1741
Burr.	..	..	Burrow's Reports, King's Bench, 5 vols., 1756—1772
Burr. S. C.	..	..	Burrow's Settlement Cases, King's Bench, 1 vol., 1733—1776
Burrell	..	..	Burrell's Reports, Admiralty, ed. by Marsden, 1 vol., 1648—1840
C. A.	..	..	Court of Appeal
C. B.	..	..	Common Bench Reports, 18 vols., 1845—1856
C. B. (N. S.)	..	..	Common Bench Reports, New Series, 20 vols., 1856—1865
C. C. Ct. Cas.	..	..	Central Criminal Court Cases (Sessions Papers), 1834—(current)
C. L. R.	..	..	Common Law Reports, 3 vols., 1853—1855
C. P. D.	..	..	Law Reports, Common Pleas Division, 5 vols., 1875—1880
C. & P.	..	..	Carrington and Payne's Reports, Nisi Prius, 9 vols., 1823—1841
Cab. & El.	..	..	Cababé and Ellis's Reports, Queen's Bench Division, 1 vol., 1882—1885
Cald. Mag. Cas.	..	..	Caldecott's Magistrates Cases, 1 vol., 1777—1786
Calth.	..	..	Calthrop's City of London Cases, King's Bench, 1 vol., 1609—1618
Camp.	..	..	Campbell's Reports, Nisi Prius, 4 vols., 1807—1816
Carp. Pat. Cas.	..	..	Carpmael's Patent Cases, 2 vols., 1602—1812
Car. & Kir.	..	..	Carrington and Kirwan's Reports, Nisi Prius, 3 vols., 1815—1853
Car. & M.	..	..	Carrington and Marshman's Reports, Nisi Prius, 1 vol., 1811—1843
Cart.	..	..	Carter's Reports, Common Pleas, fol., 1 vol., 1664—1673
Carth.	..	..	Carthew's Reports, King's Bench, fol., 1 vol., 1687—1700
Cary	..	..	Cary's Reports, Chancery, 1 vol.
Cas. in Ch.	..	..	Cases in Chancery, fol., 3 parts, 1660—1697
Cas. Pract. K. B.	..	..	Cases of Practice, King's Bench, 1 vol., 1655—1775
Cas. Sett.	..	..	Cases of Settlements and Removals, 1 vol., 1689—1727
Cas. temp. Finch	..	..	Cases temp. Finch, Chancery, fol., 1 vol., 1673—1680
Cas. temp. King	..	..	Select Cases temp. King, Chancery, fol., 1 vol., 1724—1733
Cas. temp. Talb.	..	..	Cases in Equity temp. Talbot, fol., 1 vol., 1730—1737
Ch. (preceded by date)	..	..	Law Reports, Chancery Division, since 1890 (e.g., [1891] 1 Ch.)
Ch. App.	Law Reports, Chancery Appeals, 10 vols., 1865—1875
Ch. D.	Law Reports, Chancery Division, 45 vols., 1875—1890
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Comb.	Comberbach's Reports, King's Bench, fol., 1 vol., 1685—1698
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EQUITY.

For Separate Property of Married Women - - - -

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<i>Trusts and Trustees - -</i>	„	TRUSTS AND TRUSTEES.
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<i>Undue Influence - - - -</i>	„	CONTRACT; FRAUDULENT AND VOIDABLE CONVEYANCES; MISREPRESENTATION AND FRAUD; WILLS.
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<i>Voluntary Conveyances -</i>	„	FRAUDULENT AND VOIDABLE CONVEYANCES.
<i>Waste - - - - -</i>	„	REAL PROPERTY AND CHATELS REAL.

Part I.—Equitable Jurisdiction.

SECT. 1.—*Nature and Extent of Equitable Jurisdiction.*

SUB-SECT. 1.—*The Subjects of Equitable Jurisdiction (a).*

The subjects of equitable jurisdiction.

1. Equity is the system of law which, prior to the fusion of law and equity effected by the Judicature Acts, 1873 and 1875, was administered in the Court of Chancery (*b*). In certain matters that

(a) Many of the subjects discussed in this article are dealt with in detail elsewhere under their special titles. The object here is to state the leading principles of equity, and the relation of equity to law at the present time. The Judicature Acts have emphasised, rather than diminished, the importance of the principles which made up the former system of equity jurisprudence; and these cannot be understood without frequent reference to the practice of the Court of Chancery, and the introduction of matters which may seem to be mainly of historical interest. An outline of equity which discarded the history of the system would be of little practical value.

(b) For a general description of the jurisdiction of courts of equity, see Mitford (Lord Redesdale) on Pleadings, 4th ed., pp. 4, 111; Fonblanque, Treatise of Equity, 5th ed., Vol. I., p. 9, n. (f); and as to the authority of Lord Redesdale's work, see *Lloyd v. Johns* (1804), 9 Ves. 37, per Lord ELDON, L.C., at p. 54; *Cholmondeley (Marquis) v. Clinton (Lord)* (1820), 2 Jac. & W. 1, per PLUMER, M.R., at pp. 151, 152. The Court of Chancery had its origin in the reign of Edward II. or earlier, and was due to the deficiencies of the common law courts. By reason of violence these were not always able to secure the enforcement of their judgments; moreover, their rules were needlessly strict in some matters, and in others they gave no remedy at all. In cases where the courts were thus at fault petitions for redress were presented to the King or his Council, and convenience required that these should be dealt with by a special tribunal. For this purpose the Chancellor and the officials in the Chancery—chief among them the Master of the Rolls—were available. They formed under the early Plantagenet kings an important department of state; they were intrusted with the issue of the original writs which set the ordinary courts in motion; and the Chancellor, as a member of the Council, already exercised to some extent an ordinary jurisdiction similar to that of the common law courts, which was the foundation of the subsequent common law jurisdiction of the Court of

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Chancery (4 Co. Inst. 79, 80; Spence, Vol. I., p. 336; Kerly, History of Equity, pp. 52—56; Holdsworth, History of English Law, Vol. I., pp. 200, 235). It was not unnatural that to the Chancellor should fall the extraordinary jurisdiction which was needed to assist, correct, or supplement the jurisdiction of the ordinary courts.

The separate existence of the Court of Chancery probably arose from the practice of petitions being referred from the Council to the Chancellor. This was done under Edward I.; the Chancery was becoming an independent court, under Edward II. and Edward III.; and from the latter reign onwards its existence was fully established and its progress continuous (see Pollock and Maitland, History of English Law, 2nd ed., Vol. I., pp. 193, 196, 197; Kerly, History of Equity, pp. 27—31; "Common Law and Conscience in Chancery," Law Quarterly Review, Vol. I., p. 443; Baild., pp. xv., xlv.; Holdsworth, History of English Law, Vol. I., pp. 196—199; Spence, Vol. I., p. 335). In 1349 (22 Edw. 3) the King issued a proclamation to the sheriffs of London directing, *inter alia*, that "matters of grace" should be referred to the Chancellor (Kerly, History of Equity, p. 31), and in 1394 recourse to the new tribunal was so frequent that the stat. 17 Ric. 2, c. 6 (1394), inflicted damages on plaintiffs for false claims in Chancery. In this reign, or perhaps earlier, the writ of subpoena was introduced, and the defendant was bound by it to answer the plaintiff's complaint (Spence, Vol. I., p. 345; Baild., p. xiv.).

The encroachments of the Court of Chancery, and the use of the writ of subpoena were a matter of continual, though ineffectual, protest in Parliament throughout the fifteenth century (Kerly, History of Equity, pp. 37—45). But in addition to the original reasons for the establishment of the court it had by its recognition and enforcement of trusts, in their old form of uses (Holdsworth, History of English Law, Vol. I., p. 238), rendered services to society of vast importance, and it had become impossible to dispense with it. The sixteenth century found it in similar conflict with the common law courts over the right which it claimed to override their judgments by injunction (see Kerly, History of Equity, Vol. I., pp. 89, 107—117); and the conflict was not terminated until James I. decided in favour of the Court of Chancery (*Oxford's (Earl) Case* (1615), 1 Rep. Ch. 1; 1 White & Tud. J. C., 7th ed., p. 730). The reports commence in the middle of the same century and incorporate a few rulings of earlier date, and thenceforward the system of equity jurisdiction was continuously developed under the Chancellors, of whom the most illustrious were Sir Heneage Finch (Lord Nottingham), 1673—1682 (see 3 Bl. Com. 55; 4 *ibid.* 435), known as the "father of equity" (1 Maddock, Practice of Chancery, 3rd ed., p. xix.); Lord Hardwicke, 1737—1756 (see Butler's (Charles) Reminiscences, Vol. I., s. xi., 2, 4th ed., p. 132; *Goodtitle v. Otway* (1797), 7 Term Rep. 399, 416, Ex. Ch.; *Ex parte Greenway* (1802), 6 Ves. 812); Lord Thurlow, 1778—1792; and Lord Eldon, 1801—6; 1807—27. During all this period the procedure in Chancery was based on orders issued in 1617 by Lord Bacon (see Kerly, History of Equity, p. 104).

For about a century relief corresponding to that in Chancery was given to poor suitors in the Court of Requests. This was established in the reign of Henry VIII., and notwithstanding that it incurred the jealousy of the common law courts and was decided to be illegal (*Stepney v. Lloyd* (1598), Cro. Eliz. 647; *Derby's (Earl) Case* (1614), 12 Co. Rep. 114; *Penson v. Cartwright* (1614), Cro. Jac. 345; *Culmarly's Case* (1640), Cro. Car. 595), it continued till it was abolished by statute in 1640 (Holdsworth, History of English Law, Vol. I., p. 210; 3 Bl. Com. 50). There was also an equity side to the Court of Exchequer, but this jurisdiction was transferred to the Court of Chancery by the Court of Chancery Act, 1841 (5 Vict. c. 5), s. 1. And equitable jurisdiction was exercised by the courts of Wales and of the counties palatine, and by other local courts (Spence, Vol. I., p. 352). The courts of the County Palatine of Chester and of Wales were abolished by the Law Terms Act, 1830 (11 Geo. 4 & 1 Will. 4, c. 70), s. 14. As to the Chancery Courts of Lancaster and Durham, see title COURTS, Vol. IX., pp. 120—127. For further authorities as to the early history of the Court of Chancery, see Ashb., p. 25. The power of assisting the common law courts by punishing violent interference with their process appears to have been transferred to the Star Chamber when that tribunal was instituted under Henry VII. (Ashb., p. 27; Baild., p. xx.).

* The jurisdiction of the Chancellor was often delegated to the Master of the

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court enforced rights which were not in general(c) recognised at law, as in trusts, married women's settled property, and equities of redemption; or gave relief where no relief was available at law, as in relief against penalties and forfeitures. This was known as the exclusive jurisdiction in equity. In other matters the Court of Chancery enforced rights which were also recognised at law; and it then either gave an alternative and usually a more efficient remedy, as in contract (with the alternative remedy of specific performance), fraud, mistake, account, partition and partnership; or supplied a remedy to replace a legal remedy which had been lost, as where by accident a plaintiff had lost the means of asserting his remedy at law. This was known as the concurrent jurisdiction. There was also the auxiliary jurisdiction in equity; and in exercising this the Court of Chancery did not in general itself decide upon the rights of the parties, but afforded the benefit of its special procedure either (1) to facilitate the determination of the rights of the parties in other courts, as where it compelled discovery of facts or documents, or entertained suits to perpetuate testimony; or (2) to secure to the plaintiff, if successful, the fruits of the litigation, as where it protected property pending litigation by the appointment of a receiver, or prevented irreparable damage by granting injunctions to restrain the assertion of doubtful rights; or (3) to prevent injury to a third person from the conflicting rights of others, as in interpleader. Moreover, the Court of Chancery exercised an overriding jurisdiction by preventing proceedings in the common law courts from being made the instrument of oppression: this it did by restraining the commencement or prosecution of such proceedings, or the enforcement of judgments under them, as the case might require.

SUB-SECT. 2.—The Nature of Equity.

The nature of equity.

2. Early authorities refer to "conscience," "reason," and "good faith" as the principles which guided the Court of Chancery, and the term "equity" implies a system of law which is more consonant than the ordinary law with opinions current for the time being as to a just regulation of the mutual rights and duties of men

Rolls, who thus became the deputy of the Chancellor (Holdsworth, *History of English Law*, Vol. I., p. 214; Kerly, *History of Equity*, pp. 60, 127), and in time exercised a regular jurisdiction, subject to appeal to the Chancellor (see stat. (1729—30) 3 Geo. 2, c. 30, repealed by Civil Procedure Acts Repeal Act, 1879 (42 & 43 Vict. c. 59)). The first Vice-Chancellor was appointed in 1813, and two more were added in 1842 by the Court of Chancery Act, 1841 (5 Vict. c. 5). As to the staff of the court, and as to the defects in its organisation and its reconstitution in the nineteenth century, see Holdsworth, *History of English Law*, Vol. I., pp. 217 *et seq.*; Kerly, *History of Equity*, pp. 59, 127; and compare *Ex parte The Six Clerks* (1798), 3 Ves. 589, 599, 600; Masters of the Chancery, Hargrave's *Law Tracts*, Vol. I., p. 293. In 1852 the masters were abolished; the Master of the Rolls and the Vice-Chancellors were empowered to sit in chambers, and two chief clerks were assigned to each; and conveyancing counsel to the court were appointed (Court of Chancery Act, 1852 (15 & 16 Vict. c. 80)); as to taxing masters, see *Silkstone and Haigh Moor Coal. Co. v. Edey*, [1901] 2 Ch. 652, 655, O. A. See, as to the present organisation, title **COURTS** Vol. IX., pp. 60, 67, 68.

(c) As to devises of equitable estates, see note (u), p. 94, *post*.

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living in a civilised society (*d*). But there was never a time in the history of the court when the Chancellor was at liberty to follow generally either his own, or professional, or common opinions as to what was right and convenient. Law and the administration of law are, in all systems, intended as a means of attaining justice, but the means are imperfect. The special imperfections of mediæval common law were, as to the law itself, that its rules were too strict (*e*), and that it did not cover the whole field of obligations; as to its administration, that it had no effectual means of extracting truth from the parties, that its judgments were not capable of being adapted to meet special circumstances, and that they were often unenforceable through the opposition of the defendant, or were turned into a means of oppression.

The Court of Chancery, in so far as it remedied these defects, afforded an improved system of attaining justice, but this was the extent of the difference between law and equity (*f*). Each had the

(*d*) Baill., p. xxx.; Spence, Vol. I., pp. 408, n. (a), 411, 415, n. (b). A writ from Henry V. to the Chancellor in 1419 directs him to do both right and equity (Baill., p. xxx.). Compare the words in 7 Edw. 4 (Close Rolls), xxxi., "according to equity and conscience and to the old course and laudable custom of the same court" (cited in Holdsworth, History of English Law, Vol. I., p. 202). But in general, when the word "conscience" was used, this denoted the conscience of the defendant, and the court by decree *in personam* prevented his making an unconscionable use of his rights at common law. This was the ground of injunctions against enforcing judgments at law. "When a judgment is obtained by oppression, wrong, and a hard conscience, the Chancellor will frustrate and set it aside, not for any error or defect in the judgment, but for the hard conscience of the party" (*Oxford's (Earl) Case* (1615), 1 Rep. Ch. 1; 1 White & Tud. L. C., 7th ed., p. 730). And the correction of the conscience of the defendant was the ground of the interference of equity in cases of fraud, breach of trust, and wrong and oppression generally.

(*e*) Thus there could be no action on a bond, if lost, since production of the bond was at law essential; and, on the other hand, an obligor, who paid the debt, but took no receipt and left the bond outstanding, was liable to pay over again (Doctor and Student, p. 42). The necessity for equity to correct the excessive strictness of the law was usually put upon the ground that the law was concerned with general rules and could not adapt itself to particular circumstances: "The cause why there is a Chancery is for that men's actions are so divers and infinite, that it is impossible to make any general law which may aptly meet with every particular act, and not fail in some circumstances" (per Lord ELLESMERE, L.C., in *Oxford's (Earl) Case*, *supra*); see Doctor and Student, p. 52.

(*f*) Law and equity, it was said by Lord ELLESMERE, L.C., have both the same end, which is to do right (*Oxford's (Earl) Case*, *supra*), and in some matters, especially in regard to titles to equitable estates, equity followed the law implicitly. Where it differed from the law, this was in order to moderate its rigour; to supply its omissions; to assist the legal remedy; or to relieve against the evasion of the law, or the abuse of the legal right (*Dudley (Lord) v. Dudley (Lady)* (1705), Prec. Ch. 241, 244; *Cowper v. Cowper (Earl)* (1734), 2 P. Wms. 720). It moderated its rigour by giving relief against forfeitures or the loss of documents; it supplied its omissions by exacting conscientious conduct from the defendant when the law recognised no binding obligation; it assisted the legal remedy by discovery and the preservation of property *pendente lite*; it relieved against the evasion of the law by removing technical impediments, such as a satisfied term which prevented dower from attaching; and it relieved against the abuse of the legal right by granting injunctions to restrain the enforcement of unconscionable judgments. In early days the power or number of the defendants frequently called for the intervention of equity to assist the law, and a relic of this existed in the common clause in equity bills charging combination

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same object; each attained it only imperfectly—equity somewhat less imperfectly than law. Both, moreover, were developed in the same way, by decisions given in accordance with precedents and subject to professional criticism. From the beginning the Court of Chancery acted on the maxim that “equity follows the law,” and in cases where the legal analogy clearly applied the rule of law was adopted however harsh it might be (*g*).

As to matters not ordinarily dealt with at common law, such as trusts and legacies, equity was free to go to new sources of law, and the Roman law and the canon law were laid under contribution (*h*); and for a time, in laying the foundations of a new system of jurisprudence, the Chancellors acted, when necessary, on their own initiative, and made precedents. But they made as few innovations on the common law as possible, and the usual course was to disclaim the free following of any such notion as natural justice and to adhere to precedents (*i*). By the time that Lord Eldon's chancellership closed equity was a system of rules as well

and conspiracy which lasted until the nineteenth century (Mitford on Pleadings, p. 40). As to the early records of the Court of Chancery, see Baild., and as to the grounds of the jurisdiction and the subjects originally dealt with, see Kerly, *History of Equity*, pp. 70—93, 129—153; Holdsworth, *History of English Law*, Vol. I., pp. 237 *et seq.*

(*g*) *Bath (Earl) v. Sherwin* (1710), 10 Mod. Rep. 1, *per* Lord COWPER, L.C., at p. 3; and see p. 68, *post*. A judge in equity cannot “alter the maxims of the common law, for this would be to assume a power paramount to the law.” Thus, as pointed out in that case, equity did not interfere with the singularly harsh doctrine of collateral warranty (Cary, 6, and see Co. Litt. 373 a, b). The doctrine was abolished by 4 Ann. c. 16, s. 21, see Rawle on Covenants for Title, s. 8. Equity did not allow money to be followed, as against the heir, into land purchased with it (*Townsend v. Kilmurray* (1637), Toth. 121; see *Buxton v. Snee* (1748), 1 Ves. Sen. 154; Spence, Vol. I., p. 417). But in some matters equity exercised a jurisdiction corrective of the common law (Spence, Vol. I., p. 409), and at a late date it created the doctrine of separate property of married women in violation of common law principles (*ibid.*, p. 419).

(*h*) The exclusion of the Roman law from the common law courts was not followed in Chancery (Spence, Vol. I., p. 346), though the extent to which it was really used there has been disputed (see Kerly, *History of Equity*, p. 189).

(*i*) “With such a conscience as is only *naturalis* and *interna* this court has nothing to do; the conscience by which I am to proceed is merely *civilis et politica*, and tied to certain measures” (*Cook v. Fountain* (1676), 3 Swan. 585, *per* Lord NOTTINGHAM, L.C., at p. 600). “Though proceedings in equity are said to be *secundum discretionem boni viri*, yet, when it is asked, *vir bonus est quis?* the answer is, *qui consulta patrum, qui leges juraque servat*” (*Cowper v. Cowper (Earl)* (1734), 2 P. Wms. 720, *per* JEKYLL, M.R., at p. 753). And as to the influence of precedents in Chancery, see Kerly, *History of Equity*, pp. 100, 184; Spence, Vol. I., p. 416. In *Fry v. Porter* (1670), 1 Mod. Rep. 300, the question was raised whether, since equity was a universal truth, there could be a precedent for it (*per* VAUGHAN, C.J., p. 307). But of course equity is not of this nature, and Lord Keeper BRIDGMAN put the matter on a practical ground: “Certainly precedents are very necessary and useful to us, for in them we may find the reasons of the equity to guide us; and besides the authority of those who made them is much to be regarded” (*ibid.*). Lord MACCLESFIELD's opinion was, “never to shake any settled resolution touching property or the title of land, it being for the common good that these should be certain and known, however ill-grounded the first resolution should be” (*Wagstaff v. Wagstaff* (1724), 2 P. Wms. 258; compare *Sparrow v. Harcastle* (1754), Amb. 224, 227; and Lord NOTTINGHAM in *Pitt v. Hunt* (1681), 1 Vern. 18, approving a saying attributed to WALTER, C.B.: “It is no matter what the law is, so it be known what it is.” See Maddock, *Chancery Practice*, 3rd ed., Vol. I., p. xiii.

settled as ever the common law had been (*j*), and it had become incapable of judicial alteration except by the application of old rules to new subjects or to fresh circumstances, a process that is continually going on both at law and in equity (*k*). At the end of the eighteenth century an effort was made by Lord Mansfield and other common law judges to introduce equitable principles into the common law courts, but this was viewed with jealousy in the Court of Chancery (*l*), and on most points the common law courts reverted to their former-rules (*m*).

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SUB-SECT 3.—*The Exclusive Jurisdiction in Equity (n).*

3. Trusts formed the leading subject-matter of the exclusive jurisdiction in equity (*o*), and the jurisdiction extended beyond express trusts to constructive and resulting trusts, and to rights and obligations arising out of fiduciary relationship generally (*p*). Charities constituted a special class of trust, and fell within this jurisdiction (*q*). The recognition of trusts resulted in the creation of equitable interests in property, and as to these equity had exclusive jurisdiction, though in general it dealt with them in accordance with the rules applicable at common law to legal interests.

Trusts.

4. Where property was given in trust for a married woman, equity allowed it to be settled on her as separate estate and subject to a restraint on anticipation (*r*); and even where there was no trust, equity, if the property was intended for her separate use, produced the same effect by treating the husband as a trustee for her (*s*).

Married
women's
separate
estate.

5. Choses in action and contingent or expectant interests in real property were not assignable at law, but were assignable

Equitable
assignments.

(*j*) See *v. Pritchard* (1818), 2 Swan. 402, per Lord ELDON, L.C., at p. 414: "The doctrines of this court ought to be as well settled, and made as uniform almost as those of the common law, laying down fixed principles, but taking care that they are to be applied according to the circumstances of each case"; *Davis v. Marlborough (Duke)* (1819), 2 Swan. 108, 163; see Kerly, *History of Equity*, p. 167; and see *ibid.*, pp. 184—263, for a detailed account of the growth of modern equity.

(*k*) As to modern rules of equity, see *Re Hallett's Estate, Knatchbull v. Hallett* (1880), 13 Ch. D. 696, C. A., per JESSEL, M.R., at p. 710.

(*l*) See *Cooth v. Jackson* (1801), 6 Ves. 12, 39.

(*m*) See Ashb., pp. 15, 16. But the action to recover money paid by mistake, or obtained by improper means, which was in the nature of an equitable action, became established at law (*Moses v. Macferlan* (1760), 2 Burr. 1005); see p. 22, *post*.

(*n*) Technically the distinction between the exclusive, the concurrent, and the auxiliary jurisdiction—a distinction never very clearly established in certain details—is obsolete. But references to it are still of frequent occurrence in judgments, and it is retained here as the most convenient way of showing the scope of equitable jurisdiction.

(*o*) As to the refusal of the common law courts to recognise trusts, and the consequent rise of this exclusive jurisdiction, see p. 89, *post*.

(*p*) See p. 154, *post*; and title TRUSTS AND TRUSTEES.

(*q*) See title CHARITIES, Vol. IV., p. 294.

(*r*) See *Jones v. Harris* (1804), 9 Ves. 486, 493; *Tullett v. Armstrong* (1838), 1 Beav. 1, 21; *Vaughan v. Vanderstegen* (1854), 2 Drew. 363; *Taylor v. Meads* (1865), 4 De G. J. & Sm. 597; and see title HUSBAND AND WIFE.

(*s*) *Bennet v. Davis* (1725), 2 P. Wms. 316; see *Lucas v. Lucas* (1738), 1 Atk. 270; *Graham v. Londonderry* (1746), 3 Atk. 393.

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etc.

in equity on the ground that the assignment, either in form or in effect, amounted to a declaration of trust, with authority for the assignee to make use of the name of the assignor to obtain the benefit of the assignment (t).

6. As regards claims to property generally, when they had once come, upon the ground of trust or otherwise, within its jurisdiction, equity applied its own peculiar doctrines in order to adjust the rights of the parties in accordance with the intention of settlors and testators, or to prevent injustice. Hence the exclusive jurisdiction included the application of the doctrines of conversion, election, satisfaction, and marshalling of assets and securities, and the enforcement of a wife's equity to a settlement.

Relief against
forfeitures.

7. The strictness of the common law in enforcing penalties and forfeitures led to the intervention of equity in order to give relief in certain circumstances; and to this head of the jurisdiction may be referred the equitable relief against the forfeiture of mortgaged property which gave rise to the equity of redemption, and resulted in conferring upon equity a jurisdiction, which was practically exclusive, in adjusting the rights and liabilities of mortgagor and mortgagee. In addition to equities arising out of legal mortgages, equity recognised and enforced mortgages unaccompanied by the legal estate—whether mortgages of the equity of redemption or charges—and certain kinds of non-possessory liens, which were known as equitable liens (u).

SUB-SECT. 4.—The Concurrent Jurisdiction in Equity.

Grounds
of the
concurrent
jurisdiction.

8. In certain matters which were ordinarily the subject of jurisdiction at law, equity exercised a concurrent jurisdiction. This was based on various circumstances—that the legal remedy was not available, that the equitable remedy was more efficient, or that the procedure in equity afforded advantages which were not attainable at law. In addition, the Court of Chancery could mould its decrees so as to adjust the rights of the parties in a manner not practicable at law, and, by bringing all the parties interested before it, could avoid multiplicity of suits (v). Upon some one or more of these considerations was based the jurisdiction in specific performance; fraud, mistake, and accident; account; contribution; administration of estates; partnership; determination of boundaries; partition; and dower. In tithes, and in dealing with the effects of deceased persons, the jurisdiction in equity was concurrent with that of the ecclesiastical courts.

In cases of concurrent jurisdiction, where proceedings were

(t) See Co. Litt. 232 b, n. (1); Story, s. 1040; and title CHOSSES IN ACTION, Vol. IV., p. 374.

(u) See titles LIEN; MORTGAGE. As to the jurisdiction of equity in regard to infants, see title INFANTS AND CHILDREN. The Court of Chancery, as such, had no jurisdiction in regard to lunatics.

(v) Thus, where an heir was liable to a claim against his ancestor, but had a right to be reimbursed out of the personal estate, multiplicity of suits was avoided by bringing both heir and executor before the court (*Knight v. Knight* (1734), 3 P. Wms. 331).

pending at law, the Court of Chancery did not interfere unless it had better means of doing justice between the parties than a court of law; either because it could give a more perfect remedy, or because the nature of the case admitted of its being better tried by the procedure in equity than at law (a). Where the action at law was on an instrument or judgment, and the defence was fraud, this was a question which, under the later procedure at law, could be better tried there, and the Court of Chancery, although it had complete jurisdiction in such a case, refused to interfere (b).

But where jurisdiction in equity had once been assumed, because there was no adequate remedy at law, such jurisdiction was not lost upon the common law courts obtaining an equivalent jurisdiction (c).

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(i.) *Specific Performance (d).*

9. Where a contract is not duly performed on one side the normal remedy is an action at law to recover damages for breach of contract; but if this were the only remedy, it would always be at the option of the defaulting party either to perform his contract or to pay damages. In many cases damages are an adequate remedy, and the exercise of this option does no injury to the other party. But in cases where the remedy of damages was not adequate (e), equity in very early times (f) assumed jurisdiction to deprive the defaulting party of this option and to compel him to carry his contract into effect. The remedy of specific performance is peculiar to equity, but it is exercised in respect of a subject-matter—contract—which is equally within the cognisance of courts of common law; and the foundation of the equitable jurisdiction is that the remedy at law is inadequate (g). Originally,

Specific
performance.

(a) *Ochsenbein v. Papelier* (1873), 8 Ch. App. 695, 697.

(b) *Ibid.*; *Hoare v. Bremridge* (1872), 8 Ch. App. 22.

(c) "It does not follow, because the court of law will give relief, that this court loses the concurrent jurisdiction which it has always had," see *Atkinson v. Leonard* (1791), 3 Bro. C. C. 218, 224 (lost bonds); *Kemp v. Pryor* (1802), 7 Ves. 237 (money had and received); *British Empire Shipping Co. v. Somerset* (1857), 3 K. & J. 433 (bill for discovery).

(d) See title SPECIFIC PERFORMANCE.

(e) "The court gives specific performance instead of damages only when it can by that means do more perfect and complete justice" (*Wilson v. Northampton and Banbury Junction Rail. Co.* (1874), 9 Ch. App. 279, per Lord SELBORNE, L.C., at p. 284).

(f) Kerly, *History of Equity*, p. 147; Fry on *Specific Performance*, 4th ed., ss. 33 et seq.; Bailld., p. xxxv.

(g) *Harnett v. Yielding* (1805), 2 Sch. & Lef. 549, per Lord REDENSDALE, L.C., at p. 553. The question whether or not specific performance will be enforced does not depend on whether the subject-matter of the contract is real or personal property, but on the inadequacy of the remedy at law; though usually this is inadequate in the case of realty and adequate in the case of personalty (*Adderley v. Dixon* (1824), 1 Sim. & St. 607, per LEACH, V.-C., at p. 610; and see title SPECIFIC PERFORMANCE). Thus specific performance does not lie upon a contract to purchase stock which is readily procurable in the open market (*Cuddee v. Rutter* (1719), 1 P. Wms. 570); but it lies for the delivery of certificates of stock (*Doloret v. Rothschild* (1824), 1 Sim. & St. 590), or on a contract for sale of personal chattels which cannot be readily replaced (see *Arundell (Lady) v. Phipps* (1804), 10 Ves. 139, 148), including shares in companies as opposed to

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indeed, the plaintiff was required to establish his legal title by recovering damages on the contract at law before he came into equity (*h*); and specific performance was granted as a better remedy on the legal title (*i*), and, in strictness, it assumed that the contract could be sued on at law (*k*). But the remedy was not confined to cases where the plaintiff could sue at law, and it might be given where he had forfeited his legal remedy by not himself observing the contract in all respects (*l*), or where he had not acquired a remedy in consequence of the contract not complying with the Statute of Frauds. In the latter case a court of equity might dispense with the statute where there had been part performance, and, in suitable circumstances, specifically enforce the parol agreement (*m*); and this jurisdiction is now exercised by the High Court.

Delivery of
chattels.

10. Analogous to the jurisdiction in specific performance, though not arising out of contract, was the jurisdiction to compel the specific delivery of chattels. This was exercised in cases where chattels were wrongfully withheld and the plaintiff could not be adequately compensated by damages (*n*). The appropriate remedy at common

public stocks (*Duncuft v. Albrecht* (1841), 12 Sim. 189; *Cheale v. Kenward* (1858), 3 De G. & J. 27), or where for any other reason damages will not place the innocent party in as advantageous a position as if the contract had been performed (*Buuton v. Lister* (1746), 3 Atk. 383); and though a contract involving the performance of work will not in general be specifically enforced, in consequence of the inability of the court to superintend the performance, yet this objection will not prevail if the contract is definite and damages are not an adequate remedy, and if the defaulting party has obtained possession of the subject-matter of the contract (*Wolverhampton Corporation v. Emmons*, [1901] 1 K. B. 515, C. A.; compare *Mosely v. Virgin* (1796), 3 Ves. 184).

There was at one time a notion that a court of equity, if it refused specific performance, might give compensation for the breach of contract (*Denton v. Stewart* (1786), 1 Cox, Eq. Cas. 258; *Greenaway v. Adams* (1806), 12 Ves. 395); but this was overruled (*Todd v. Gee* (1810), 17 Ves. 273; *Sainsbury v. Jones* (1839), 5 My. & Cr. 1; see *Aberaman Ironworks v. Wickens* (1868), L. R. 5 Eq. 485, 514). However, statutory power to give damages in addition to or in lieu of specific performance was conferred on the Court of Chancery by the Chancery Amendment Act, 1858 (21 & 22 Vict. c. 27), s. 2. This is repealed, but the jurisdiction was preserved by the Statute Law Revision and Civil Procedure Act, 1883 (46 & 47 Vict. c. 49), and the same power now exists also under the Judicature Acts; see p. 51, *post*.

(*h*) Before Lord Somers' time the party was sent to law, and the bill for specific performance was only entertained if he got damages (*Doddsley v. Kinnerdale* (1761), Amb. 403, 406; see *Normanby (Marquis) v. Devonshire (Duke)* (1697), Freem. (CH.) 216; and as to the separation of courts of law and equity, see 1 Butler's (Charles) Reminiscences, s. III., 4).

(*i*) *Halsey v. Grant* (1806), 13 Ves. 73, 76; *Alley v. Deschamps* (1806), 13 Ves. 225, 229.

(*k*) *Williams v. Steward* (1817), 3 Mer. 472, 491; see *Cannel v. Buckle* (1724), 2 P. Wms. 243, where the jurisdiction to enforce an agreement to convey land in consideration of marriage was affirmed.

(*l*) *Davis v. Hone* (1805), 2 Sch. & Lef. 341, 347; *Lennon v. Napper* (1802), 2 Sch. & Lef. 682, 684.

(*m*) *Cooth v. Jackson* (1801), 6 Ves. 12, 27; see *Clinan v. Cooke* (1802), 1 Sch. & Lef. 22, 40; *Maddison v. Alderson* (1883), 8 App. Cas. 467, 479; *McManus v. Cooke* (1887), 35 Ch. D. 681, 697; and as to the policy of setting aside the statute, see *Lindsay v. Lynch* (1804), 2 Sch. & Lef. 1, 5.

(*n*) *Fells v. Read* (1796), 3 Ves. 70; see *Lloyd v. Loaring* (1802), 6 Ves. 773; *Lowther v. Lowther* (1806), 13 Ves. 95.

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law was an action of *detinue*, but in this the defendant might either return the chattel or pay the assessed value (*o*). Where the chattel could be replaced, the payment of the value was a compensation to the plaintiff; but where the article was unique in its nature (*p*), or where it was associated with rights in real estate (*q*), damages were not a compensation, and equity supplied the deficiency of the common law remedy by requiring the chattel to be returned. There was additional reason for the interference of equity where the chattel was withheld in breach of trust (*r*).

(ii.) *Fraud (s)*.

11. A court of equity has jurisdiction to relieve against every species of fraud (*t*), except that, where a will or a part of a will of personal estate has been procured by fraud, the matter is within the exclusive cognisance of the probate court, which, on proof of the fraud, will refuse probate of the will or will grant probate with the impugned part omitted, as the case may require (*a*); unless, indeed, the fraud is such as can properly be relieved against by allowing the will to stand and declaring the fraudulent legatee to be a trustee for the beneficiary intended by the testator (*b*). In the case of real estate the will might formerly be set aside at law on the issue *devisavit vel non*, and the Court of Chancery had no authority to set aside a will of land without a trial at law (*c*); but as regards real estate also the proper court in which to contest the will is now the probate court—that is, the Probate, Divorce, and Admiralty Division of the High Court of Justice (*d*).

12. Actual fraud was cognisable at law either as the ground of an action—in an action of deceit—or by way of defence, as where

Remedies for
fraud.

(*o*) This option was taken away by the Common Law Procedure Act, 1854 (17 & 18 Vict. c. 125), s. 78, and the defendant in the common law action could be compelled to return the chattel. As to delivery of chattels due under contract, see Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 52. As to the power of the High Court to order specific delivery of chattels, see R. S. C., Ord. 48, and title EXECUTION.

(*p*) *Somersett (Duke) v. Cookson* (1735), 3 P. Wms. 390; *contra*, where the plaintiff had himself, in effect, placed a price on the article (*Dowling v. Beljermann* (1862), 2 John. & H. 544).

(*q*) *Pusey v. Pusey* (1684), 1 Vern. 273 (the Pusey horn, a chattel held *as an* incident of tenure); *Jackson v. Butler* (1742), 2 Atk. 306 (mortgage deeds); *Macclesfield (Earl) v. Davis* (1814), 3 Ves. & B. 16.

(*r*) *Fells v. Reud* (1796), 3 Ves. 70.

(*s*) See title MISREPRESENTATION AND FRAUD.

(*t*) *Chesterfield (Earl) v. Janssen* (1751), 2 Ves. Sen. 125; *Hoare v. Bremridge* (1872), 8 Ch. App. 22, 26; see *Hamington v. Du Chastel* (1781), cited 2 Swan. 159, n; *St. Aubyn v. Smart* (1867), L. R. 5 Eq. 183. Fraud, trust, and accident were frequently referred to as the matters with which equity was specially conversant (*Man v. Ward* (1741), 2 Atk. 228; Hargrave, Law Tracts, p. 431).

(*a*) *Kerrich v. Bransby* (1727), 7 Bro. Parl. Cas. 437; *Allen v. Macpherson* (1842), 1 Ph. 133; (1847) 1 H. L. Cas. 191; *Meluish v. Milton* (1876), 3 Ch. D. 27, C. A. A distinction has been taken where probate has been obtained by fraud, and it has been said that in this case equity would interfere (*Barnesly v. Powel* (1749), 1 Ves. Sen. 284; *Price v. Dewhurst* (1838), 4 My. & Cr. 76).

(*b*) *Allen v. Macpherson*, *supra*; see judgment of Lord LYNDHURST, L.C., and cases there referred to. Compare *Whitton v. Russell* (1739), 1 Atk. 448.

(*c*) *Kerrich v. Bransby*, *supra*; *Allen v. Macpherson*, *supra*.

(*d*) See Court of Probate Act, 1857 (20 & 21 Vict. c. 77), ss. 61, 62; Land Transfer Act, 1897 (60 & 61 Vict. c. 65), s. 1 (3); and see title WILLS.

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fraud was given in evidence to support a plea of *non est factum* to a deed; and the jurisdiction in equity was concurrent (e). The appropriate court was determined by the procedure and by the nature of the remedy.

As regards procedure equity was originally the better court, both for the plaintiff, because he could get discovery and relief at the same time, and for the defendant, because he could clear himself on oath (f), a privilege denied to him at law till 1851 (g). Moreover, in equity presumption of fraud could be acted on, when at law strict proof would be required (h).

As regards remedy the plaintiff was at law restricted to damages; in equity, while he could not get damages, he could obtain the rescission of a contract, or the setting aside of a deed or other instrument and the restitution of property, with any pecuniary adjustment that might be necessary on either side by way of accounting for profits or allowance for depreciation (i).

Nature of
fraud.

An action of damages for deceit requires that actual fraud shall be proved. There is no such thing as an equitable action for deceit (k). But the court has never ventured to lay down as a general proposition what constitutes fraud (l). Actual fraud arises from acts and circumstances of imposition (m). It usually takes either the form of a statement of what is false or a suppression of what is true. A statement—*suggestio falsi*—is not necessarily fraudulent because it is untrue. To constitute fraud the person making the statement must either know it to be untrue, or make it without belief in its truth, or make it recklessly, careless whether it be true or false (n). The withholding of information—*suppressio veri*—is not in general fraudulent unless there is a special duty to disclose it (o); but the partial statement of fact, and the withholding of

(e) As to the extent of the concurrence, see *Hoare v. Bremridge* (1872), 8 Ch. App. 22.

(f) *Evans v. Bicknell* (1801), 6 Ves. 174, 184.

(g) Evidence Act, 1851 (14 & 15 Vict. c. 99), s. 2.

(h) *Man v. Ward* (1741), 2 Atk. 228; *Fullagar v. Clark* (1812), 18 Ves. 481, 483; see *Trenchard v. Wanley* (1723), 2 P. Wms. 166, 167.

(i) *Erlanger v. New Sombrero Phosphate Co.* (1878), 3 App. Cas. 1218, 1278. Restitution of property can be obtained from the holder of it, though he was no party to the fraud (*Bridgeman v. Green* (1757), Wilm. 58; *Smith v. Kay* (1859), 7 H. L. Cas. 750, 759), unless he has acquired it in such a manner as to give him a title free from this equity.

(k) *Arkwright v. Newbold* (1881), 17 Ch. D. 301, C. A.; *Smith v. Chadwick* (1884), 9 App. Cas. 187; *Derry v. Peek* (1889), 14 App. Cas. 337; see title MISREPRESENTATION AND FRAUD.

(l) *Mortlock v. Buller* (1804), 10 Ves. 291, 305, per Lord ELDON, L.C. The court did not lay down a general rule beyond which it would not go, lest other means of avoiding the equity of the court should be found out (*Lawley v. Hooper* (1745), 3 Atk. 278, 279).

(m) *Chesterfield (Earl) v. Janssen* (1751), 2 Ves. Sen. 125, 155. This is the first kind of fraud in Lord HARDWICKE's classification.

(n) *Derry v. Peek*, *supra*, at p. 374.

(o) Thus upon a contract of sale the maxim *caveat emptor* applies both at law and in equity, and a party who has special knowledge of the property is not bound to disclose it unless there is some obligation of disclosure arising otherwise than out of the relation of vendor and purchaser (*Fox v. Mackreth* (1788), 2 Bro. C. C. 400, 420; see *Turner v. Harvey* (1821), Jac. 169, 178; *Keates*

essential qualifications, may make that which is stated absolutely false and bring it under the head of *suggestio falsi* (*p*).

A misrepresentation made without knowledge of its untruth does not ordinarily give a right to damages at law, but it is a ground in equity for rescinding a contract (*q*), though not for setting aside a conveyance for value (*r*). If, however, a gift has been obtained by means of an innocent misrepresentation, restitution will be ordered (*s*).

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Innocent
misrepresen-
tation.

Passing off
goods.

13. The jurisdiction of a court of equity to prevent a man from selling his goods under such a description as to lead the public to believe that they are buying the goods of another appears to have been based upon the jurisdiction to prevent fraud, although actual fraudulent intent need not now be proved, and the effect of the jurisdiction is to create a property in trade names and marks (*t*).

(iii.) *Extensions of Fraud (u).*

14. In cases of actual fraud the jurisdiction in equity was strictly concurrent with that at law. But equity extended its jurisdiction by including under the head of fraud transactions which were so opposed to fair dealing between the parties that they ought not to be held binding. Under the head of constructive fraud, as this was called, were included the following cases:—(1) Where on one side there was no true consent, including cases where consent had been obtained by surprise; (2) where one party, though consenting, was not free; (3) where the transaction infringed the rights of third parties; and (4) where undue advantage had been taken of expectant heirs (*a*). In all these cases there might also be circumstances of contrivance or undue advantage implying actual fraud.

Constructive
fraud.

15. The first case—want of consent—arises when a transaction is entered into by a person of unsound mind. Such a person being

(1) Want of
consent.

v. Cadogan (Earl) (1851), 10 C. B. 591). The obligation of disclosure may arise from the relation of the parties, as where they are agent and principal; or from the nature of the contract, as where it is *uberrimæ fidei*; or from circumstances occurring during the negotiation, as where a statement made with honest belief is subsequently discovered to be false (*Davies v. London and Provincial Marine Insurance Co.* (1878), 3 Ch. D. 469, *per* FRY, J., at pp. 474, 475; *Brownlie v. Campbell* (1880), 5 App. Cas. 925, *per* Lord BLACKBURN, at p. 950).

(*p*) *Peek v. Gurney* (1873), L. R. 6 H. L. 377, 403; *Aaron's Reefs v. Twiss*, [1896] A. C. 273, 287.

(*q*) *Rawlins v. Wickham* (1858), 3 De G. & J. 304; *Redgrave v. Hurd* (1881), 20 Ch. D. 1, C. A.; *Derry v. Peek* (1889), 14 App. Cas. 337, 374.

(*r*) *See Wilde v. Gibson* (1848), 1 H. L. Cas. 605.

(*s*) *Re Glubb, Bunsfield v. Rogers*, [1900] 1 Ch. 354, C. A.; not following *Wilson v. Thornbury* (1876), 10 Ch. App. 239, in this respect. See title GIFTS.

(*t*) See *Leather Cloth Co. v. American Leather Cloth Co.* (1865), 11 H. L. Cas. 523, 538; *Reddaway v. Banham*, [1896] A. C. 199, 209, 215; *Warwick Tyre Co. v. New Motor etc. Co.*, [1910] 1 Ch. 248, 255; see title TRADE MARKS, ETC.

(*u*) See title FRAUDULENT AND VOIDABLE CONVEYANCES. As to frauds on powers, see *Aleyn v. Belchier* (1758), 1 Eden, 132; 2 White & Tud. L. C., 7th ed., 308; and title POWERS.

(*a*) The general principle is that if the party is in a situation in which he is not a free agent, and is not equal to protecting himself, a court of equity will protect him (*Evans v. Llewellyn* (1797), 2 Bro. C. C. 150).

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incapable of entering into a valid contract or of doing any valid act, a person dealing with him and knowing his incapacity is deemed to perpetrate a meditated fraud on him and his rights (*b*). And the mere incapacity is a ground in equity for reviewing the contract and setting it aside, if not for the lunatic's benefit (*c*); but this will not be done if the other party has acted in good faith, and if the parties cannot be restored to their original position (*d*).

Drunkenness.

Drunkenness existing at the time of a transaction, to such an extent as to deprive the party of mental capacity, invalidated the transaction at law, and, if there was nothing more, equity did not interfere, either to enable one party to get rid of his agreement or deed, or the other party to enforce it; but if the party had been enticed into drink or some unfair advantage had been taken of him, then equity would relieve him, even though the drunkenness was not such as to deprive him of reason (*e*); and the same relief will now be given by the High Court.

Weakness of mind.

Mere weakness of mind, short of unsoundness, is not alone a ground for relief in equity; but if the transaction is in itself improvident or unfair, there arises a presumption of fraud which will readily be supported if there are facts showing imposition, or advantage taken of the weakness of mind (*f*).

Inadequate consideration.

Inadequacy of consideration does not necessarily show want of consent, and it is not in itself a ground for relief in equity (*g*); but

(*b*) Story, s. 227. At common law a person of unsound mind could not himself plead his incapacity so as to invalidate his own acts (*Beverley's Case* (1603), 4 Co. Rep. 123 b), though his acts might be set aside by the Crown or by his heirs (Co. Litt. 247 a, b). But equity, in adopting the principle, confined it to acts done by the lunatic to the prejudice of others, and as to acts done to his own prejudice his lunacy was recognised as a ground for relief (Fonblanque, Treatise of Equity, 5th ed., Vol. I., p. 52; *Ridder v. Ridder* (1729), 1 Eq. Cas. Abr. 279; *Addison v. Dawson* (1711), 2 Vern. 678); and the courts of common law came to recognise that unsoundness of mind, if known to the other party, was a good defence to an action on a contract (*Baxter v. Portsmouth (Earl)* (1826), 5 B. & C. 170; *Molton v. Camroux* (1848), 2 Exch. 487; affirmed (1849) 4 Exch. 17, Ex. Ch.; *Imperial Loan Co. v. Stone*, [1892] 1 Q. B. 599, C. A.). The defence does not extend to claims for necessities (*Re Rhodes, Rhodes v. Rhodes* (1890), 44 Ch. D. 94, C. A.); see also title LUNATICS AND PERSONS OF UNSOUND MIND.

(*c*) See *Selby v. Jackson* (1843), 6 Beav. 192; affirmed (1844), 13 L. J. (OH.) 249. (*d*), *Niell v. Morley* (1804), 9 Ves. 478; *Sergeson v. Sealey* (1742), 2 Atk. 412; *Price v. Berrington* (1850), 3 Mac. & G. 486.

(*e*) *Cooke v. Clayworth* (1811), 18 Ves. 12; see *Rich v. Sydenham* (1671), 1 Cas. in Ch. 202; *Johnson v. Medlicott* (1734), 3 P. Wms., 6th ed., p. 130, n. (A); see title CONTRACT, Vol. VII., p. 342.

(*f*) *Osmond v. Fitzroy* (1731), 3 P. Wms. 129. There is no such thing as an equitable incapacity, where there is a legal capacity (*per* JEKYLL, M.R., at p. 130); *Clarkson v. Hanway* (1723), 2 P. Wms. 203; *Bridgman v. Green* (1755), 2 Ves. Sen. 627; *Filmer v. Gott* (1774), 4 Bro. Parl. Cas. 230; *Nantes v. Corrock* (1803), 9 Ves. 182; *Willan v. Willan* (1810), 16 Ves. 72; compare *Willis v. Jerreagan* (1741), 2 Atk. 251, *per* Lord HARDWICKE, L.C.; *Gartside v. Isherwood* (1783), 1 Bro. C. C. 558; Fonblanque, Treatise of Equity, 5th ed. Vol. I., p. 62. And the transaction is set aside not only as against the party guilty of the fraud, but as against innocent persons claiming through him (*Huguenin v. Baseley* (1807), 14 Ves. 273, *per* Lord ELDON, L.C., at p. 289; *Bridgman v. Green*, *supra*). Where coverture is no bar to a contract or conveyance by a married woman, she is bound by it, unless there is such fraud as would be a ground for setting aside the transaction in the case of any other person (see *Dalbiac v. Dalbiac* (1809), 16 Ves. 116).

(*g*) *Griſſith v. Spratley* (1787), 1 Cox, Eq. Cas. 383 (in the Exchequer); *Naylor*

it may be an element in establishing such fraud as will avoid the transaction (*h*), or the transaction may be so unconscionable as to afford in itself evidence of fraud (*i*). But, in order that relief may be given, it must be possible for the parties to be restored to their former position, and hence a marriage settlement cannot be set aside (*k*).

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A voluntary settlement may be set aside if its effect was not properly understood by the settlor, and when it contains no power of revocation, his attention should be expressly called to the omission and his instructions obtained and recorded. But the absence of a power of revocation, and the failure to draw attention to it, do not make the settlement invalid. They are merely circumstances to be considered (*l*).

Voluntary
settlement.

16. The fact that a party has acted without due deliberation, or under a misapprehension of his rights or of the effect of the transaction, is not a ground for relief in equity, unless the case is one in which relief can be afforded on the ground of mistake; but if by the conduct of the other party he has been taken unawares, and has acted without due deliberation, and under confused and sudden impressions, this is a case of surprise against which equity will relieve (*m*). But the relief is given on the ground of the fraud attending the surprise (*n*), and in general there are other circumstances, such as weakness of mind, or poverty, or inadequacy of consideration, which assist the result (*o*). If, however, surprise or mistake is set up as a ground for resisting specific performance of an agreement, the element of fraud need not be present (*p*).

Surprise.

17. A party to a transaction, though consenting to it, may not give a free consent, because he is exposed to such influence from the other party as to deprive him of the free use of his judgment; and in such a case equity will set the transaction aside, and if property has passed will order restitution, and if necessary follow it into the hands of innocent third parties (*q*). The evidence

(2) Undue
influence.

v. Winch (1824), 1 Sim. & St. 555, 565; *Borell v. Dann* (1843), 2 Hare, 440; *Harrison v. Guest* (1860), 8 H. L. Cas. 481. As to inadequacy of consideration in bargains with expectant heirs, see p. 21, *post*.

(*h*) See *Aylesford (Earl) v. Morris* (1873), 8 Ch. App. 484, 490; *Fry v. Lane, Re Fry, Whittell v. Bush* (1888), 40 Ch. D. 312, 324.

(*i*) *Coles v. Trecothick* (1804), 9 Ves. 234, 246; *Copis v. Middleton* (1818), 2 Madd. 410; *Peacock v. Evans* (1809), 16 Ves. 512.

(*k*) *North v. Ansell* (1731), 2 P. Wms. 618, 619; *Campbell v. Ingilby* (1856), 21 Beav. 567, 576.

(*l*) *Hall v. Hull* (1873), 8 Ch. App. 430; see *Villers v. Beaumont* (1682), 1 Vern. 100; *Petre v. Espinasse* (1834), 2 My. & K. 496; *Bill v. Cureton* (1835), 2 My. & K. 503; *Harvey v. Mount* (1845), 8 Beav. 439, 451. A voluntary conveyance was formerly liable to be defeated by a subsequent conveyance for value (see *Buckle v. Mitchell* (1812), 18 Ves. 100); but this cannot result from any such conveyance made after June 29th, 1893 (Voluntary Conveyances Act, 1893 (56 & 57 Vict. c. 21)).

(*m*) *Story*, s. 120, n. (3); *Evans v. Llewellyn* (1787), 2 Bro. C. C. 150; see *Irnham (Lord) v. Child* (1781), 1 Bro. C. C. 92.

(*n*) *Bath (Earl) v. Mountague (Earl)* (1693), 3 Cas. in Ch. 55; 1 Fonblanque, *Treatise of Equity*, 6th ed., Vol. I., p. 122.

(*o*) *Pickett v. Loggon* (1807), 14 Ves. 215.

(*p*) *Townshend (Marquis) v. Stangroom* (1801), 6 Ves. 323.

(*q*) *Bridjeman v. Green* (1757), Wilm. 58.

SECT. 1.

Nature and
Extent of
Equitable
Jurisdiction.Parent and
child.Guardian and
ward; trustee
and *cestui que*
trust.

may show that there was actual undue influence in the particular case (r); but in certain relations the existence of undue influence is presumed, and then the party seeking to uphold the transaction must give evidence rebutting the presumption (s). These relations are:—

(1) Parent and child (t), especially where the child has only recently come of age and is still under parental control (a). The child is presumed to be under the exercise of parental influence as long as the dominion of the parent lasts (b); but if the exercise of parental influence is disproved—as by showing that the child had independent advice, and acted on it (c), or otherwise—and if the child understood the contents of the deed, then the gift from the child stands on the same footing as any other gift (d). The rule applies where a person who is or has been *in loco parentis* takes a benefit from the child (e). But it does not apply where the transaction is one for the settlement of property in which the parties are mutually interested; and such transactions are regarded by the court with favour (f). Consequently, a resettlement, under which a son's estate is cut down, will be upheld if he understood it, although he was not separately advised (g); parental influence is not a ground for interference when it is not exercised for the benefit of the parent (h).

(2) Guardian and ward; (3) Trustee and *cestui que trust* (i). In these relations the rule is similar to that in the case of parent and child, but is applied more strictly. On grounds of public policy the court raises a strong presumption of undue influence, even though there is no actual unfairness (j). And it applies both during the actual relation and afterwards as long as the influence resulting from the relation lasts (k); but when the relation and its influence have ceased, and in particular after accounts have been settled and

(r) See *Allcard v. Skinner* (1887), 36 Ch. D. 145, 171, C. A.; *Morley v. Loughnan*, [1893] 1 Ch. 736.

(s) *Huguenin v. Baseley* (1807), 14 Ves. 273.

(t) *Hoghton v. Hoghton* (1852), 15 Beav. 278; *Baker v. Bradley* (1855), 7 De G. M. & G. 597, C. A.; *Hoblyn v. Hoblyn* (1889), 41 Ch. D. 200; and see title INFANTS AND CHILDREN.

(a) *Archer v. Hudson* (1844), 7 Beav. 551.

(b) *Wright v. Vanderplank* (1856), 8 De G. M. & G. 133, C. A., per TURNER, L.J., at p. 146.

(c) *Powell v. Powell*, [1900] 1 Ch. 243.

(d) *Wright v. Vanderplank*, *supra*; *Turner v. Collins* (1871), 7 Ch. App. 329; see *Blackburn v. Edgley* (1719), 1 P. Wms. 600.

(e) *Archer v. Hudson*, *supra*; see *Dettmar v. Metropolitan and Provincial Bank* (1863), 1 Hem. & M. 641.

(f) *Baker v. Bradley*, *supra*, per TURNER, L.J., at p. 620; *Hoghton v. Hoghton*, *supra*, at p. 302; see title FAMILY ARRANGEMENTS.

(g) *Jenner v. Jenner* (1860), 2 De G. F. & J. 359; see *Cory v. Cory* (1747), 1 Ves. Sen. 19.

(h) *Hartopp v. Hartopp* (1856), 21 Beav. 259.

(i) See titles INFANTS AND CHILDREN and TRUSTS AND TRUSTEES respectively.

(j) *Hylton v. Hylton* (1754), 2 Ves. Sen. 547, as to guardians; see *Hunter v. Atkins* (1834), 3 My. & K. 113, 135; *Vaughton v. Noble* (1861), 30 Beav. 34, 39, as to trustees. The rule applies to a person assuming the office of guardian (*Griffin v. De Veuille* (1781), cited in *Huguenin v. Baseley* (1807), 14 Ves. 273, 283).

(k) *Hatch v. Hatch* (1804), 9 Ves. 292; and see *Everitt v. Everitt* (1870), L. R. 10 Eq. 405, as to the guardian's influence being a ground for setting aside a voluntary settlement, although not in his favour.

the property handed over, a gift to the guardian or trustee in recognition of his trouble may be a very proper act (l).

(4) Solicitor and client. This relation raises so strong a presumption of undue influence that it has been said to be almost impossible for a gift made by a client to a solicitor to stand (m). The presumption, however, is not irrebuttable. It can be rebutted, in case of a gift, by proving that the solicitor was not acting as such in the matter of the gift, and that the donor had competent independent advice of such a nature as to show that the influence of the solicitor was not operative (n); and it can be rebutted, in case of a sale, by showing that the client was fully informed, that he had competent independent advice, and that the price was fair (o).

The presumption of undue influence arises also in other confidential relations, such as physician and patient (p), and religious superior and inferior (q), but not, apparently, in the case of husband and wife (r).

18. Where a party to a transaction enters into it under duress in the strict sense—that is, where he is compelled to it by bodily restraint or fear of bodily harm—the transaction is void at law (s), and in such case it will be set aside in equity (t). But relief is also granted in equity where the compulsion is not of this extreme nature, and to avoid the transaction it is sufficient that there were such circumstances of pressure as to prevent the party being a free agent (u). Similarly, where a transaction is voidable, a confirmation of it procured by terror is of no effect (v).

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(l) *Hylton v. Hylton* (1764), 2 Ves. Sen. 547; *Hatch v. Hatch* (1804), 9 Ves. 292; see as to accounts being unsettled and property retained, *Pierse v. Waring* (1745), 1 P. Wms. 121, n. (1); *Hamilton v. Mohun* (1710), 1 P. Wms. 118.

(m) *Hatch v. Hatch*, *supra*; *Hunter v. Atkins* (1834), 3 My. & K. 113, 135.

(n) *Rhodes v. Bute* (1866), 1 Ch. App. 252; *Liles v. Terry*, [1895] 2 Q. B. 679, C. A.; *Wright v. Carter*, [1903] 1 Ch. 27, C. A. And the rule applies if the gift is to a near relation of the solicitor (*Barron v. Willis*, [1900] 2 Ch. 121, C. A.); and as between counsel and client (*Brown v. Kennedy* (1864), 4 De G. J. & Sm. 217, C. A.). See also titles BARRISTERS, Vol. II., p. 392; SOLICITORS.

(o) *Gibson v. Jeyes* (1801), 6 Ves. 266, 277; *Wright v. Carter*, *supra*, per STIRLING, L.J., at p. 60; *Re Haslam and Hier-Evans*, [1902] 1 Ch. 765, 770, C. A.

(p) *Mitchell v. Homfray* (1881), 8 Q. B. D. 587, C. A. See title MEDICINE AND PHARMACY.

(q) *Allcard v. Skinner* (1887), 36 Ch. D. 145, C. A.; *Morley v. Loughnan*, [1893] 1 Ch. 736; compare *Fulham v. McCarthy* (1848), 1 H. L. Cas. 703.

(r) *Huoves v. Bishop*, [1909] 2 K. B. 390, C. A., where *Chaplin & Co. v. Brammall*, [1908] 1 K. B. 233, C. A., is distinguished. See title HUSBAND AND WIFE.

(s) See title CONTRACT, Vol. VII., p. 356.

(t) *Haaves v. Wyatt* (1790), 3 Bro. C. C. 156, 158; *Scott v. Scott* (1847), 11 I. Eq. R. 74. The fact that a conveyance or contract was made in prison with a view to procuring release is not a ground for avoiding it, if it is fair and is made on proper advice (*Hinton v. Hinton* (1755), 2 Ves. Sen. 631, 635; *Brinkley v. Hann* (1843), 1 Drury temp. Sug. 175); and so as to bail given while under arrest by process of law (*Roy v. Beaufort (Duke)* (1741), 2 Atk. 190, 193; *Liverpool Marine Credit Co. v. Hunter* (1868), 3 Ch. App. 479, disapproving *Talleyrand v. Boulanger* (1797), 3 Ves. 447). But if, owing to the arrest, there is no free consent, the court will relieve, notwithstanding that the arrest was lawful (*Nicholls v. Nicholls* (1737), 1 Atk. 409; *Falkner v. O'Brien* (1812), 2 Ball & B. 214).

(u) *A.-G. v. Sothom* (1705), 2 Vern. 497; *Williams v. Bayley* (1866), L. R. 1 H. L. 200; *Ellis v. Barker* (1871), 7 Ch. App. 104; compare *Barnes v. Richards* (1902), 60 W. R. 363.

(v) *Orcue v. Ballard* (1790), 1 Ves. 215, 220.

SECT. 1.

Nature and
Extent of
Equitable
Jurisdic-
tion.(3) Injury to
third parties.(4) Uncon-
scionable
bargains with
expectant
heirs and
others.

19. A transaction will be relieved against in equity where it involves an injury to third parties; and this rule has been established on grounds of public policy (*w*). Instances are afforded by marriage brokage contracts (*x*); by secret contracts which defeat the purpose of agreements or arrangements made on the occasion of a marriage, or the proper expectation of either spouse (*a*); and by secret agreements between a debtor and one of his creditors which give such creditor some advantage which he would not obtain under an arrangement treating all the creditors equally and fairly (*b*).

20. Relief is given in equity against unconscionable bargains made with heirs and other persons on the security of their expectant or reversionary interests in property—catching bargains, as they have been called, with heirs, reversioners, and expectants during the lives of their parents or other ancestors (*c*). These cases

(*w*) *Chesterfield (Earl) v. Janssen* (1751), 2 Ves. Sen. 125, *per* Lord HARDWICKE, L.C., at p. 156: "Particular persons in contracts shall not only transact *bonâ fide* between themselves, but shall not transact *malâ fide* in respect of other persons who stand in such a relation to either as to be affected by the contract, or the consequences of it; and as the rest of mankind, beside the parties contracting, are concerned, it is properly said to be governed on public utility."

(*x*) *Hall v. Potter* (1695), Show. Parl. Cas. 76; *Drury v. Hooke* (1686), 1 Vern. 412; *Roberts v. Roberts* (1730), 3 P. Wms. 66; *Cole v. Gihon* (1750), 1 Ves. Sen. 503, 506; *Shirley v. Martin* (1779), referred to in *Roche v. O'Brien* (1810), 1 Ball & B. 330, 358. Equity relieves against a bond, even though given after the marriage (*Williamson v. Gihon* (1805), 2 Sch. & Lef. 357), and orders money already paid to be refunded (*Smith v. Bruning* (1700), 2 Vern. 392; *Hermann v. Charlesworth*, [1905] 2 K. B. 123); and see title CONTRACT, Vol. VII., p. 397.

(*a*) Such as a security by husband or wife to return property provided on the marriage to the person providing it (*Turton v. Benson* (1718), 1 P. Wms. 496; *Redman v. Redman* (1685), 1 Vern. 348; *Gale v. Lindo* (1687), 1 Vern. 475; *Neville v. Wilkinson* (1782), 1 Bro. C. C. 543; *Palmer v. Neave* (1805), 11 Ves. 165). The fraud in these cases consists "in affecting to put the party contracting for the marriage in one situation by the articles, and putting that party in another and a worse situation by private agreement" (*per* GRANT, M.R., in *Palmer v. Neave*, *supra*). The relief being based on public policy, it is no objection that the party claiming relief was *particeps criminis* (*Redman v. Redman*, *supra*; *Vauxhall Bridge Co. v. Spencer (Earl)* (1821), Jac. 64, 67). The same principle is applied in cases where a woman about to marry makes a disposition of her property in fraud of her husband's marital rights (*Strathmore (Countess) v. Bowes* (1789), 1 Ves. 22; 1 White & Tud. L. C., 7th ed., p. 613).

(*b*) *Chesterfield (Earl) v. Janssen*, *supra*; *Jackman v. Mitchell* (1807), 13 Ves. 581. Here, too, since relief is given on grounds of public policy, a person *particeps criminis* may obtain it (*Jackman v. Mitchell*, *supra*). A bond given for such purpose came to be recognised as bad at law, but this did not oust the jurisdiction in equity (*ibid.*, at p. 586). In modern practice the principle is well established (*Mare v. Sandford* (1859), 1 Giff. 288; *McKewan v. Sanderson* (1873), L. R. 15 Eq. 229, 235; (1875), L. R. 20 Eq. 65); and money paid by the debtor under the arrangement can be recovered (*Re Lenzberg's Policy* (1877), 7 Ch. D. 650). So, too, a general deed of compromise can be repudiated by a creditor if he discovers that other creditors have been induced to execute it by a secret bargain to their advantage (*Daughlish v. Tennent* (1866), L. R. 2 Q. B. 49; *Re Milner, Ex parte Milner* (1885), 15 Q. B. D. 605, C. A.). But the principle only applies where there has been a common basis of consent between the creditors; not where their debts have been bought up separately (*Re Levita's Claim*, [1894] 3 Ch. 365, C. A.). See title FRAUDULENT AND VOIDABLE CONVEYANCES.

(*c*) *Chesterfield (Earl) v. Janssen*, *supra*; *Twistleton v. Griffith* (1716), 1 P. Wms. 310; *Gwynne v. Heaton* (1778), 1 Bro. C. C. 1, 9; *Gowland v. De Faria*

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sometimes show actual fraud ; but, without this, they contain various elements which afford a recognised ground for relief—the inequality of the parties, the intrinsic unconscionableness of the bargain, and the defeating of the intentions of the ancestor (*d*).

Formerly mere inadequacy of price was a ground for setting aside such a bargain, and the onus of proving that the price was fair was imposed on the person who had dealings with the expectant heir or reversioner (*e*). In the case of loans the transaction might also be void as being in breach of the usury laws. Mere inadequacy of price is no longer a ground for equitable relief (*f*) ; but neither this change in the law, nor the repeal of the usury laws, has affected the general principles as to relief of expectant heirs (*g*). The knowledge of, and want of protest by, the person from whom the expectancy is derived, and *a fortiori* his sanction, removes a chief objection to the bargain, and in general will validate it (*h*).

Apart from the fraud on the ancestor, the doctrine is founded on pressure upon the heir, or the distress of the party disposing of his expectancy (*i*). If, when this is removed, he confirms the bargain it will stand (*k*).

Where the contract is set aside, it will be set aside on equitable terms, that is, the plaintiff must repay the money he has actually received, with interest at the rate of £5 per cent. per annum, and must pay any sums properly expended on the property and costs (*l*), unless the misconduct of the defendant in the matter has been such as to disentitle him to costs (*m*).

Upon the same principle equity interferes generally to set

(1811), 17 Ves. 20 ; *Davis v. Marlborough (Duke)* (1819), 2 Swan. 108, 139, n. (a) ; Ponblanque, Treatise of Equity, 5th ed., Vol. I., p. 134. Possibly the rule originally applied only to expectant heirs and not to reversioners (*Wool v. Abrey* (1818), 3 Madd. 417, 423). See also title INFANTS AND CHILDREN.

(*d*) *Chesterfield (Earl) v. Janssen* (1751), 2 Ves. Sen. 125.

(*e*) *Peacock v. Evans* (1809), 16 Ves. 512, 514 ; *Bawtree v. Watson* (1834), 3 My. & K. 339 ; *Aldbrough (Earl) v. Trye* (1840), 7 Cl. & Fin. 436, II. L. ; *King v. Savery* (1853), 1 Sm. & G. 271 ; *sub nom. Savery v. King* (1856), 5 II. L. Cas. 627 ; *Edwards v. Burt* (1852), 2 De G. M. & G. 55, C. A. ; *Bromley v. Smith* (1859), 26 Beav. 644. The onus was discharged by showing that the sale had been by auction, provided the auction was *bonâ fide* (*Shelly v. Nash* (1818), 3 Madd. 232 ; *Fox v. Wright* (1821), Madd. & G. 111).

(*f*) Sales of Reversions Act, 1867 (31 & 32 Vict. c. 4).

(*g*) *Aylesford (Earl) v. Morris* (1873), 8 Ch. App. 484 ; see *Croft v. Graham* (1863), 2 De G. J. & Sm. 155, C. A. ; *Miller v. Cook* (1870), L. R. 10 Eq. 641, 646 ; *Tyler v. Yates* (1870), L. R. 11 Eq. 265 ; affirmed (1871), 6 Ch. App. 665 ; *Beynon v. Cook* (1875), 10 Ch. App. 389 ; *Fry v. Lane, Re Fry, Whittet v. Bush* (1888), 40 Ch. D. 312, 324. The doctrine also applies to a loan on unconscionable terms to one who has only general expectations of benefiting on the death of another (*Nevill v. Snelling* (1880), 15 Ch. D. 679). See also title MONEY AND MONEY-LENDING.

(*h*) *King v. Hamlet* (1834), 2 My. & K. 456, 474 ; approved, Story, s. 339 ; questioned, Sugden, Vendors and Purchasers, 11th ed., p. 316.

(*i*) *King v. Hamlet*, *supra*, per Lord BROUGHAM, L.C., at p. 480. While this continues he is treated as an infant (*Gwynne v. Heaton* (1778), 1 Bro. C. C. 1, 9).

(*k*) *Cole v. Gibbons* (1734), 3 P. Wms. 290 ; *Chesterfield (Earl) v. Janssen*, *supra*.
(*l*) *Gwynne v. Heaton* (1778), 1 Bro. C. C. 1 ; *Twistleton v. Griffith* (1716), 1 P. Wms. 310 ; *Peacock v. Evans*, *supra* ; *Bawtree v. Watson*, *supra*, at p. 341 ; *Miller v. Cook*, *supra*, at p. 647 ; compare *Barker v. Vansommer* (1782), 1 Bro. C. C. 149.

(*m*) *Gowland v. De Faria* (1811), 17 Ves. 20 ; *Morony v. O'Dea* (1809), 1 Ball

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Mistake.

aside transactions by way of sale and otherwise where, on account of poverty, ignorance, under-value, and lack of independent advice, the transaction is unconscionable (n).

(iv.) *Mistake (o).*

21. Mistake was a ground for relief both at law and in equity, and hence the jurisdiction was classed as concurrent, but there were differences as regards the nature of the relief and the circumstances in which it was given.

Money paid by mistake was in general only recoverable in equity if paid under a mistake of fact (p). The rule was the same at law (q), and on this point law and equity were practically the same, since the appropriate legal action, an action for money had and received, was in its nature an equitable action (r). But where money was paid under a mistake of law, the plaintiff in equity might obtain relief if there were special circumstances which made it inequitable that the party who had received the money should retain it (s).

Mistake in
language of
agreement.

22. A mistake in an executory agreement may be either in the language of the agreement, or in regard to circumstances inducing the agreement. There is a mistake in the language when it does not represent the actual intention of one or both parties. If the parties had the same intention, but by mistake this has not been expressed, equity, upon proof of such intention, will rectify the agreement at the instance of either party (t). If, in a written agreement, only one party has used language which does not express his intention, he is without remedy at law, since he cannot give parol evidence to contradict the written instrument (a). But he

& B. 109; *Benyon v. Fitch* (1866), 35 B. & W. 570, 578; *Tyler v. Yates* (1870), L. R. 11 Eq. 265; *Bromley v. Smith* (1859), 26 Beav. 644.

(n) *Longmate v. Ledger* (1860), 2 Giff. 157; *Clark v. Malpas* (1862), 4 De G. F. & J. 401, C. A.; *Baker v. Monk* (1864), 4 De G. J. & Sm. 388, C. A.; *Pres v. Coke* (1871), 6 Ch. App. 645; *Fry v. Lane, Re Fry, Whittet v. Bush* (1888), 40 Ch. D. 312, 322; *James v. Kerr* (1889), 40 Ch. D. 449, 460; *Rees v. De Bernardy*, [1896] 2 Ch. 437. As to circumstances not sufficient to set aside a conveyance, see *Harrison v. Guest* (1860), 8 H. L. Cas. 481.

(o) See title MISTAKE.

(p) *Rogers v. Ingham* (1876), 3 Ch. D. 351, C. A.

(q) *Bilbie v. Lumley* (1802), 2 East, 469, 472; *Kelly v. Solari* (1841), 9 M. & W. 54; *Durrant v. Ecclesiastical Commissioners* (1880), 6 Q. B. D. 234.

(r) *Moses v. Macferlan* (1760), 2 Burr. 1005, 1012.

(s) *Rogers v. Ingham, supra.* A trustee in bankruptcy who receives money paid under a mistake of law must, as an officer of the court, set an example by repaying it (*Re Condon, Ex parte James* (1874), 9 Ch. App. 609, 614); see *Re Tyler, Ex parte Official Receiver*, [1907] 1 K. B. 865, C. A. And in equity relief can be given against mistakes of law (*Stone v. Godfrey* (1854), 5 De G. M. & G. 76, 90; *Re Saxon Life Assurance Society* (1862), 2 John. & H. 408, 412). See generally title MISTAKE.

(t) *Henkle v. Royal Exchange Assurance Co.* (1749), 1 Ves. Sen. 317; *Shelburne v. Inchiquin* (1784), 1 Bro. O. C. 338; affirmed *sub nom. Inchiquin v. Fitzmaurice* (1785), 5 Bro. Parl. Cas. 168; *Townshend (Marquis) v. Stangroom* (1801), 6 Ves. 328; *Paget v. Marshall* (1884), 28 Ch. D. 255; see note (q), p. 24, *post*. But not after the agreement has been construed by the court, and executed by payment of money under the judgment of the court (*Caird v. Moss* (1886), 33 Ch. D. 22, C. A.).

(a) *Druiff v. Parker (Lord)* (1868), L. R. 5 Eq. 131. See title DEEDS AND OTHER INSTRUMENTS, Vol. X., p. 444. In equity parol evidence of mistake

will be relieved in equity (b) if the mistake was caused by the other party, or if it involves serious hardship (c) and was not due to mere carelessness (d).

Where a party is entitled to relief against a unilateral mistake, the court may go so far as to hold that there was no contract because the parties were not *ad idem* (e). But usually the mistake can only be set up as a defence to an action for specific performance. Formerly a successful defence would still have left the mistaken party liable to an action at law, and this result is in effect preserved by the present rule that the court which refuses specific performance can give the damages, if any, to which the plaintiff may be entitled (f). If the words are capable of a double meaning, a party may first set up his own construction as being the right one, and, if he fails, may then seek relief on the ground of mistake (g). But if the words are clear, the party cannot have relief on the ground that he was mistaken as to their legal effect (h), or as to the nature of the obligations which he has undertaken (i), unless the mistake has been induced by the other party (k).

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mistake.

23. If the mistake lies in some circumstance which induced the agreement, the general rule is that relief will be given if the mistake was as to a matter of fact, but not if it was a mistake of law. But "law" in this connection means a general principle of law, and not that particular application of law to fact which determines the private right of the party in the subject-matter of the contract. Such private right is a matter of fact, and an agreement made under a mistake as to the interest of the parties, or one of them, in the subject-matter will be rescinded (l).

Mistake in
circumstance
inducing
agreement.

can be given to resist specific performance (*Townshend (Marquis) v. Stangroom* (1801), 6 Ves. 328), but not to obtain it (*Higginson v. Clowes*) (1808), 15 Ves. 516).

(b) *Webster v. Cecil* (1861), 30 Beav. 62 (mistake in price); *Manser v. Back* (1848), 6 Hare, 443 (mistake in not reserving a right of way); *Hickman v. Berens*, [1895] 2 Ch. 638, C. A. (mistake in description of intended subject-matter of compromise); see *Wilding v. Sanderson*, [1897] 2 Ch. 534, C. A.

(c) *Higginson v. Clowes* (1808), 15 Ves. 516; *Preston v. Luck* (1884), 27 Ch. D. 497, C. A.; *Goddard v. Jeffreys* (1881), 30 W. R. 269.

(d) *Tamplin v. James* (1880), 15 Ch. D. 215, C. A.; *Van Praagh v. Everidge*, [1902] 2 Ch. 266; reversed on another ground, [1903] 1 Ch. 434, C. A.; see *Swaisland v. Dearsley* (1861), 29 Beav. 430, 433; *Goddard v. Jeffreys*, *supra*.

(e) *Hickman v. Berens*, *supra*; *Paget v. Marshall* (1884), 28 Ch. D. 255. And at law a mistake as to the very subject-matter of the contract, and not as to some incident of it, is a ground for holding that there was no contract (*Kennedy v. Panama etc. Mail Co.* (1867), L. R. 2 Q. B. 580), provided, that is, that evidence of the mistake is admissible; but not a mistake as to quality, not induced by the vendor, although known to him (*Smith v. Hughes* (1871), L. R. 6 Q. B. 597). But instead of treating the contract as a nullity, the court may give the defendant the option of taking what the plaintiff meant to give (*Paget v. Marshall*, *supra*).

(f) *Tamplin v. James*, *supra*; see p. 12, note (g), *ante*.

(g) *Wilding v. Sanderson*, *supra*; or he can elect to enforce the contract according to the construction admitted by the other side (*Preston v. Luck*, *supra*); see *Rich v. Jackson* (1794), cited in *Townshend (Marquis) v. Stangroom* (1801), 6 Ves. 328, at p. 334.

(h) *Powell v. Smith* (1872), L. R. 14 Eq. 85.

(i) *Stewart v. Kennedy* (1890), 15 App. Cas. 108, 118, 121.

(k) *Wilding v. Sanderson*, *supra*, at p. 550.

(l) *Cooper v. Phibbs* (1867), L. R. 2 H. L. 149, *per* Lord WESTBURY, at p. 170;

SECT. 1.

Nature and
Extent of
Equitable
Jurisdiction.Compromise
made under
mistake.

24. Special considerations apply to a compromise entered into under a mistake of fact or law. A compromise assumes that the rights of the parties are doubtful, and the compromise is effected for the purpose of settling their interests in property, or their claims against each other, without resorting to or without continuing litigation; and, in general, it would defeat the object of the compromise if it could be set aside on the ground of mistake.

So far as the rights depend on matters of fact, it is the duty of each party to disclose to the other all relevant facts known to himself (*m*); and if, owing to a failure in this respect, either party enters into the compromise under a mistake of fact, it will be set aside. And, generally, it appears that a compromise can be set aside, like other contracts, for mistake of fact, unless the doubtfulness of the fact was the ground of compromise (*n*).

So far as the rights depend on questions of law, there is a distinction according as the law is clear or doubtful. If the law is clear and the facts are admitted, the rights are not in doubt; the basis for a compromise does not exist, and a compromise entered into in such circumstances will be set aside (*o*). But if the rights depend upon doubtful law, or upon the doubtful construction of a document, mistake as to these rights is no ground for setting the compromise aside (*p*).

Mistake in
executed
transaction.

25. Where a transaction has been completed by the execution of a deed or other instrument, but the instrument does not carry out the common intention of the parties, it will be rectified if evidence of such intention can be produced (*q*). A common error

Beauchamp (Earl) v. Winn (1873), L. R. 6 H. J. 223; *Allcard v. Walker*, [1896] 2 Ch. 369, 381; see *Jones v. Clifford* (1876), 3 Ch. D. 779, 792. As to setting aside a consent order on the ground of mistake, see *Huddersfield Banking Co., Ltd. v. Henry Lister & Son, Ltd.*, [1895] 2 Ch. 273, C. A.

(*m*) *Gordon v. Gordon* (1821), 3 Swan. 400; *Harvey v. Cooke* (1827), 4 Russ. 34, 58; *Smith v. Pincombe* (1852), 3 Mac. & G. 653; *Greenwood v. Greenwood* (1863), 2 De G. J. & Sm. 28, C. A. In cases of compromise the withholding of knowledge by one side amounts in the view of a court of equity to fraud (*Brooke v. Moslyn (Lord)* (1864), 2 De G. J. & Sm. 373, 416, C. A.). As to what facts are relevant, see *Maynard v. Eaton* (1874), 9 Ch. App. 414. Perhaps the duty of disclosure is confined to cases of compromise by way of family arrangement (see *Turner v. Green*, [1895] 2 Ch. 205; and title FAMILY ARRANGEMENTS).

(*n*) See Vaizey, *Settlement of Property*, Vol. II., p. 1502; and title MISTAKE.

(*o*) *Naylot v. Winch* (1824), 1 Sim. & St. 555; *Lansdown v. Lansdown* (1730), Mos. 364; 2 Jac. & W. 205, n.; *Gibbons v. Caunt* (1799), 4 Ves. 840, 849; *Stockley v. Stockley* (1812), 1 Ves. & B. 23, 31. But if the point of law was known to the party's legal adviser, the compromise will not be set aside (*Stewart v. Stewart* (1839), 6 Cl. & Fin. 911, H. L.); *contra*, if it was entered into in consequence of an erroneous view of the facts or of the law taken by the solicitor acting for all parties (*Re Roberts, Roberts v. Roberts*, [1905] 1 Ch. 704, C. A.).

(*p*) *Cann v. Cann* (1721), 1 P. Wms. 723; *Hotchkiss v. Dickson* (1820), 2 Bl. 303, 348, H. L.; *Stewart v. Stewart*, *supra*, at pp. 966—970; see *Miles v. New Zealand Alford Estate Co.* (1886), 32 Ch. D. 266, 291, C. A. And it is sufficient if the parties *bonâ fide* consider the question in dispute to be doubtful (*Lucy's Case* (1853), 4 De G. M. & G. 356, C. A.).

(*q*) In the case of a deed *inter partes* it is necessary both to show that there has been a mistake by all parties and also to show what was intended to be done (*Bentley v. Mackay* (1862), 4 De G. F. & J. 279, C. A.); as to marriage

as to parcels can be amended by rectification of the conveyance (r). But if, under a mistake of law, the parties have intentionally executed the instrument in a particular form, it will not be rectified so as to incorporate provisions which they would have inserted had they known the law (s).

A unilateral mistake, whether of fact (t) or of law, in a deed or other instrument of conveyance is not in general a ground for setting aside the instrument, unless the mistake has been induced by fraud. In the case of a defect in title being overlooked by mistake, the remedy, as between vendor and purchaser, is on the vendor's covenants (a). But there is an exception in the case of a conveyance to the purchaser of property which was already his own. In such a case the purchase-money is recoverable (b).

SECT. 1.
Nature and
Extent of
Equitable
Jurisdiction.

(v.) Accident.

26. Equity afforded relief in certain cases of accident, and since the jurisdiction was exercised in respect of claims which were also enforceable at law, it was classed as concurrent. But it was not concurrent in the sense that the plaintiff could at his option sue either at law or in equity. If he had an action at law, he was confined to that remedy; but if by accident his legal remedy was not available, then equity supplied a corresponding remedy to take its place. The term "accident" includes not merely inevitable casualty, or what is known as *vis major*, but such unforeseen events, misfortunes, losses, acts, or omissions as are not the result of any negligence or misconduct of the party claiming relief (c).

27. Cases of accident arise where documents required to establish a personal claim, or a title to land or other property, have been lost or destroyed. In the case of a bond, profert of the bond was originally necessary at law, and the loss or destruction of the bond made the action at law impossible; hence the obligee was allowed a remedy in equity in place of that which he had lost at law. Proceedings in equity had the further advantage that the

settlements, see *Bold v. Hutchinson* (1855), 5 De G. M. & G. 558; that is, it must be possible to show clearly what ought to be the amended form of the deed (*Fowler v. Fowler* (1859), 4 De G. & J. 250, 274). After the death of one party rectification may be ordered on the parol evidence of another (*Wollaston v. Tribe* (1869), L. R. 9 Eq. 44), though this is exceptional (*Tucker v. Bennett* (1887), 38 Ch. D. 1, C. A.). Where in a voluntary deed poll a power of revocation is omitted by mistake, the deed can be rectified; but in the absence of mistake, the settlor cannot revoke it because he mistook the law (*Worrall v. Jacob* (1817), 3 Mer. 256).

(r) *Beale v. Kyte*, [1907] 1 Ch. 564, questioning *Bloomer v. Spittle* (1872), L. R. 13 Eq. 427.

(s) *Irnham (Lord) v. Child* (1781), 1 Bro. C. C. 92; see *Pullen v. Ready* (1743), 2 Atk. 587, 591.

(t) *Brownlie v. Campbell* (1880), 5 App. Cas. 925, 937.

(a) See *Clayton v. Leech* (1889), 41 Ch. D. 103, C. A.; *Debenham v. Sawbridge*, [1901] 2 Ch. 98, 109.

(b) *Bingham v. Bingham* (1748), 1 Ves. Sen. 126; Belt's Sup. 79; see *Cooper v. Phibbs* (1867), L. R. 2 H. L. 149, 164; *Jones v. Clifford* (1876), 3 Ch. D. 779, 791; but see *Stewart v. Stewart* (1839), 6 Cl. & Fin. 911, 968, H. L.

(c) Story, s. 78. As to cases of accident recognised at law, see 3 Bl. Com. 431.

SECT. 1.
Nature and
Extent of
Equitable
Jurisdic-
tion.

Instruments
 under hand.

terms of the indemnity to be given by the *plaintiff could be satisfactorily settled, and that all parties liable, whether as principals or sureties, could be brought before the court and their rights and liabilities adjusted (d).

In the case of instruments under hand, profert was not necessary; but where the instrument was lost, equity exercised jurisdiction, since it had the means of requiring an indemnity (e); and in the case of a lost negotiable instrument there was the further reason that no remedy at law was available (f). In the case of the destruction of the instrument the legal remedy was available, and, since an indemnity was not required, equity declined jurisdiction (g).

Title deeds.

28. As regards lost or destroyed title deeds equitable remedies were available as follows:—(1) Where the plaintiff was out of possession, and could show that deeds had been destroyed or were concealed by the defendant, he was put in possession until the defendant produced the deeds (h); (2) where the plaintiff was in possession, but feared future attacks on his title, he might obtain a decree establishing his possession (i); (3) and, generally, he might sue in equity if there were independent equities calling for the action of the court (j).

(d) *East India Co. v. Boddam* (1804), 9 Ves. 464. The requirement of profert was at length dispensed with at law (*Read v. Brookman* (1789), 3 Term Rep. 161), a change which was not favourably regarded in equity, since the proceduro in equity was more suitable for such cases (*Ex parte Greenway* (1802), 6 Ves. 812); but it did not take away the jurisdiction in equity (*Atkinson v. Leonard* (1791), 3 Bro. C. C. 218; *Toulmin v. Price* (1800), 5 Ves. 235, 239; *Bromley v. Holland* (1802), 7 Ves. 3, 19; *Kemp v. Pryor* (1802), 7 Ves. 237, 249).

(e) *Walmsley v. Child* (1749), 1 Ves. Sen. 341. In all cases of a claim in equity for relief on the ground of the loss or destruction of an instrument the plaintiff had to annex to his bill an affidavit of such loss or destruction in order to found the jurisdiction; but this was not necessary if he came for discovery only, and not for substantial relief (*ibid.*); compare *Whitfield v. Fausset* (1750), 1 Ves. Sen. 387, 392; Bolt's Sup. 163.

(f) In *Mossop v. Eadon* (1810), 16 Ves. 430, where no indemnity was necessary, relief was refused in equity, since it was supposed that an action on the instrument, half of which was lost, would lie at law (see *Glynn v. Bank of England* (1750), 2 Ves. Sen. 38). In *Hansard v. Robinson* (1827), 7 B. & C. 90, however, it was held that an action at law would not lie, because the plaintiff was not in a position to deliver up the instrument on payment (see *Crowe v. Clay* (1854), 9 Exch. 604). In consequence of this, equity assumed jurisdiction in the case of lost instruments on the ground of the failure of the remedy at law, and quite apart from the question of indemnity (*Macartney v. Graham* (1828), 2 Sim. 285). The decision in *Hansard v. Robinson*, *supra*, was also based on the consideration that equity was the proper tribunal in the case of lost instruments, since it could require indemnity. By the Common Law Procedure Act, 1854 (17 & 18 Vict. c. 125), s. 87, power to require this was conferred on the common law courts (*King v. Zimmerman* (1871), L. R. 6 C. P. 466; Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), s. 70). In the case of a lost insurance policy the decree of the court directing payment is a sufficient indemnity to the office, and no indemnity from the payee can be required (*England v. Tredegar (Lord)* (1866), L. R. 1 Eq. 344).

(g) *Wright v. Maidstone (Lord)* (1855), 1 K. & J. 701.

(h) *R. v. Arundel (Countess)* (1616), Hob. 109; *Whitfield v. Fausset* (1750), 1 Ves. Sen. 387, 392.

(i) *Walmsley v. Child* (1749), 1 Ves. Sen. 341; *Dalston v. Coatsworth* (1721), 1 P. Wms. 731.

(j) *Dermer v. Fortescue* (1744), 3 Atk. 124, 132.

29. Equity does not relieve against contracts which, owing to circumstances which might have been provided against, prove unexpectedly burdensome to one of the parties. In such cases equity follows the law, and acts on the legal effect of the contract (*k*). And where the parties have arranged a certain mode—*e.g.* arbitration—for settling certain terms of a contract, and the mode fails, the court does not interfere to complete the terms, and make a contract in equity when there is none at law (*l*). And there is no equitable relief in case of accidental omission to make a voluntary disposition of property—*e.g.*, to make a will (*m*). But in certain cases equity relieves against the defective execution, though not against the non-execution, of a power (*n*); and an executor is not charged in equity with the accidental loss of assets (*o*).

SECT. 1
Nature and
Extent of
Equitable
Jurisdic-
tion.

Limits of
equitable
relief.

(vi.) *Account and Apportionment.*

30. The facilities afforded by the Court of Chancery for taking accounts largely contributed to the extension of its jurisdiction. Where there was a liability to account, either by virtue of a legal relation, as guardian in socage, or of contract, as bailiff or receiver, an action of account lay at law (*p*). But it was dilatory and troublesome and fell into disuse (*q*). Apart from this special form of action, matters of account arising on contract might be determined in an action of *assumpsit* for the balance due (*r*), but this again was impracticable if the accounts were too complicated for a jury. In equitable matters the Court of Chancery took any necessary accounts (*s*), and for the sake of affording a more adequate remedy it assumed a concurrent jurisdiction in common law matters (*t*). But where the claim was a legal one, the mere fact

Accounts.

(*k*) Thus, when demised buildings are destroyed by fire, the rent is not suspended in equity (*Leeds v. Cheetham* (1827), 1 Sim. 146, 150), and a fixed coal-mining rent is payable notwithstanding deficiency in the coal (*Mellers v. Devonshire (Duke)* (1852), 16 Beav. 252).

(*l*) *Cooth v. Jackson* (1801), 6 Ves. 12, 34; *Blundell v. Brettargh* (1810), 17 Ves. 232, 243.

(*m*) *Whitton v. Russell* (1739), 1 Atk. 448.

(*n*) See title POWERS.

(*o*) *Jones v. Lewis* (1751), 2 Ves. Sen. 240; *Job v. Job* (1877), 6 Ch. D. 562; and as to the personal representative being exonerated as regards matters done in the regular course of business, see *Clough v. Bond* (1838), 3 My. & Cr. 490, 497. See also title EXECUTORS AND ADMINISTRATORS.

(*p*) Co. Litt. 90 b, 172 a; *Devonshire's (Earl) Case* (1607), 11 Co. Rep. 89 a; and see title ACTION, Vol. I., p. 36.

(*q*) Lee, Dictionary of Practice, 1825, p. 8; Bac. Abr. tit. "Accompt." "The writ of account at common law did not exclude, but rather was superseded by, the jurisdiction of the courts of equity on this subject; because the proceeding in equity was found to be the more convenient mode of calling parties to an account—partly on account of the difficulty attending the process under the old writ of account, but chiefly from the advantage of compelling the party to account upon oath, according to the practice of courts of equity" (*A.-G. v. Dublin Corporation* (1827), 1 Bli. (N. s.) 312, H. L., per Lord REDESDALE, at p. 337). See *Ex parte Bax* (1751), 2 Ves. Sen. 388.

(*r*) *Tomkins v. Willshear* (1814), 5 Taunt. 431; 2 Wms. Saund. 127, n. (f).

(*s*) See Story, s. 454. See the statement of the equitable jurisdiction in account in the judgment of LINDLEY, L.J., in *London, Chatham and Dover Rail. Co. v. South Eastern Rail. Co.*, [1892] 1 Ch. 120, 140, O. A.

(*t*) *Carlisle Corporation v. Wilson* (1807), 13 Ves. 276, 278.

Sect. 1.
Nature and
Extent of
Equitable
Jurisdic-
tion.

that an account was asked for did not justify the plaintiff in filing a bill; and, even though he had to come into equity for discovery, it did not follow that equity would also take the account (*u*). If the account was mutual, or was so complicated as to be unfit to be submitted to a jury, then it was proper to file a bill in equity (*v*); but otherwise the plaintiff was confined to his remedy at law (*w*). And where an action involving an account had already been commenced at law, it was not restrained at the instance of the defendant unless there were strong considerations of convenience in favour of taking the account in equity (*a*). An action was not withdrawn from a court of law merely because it might originally have been commenced in equity (*b*).

Apportion-
ment.

31. The general rule of the common law was to refuse to recognise the possibility of apportionment, whether of contracts and payments under them, or of rent, interest, and annuities; and in this respect equity followed the law, only venturing to differ on some minor points. A contract is usually indivisible; and, on the one hand, payment under it is not due until the service which earns the payment has been entirely performed; while, on the other hand, when a payment has been already made, a part of it cannot be recovered because the contract has not been wholly performed. And where there is no apportionment of such payments at law, there is none in equity (*c*).

Interest.

Interest accrued from day to day and was therefore apportionable (*d*), but rents and annuities and other periodical payments

(*u*) There was at one time a strong tendency to make the account in equity consequential on discovery (*Barker v. Dacie* (1802), 6 Ves. 681, 688; *Adley v. Whitstable Co.* (1810), 17 Ves. 315, 324; *Mackenzie v. Johnston* (1819), 4 Madd. 373); but this did not prevail (*Foley v. Hill* (1848), 2 H. L. Cas. 28, 37, 42; *Phillips v. Phillips* (1852), 9 Hare, 471; compare *Pearce v. Creswick* (1843), 2 Hare, 286, 293). In addition to the right of discovery there must have been some special reason of convenience in taking the account in equity (*Shepard v. Brown* (1862), 4 Giff. 208).

(*v*) *O'Connor v. Spraight* (1804), 1 Sch. & Lef. 305, 309; *Taff Vale Rail. Co. v. Nixon* (1847), 1 H. L. Cas. 111; *Phillips v. Phillips*, *supra*. To constitute mutual accounts there must be receipts and payments on both sides, not merely receipts and payments on one side, in which case it is a mere question of set-off (*Phillips v. Phillips*, *supra*).

(*w*) *Foley v. Hill*, *supra*; see *Dinwiddie v. Bailey* (1801), 6 Ves. 136; *Courteney (Lord) v. Godschall* (1804), 9 Ves. 473; *Ambrose v. Dunmow Union* (1846), 9 Beav. 508; *Phillips v. Phillips*, *supra*; *Smith v. Leveaux* (1863), 2 De G. J. & Sm. 1, C. A.; *Harrington v. Churchward* (1860), 6 Jur. (N. S.) 576; *Flockton v. Peake* (1864), 12 W. R. 562; *Dabbs v. Nugent* (1865), 11 Jur. (N. S.) 943.

(*a*) *North Eastern Rail. Co. v. Martin* (1848), 2 Ph. 758; see *Martin v. Powning* (1869), 4 Ch. App. 356, 370.

(*b*) *South Eastern Rail. Co. v. Brogden* (1850), 3 Mac. & G. 8.

(*c*) At one time it was considered that apprenticeship premiums could be apportioned, and a part recovered on the death of the master during the term (*Hirst v. Tolson* (1850), 2 Mac. & G. 134); but there is no debt in such a case at law (*Whincup v. Hughes* (1871), L. R. 6 C. P. 78), nor is there any debt in equity (*Ferns v. Carr* (1885), 28 Ch. D. 409). The bankruptcy of the master was treated as a case of accident, and a part of the premium was recoverable in equity (*Hale v. Webb* (1786), 2 Bro. O. C. 78, 80; *Ex parte Sandby* (1745), 1 Atk. 149; see now Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 41).

(*d*) As to interest on mortgages, see *Edwards v. Warwick (Countess)* (1723),

were not apportionable at law (*e*), and therefore not in equity; so that where a lessor, whose estate determined with his life, died between two rent days, his executors were not entitled to any rent, and since the lease was at an end the lessee was not bound to pay any (*f*); though if he held till next rent-day, and then paid the whole rent to the successor, the latter was bound in equity to account for a proportionate part to the lessor's executors (*g*). And though annuities and dividends were not in general apportionable (*h*), an exception was made in equity where they were given for the maintenance of an infant (*i*), or of a married woman living apart from her husband (*j*). At the present time rents, annuities, and other periodical payments are apportionable by statute (*k*).

SECT. 1.
Nature and
Extent of
Equitable
Jurisdic-
tion.

Rent.
Annuities.

Rent, though not apportionable in respect of time, was in some cases apportionable at law in respect of estate, *e.g.*, on the lawful eviction of the tenant from part of the land (*l*); and apparently an interference with enjoyment, without actual eviction, was a ground for apportionment in equity, as where a right of common was established on part of the land (*m*). Rent service was apportionable upon a severance of the reversion, whether by act of the parties or of law (*n*).

When rent
apportioned.

A rentcharge, on the other hand, though apportionable if part of the lands vested in the owner of the rentcharge by act of law, was not apportionable, but was extinguished at law, if part of the lands was purchased by the owner of the rentcharge (*o*). In equity, however, the rentcharge was apportioned in this latter case as well (*p*).

Rentcharge.

2 P. Wms. 171; *Pearly v. Smith* (1745), 3 Atk. 260; *Wilson v. Harman* (1755), 2 Ves. Sen. 672; on bonds, *Banner v. Lowe* (1806), 13 Ves. 135.

(*e*) *Clun's Case* (1613), 10 Co. Rep. 127 a, as to rents; and as to annuities and other periodical payments, see cases cited in note to *Ex parte Smyth* (1818), 1 Swan. 337.

(*f*) *Jenner v. Morgan* (1717), 1 P. Wms. 392. Under the Distress for Rent Act, 1737 (11 Geo. 2, c. 19), s. 15, the executors of the tenant for life were entitled to a proportion of the rent; as to the equitable extension of the statute to tenants in tail, see *Puget v. Tee* (1753), Amb. 198; App. (1ⁿ), p. 807; *Vernon v. Vernon* (1782), 2 Bro. O. C. 659; and as to leases of tithes, *Bentham v. Alston* (1690), 2 Vern. 204.

(*g*) *Paget v. Gee*, *supra*.

(*h*) *Pearly v. Smith*, *supra*; *Sherrard v. Sherrard* (1747), 3 Atk. 502.

(*i*) *Hay v. Palmer* (1728), 2 P. Wms. 501; *Sheppard v. Wilson* (1845), 4 Hare, 392, 395.

(*j*) *Howell v. Hanforth* (1775), 2 Wm. Bl. 1016; *Anderson v. Dwyer* (1804), 1 Sch. & Lef. 301.

(*k*) Apportionment Act, 1870 (33 & 34 Vict. c. 35). See title RENTCHARGES AND ANNUITIES.

(*l*) *Smith v. Malings* (1607), Cro. Jac. 160. See title LANDLORD AND TENANT.

(*m*) *Jew v. Thackwell* (1663), 3 Rep. Ch. 7, 11; 1 Cas. in Ch. 31; Freem. (CH.) 174; but a subsequent diminution in the value of the premises was no ground for reducing the rent (*Duckenfield v. Whitchcott* (1674), 2 Cas. in Ch. 204).

(*n*) Littleton's Tenures, s. 222; Oo. Litt. 148 a; *Collins and Harding's Case* (1597), 13 Co. Rep. 57; *Salts v. Battersby* (1910), 102 L. T. 730.

(*o*) Co. Litt. 148 a.

(*p*) *Slater v. Buck* (1730), Mos. 256; see *Anon. v. Hawkes* (1676), 1 Cas. in Ch. 273; extinguishment of rights by acceptance of an estate was not allowed in equity (*Elliot v. Hancock* (1690), 2 Vern. 143); see title RENTCHARGES AND ANNUITIES.

SECT. 1.

Nature and
Extent of
Equitable
Jurisdic-
tion.

Contribution.

(vii.) Contribution (q).

32. In matters of contribution equity exercised jurisdiction concurrent with that at law (*r*), but the procedure in equity was more convenient, chiefly because all parties liable to contribute could be brought before the court at once. This both avoided multiplicity of suits and enabled the mutual liabilities to be more completely adjusted (*s*). Contribution, though its extent may be modified by contract (*t*), is based not on contract, but on principles of natural justice (*a*). Payment by one person liable releases the others from the principal demand, and they are required to contribute as a return for this benefit. But the principle in this shape does not apply unless all the parties are liable to a common demand, and such liability, therefore, is a condition of contribution (*b*). As between the principal debtor liable under a bond and a surety, the surety, on paying the debt, becomes only a simple contract creditor of the principal (*c*), unless he procures an assignment of the bond (*d*).

(viii.) Administration (*e*).Administra-
tion.

33. The Court of Chancery acquired jurisdiction in the administration of the estates of deceased persons in consequence of the defective remedies afforded in the common law and the

(q) See title GUARANTEE.

(*r*) In numerous cases contribution was recognised in early times at law, and after judgment against one party contribution was enforced against others by proceedings taken on the judgment, namely, by writ of *audita querela* or *scire facias* (*Harbert's Case* (1584), 3 Co. Rep. 11 b; *Dering v. Winchelsea* (*Earl*) (1787), 1 Cox, Eq. Cas. 318). Then it came to be enforced at law, as between co-sureties, in *assumpsit* on the footing of implied contract, but this involved a separate judgment against each surety (*Cowell v. Edwards* (1800), 2 Bos. & P. 268; *Craythorne v. Swinburne* (1807), 14 Ves. 160, 164; *Wohnershausen v. Gullick*, [1893] 2 Ch. 514, 519; and see 1 Wms. Saund. 264 c, n. (e); *Re Snowden, Ex parte Snowden* (1881), 17 Ch. D. 44, C. A.). Actions for contribution between partners were also entertained at law, but this did not oust the jurisdiction in equity (*Wright v. Hunter* (1801), 5 Ves. 792).

(*s*) Thus at law a co-surety who has paid the whole debt can recover from each of the others only an aliquot part according to the whole number of sureties, and if one is insolvent he has no further right against the rest (*Cowell v. Edwards, supra*; *Browne v. Lee* (1827), 6 B. & C. 689, 697). But in equity he can make the solvent sureties contribute rateably to the entire debt (*Peter v. Rich* (1629), 1 Rep. Ch. 19, [34]; *Hole v. Harrison* (1675), 1 Cas. in Ch. 246; *Hitchman v. Stewart* (1855), 3 Drew. 271). And the latter rule now prevails (*Lowe v. Dixon* (1885), 16 Q. B. D. 455). Again, at law the death of a surety puts an end to his liability to contribute, but in equity the liability can be enforced against his estate (*Primrose v. Bromley* (1739), 1 Atk. 89).

(*t*) *Swain v. Wall* (1641), 1 Rep. Ch. 80 [149]; *Dering v. Winchelsea* (*Earl*), *supra*; *Craythorne v. Swinburne, supra*.

(*a*) *Dering v. Winchelsea* (*Earl*), *supra*; *Stirling v. Forrester* (1821), 3 Bl. 575, 596, II. L.

(*b*) *Johnson v. Wild* (1890), 44 Ch. D. 146. Hence there is no contribution where each surety undertakes a distinct part of the principal debt (*Coope v. Twynum* (1823), Turn. & R. 426).

(*c*) *Copis v. Middleton* (1823), Turn. & R. 224.

(*d*) *Hodgson v. Shaw* (1834), 3 My. & K. 183; and see Mercantile Law Amendment Act, 1856 (19 & 20 Vict. c. 97), s. 5.

(*e*) See also title EXECUTORS AND ADMINISTRATORS.

ecclesiastical courts. A creditor could sue the personal representative at law and recover judgment for his debt; but he could not obtain discovery or an account of the assets, nor could these be made available for all the creditors in a due course of administration; and although the estate was to some extent under the control of the ecclesiastical court in which the will was proved or administration granted, yet a creditor could not contest the inventory exhibited by the personal representative (*f*), nor could he take advantage of a breach of the administrator's bond (*g*).

Consequently it became the practice for the creditor to proceed in equity for discovery and an account of the assets, and equity, having possession of the cause for these purposes, in order to avoid multiplicity of actions gave substantial relief also and decreed payment of the debt (*h*). At first the creditor sued only for his own debt, and obtained a decree for an account of the assets come to the hands of the personal representative, and for payment of his debt in a due course of administration (*i*). Subsequently he sued on behalf of all the creditors, and the decree was for an account of debts and of assets, and for payment of the debts (*k*). Until decree he remained *dominus litis*, and could dismiss the bill; and the executor, on paying his debt and costs, was entitled to have it dismissed (*l*). But after decree he could not deprive other persons of the benefit of the decree if they wished to prosecute it (*m*).

34. The intervention of equity was necessary also on behalf of legatees and next of kin. A legatee could sue at law for a specific legacy on the executor assenting to the bequest, since the assent vested the legal title in him, but he could not sue for a pecuniary legacy (*n*); and though he could sue in the ecclesiastical court, yet

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(*f*) *Canterbury (Archbishop) v. Wills* (1707), 1 Sulk. 315; this was on the ground that his proper remedy was at law.

(*g*) The bond was intended for the benefit of the legatees and next of kin (*Wallis v. Pipon* (1753), Amb. 183; see *Ashley v. Baillie* (1751), 2 Vcs. Sen. 368). A creditor who took an assignment of the bond from the ordinary would be restrained in equity from suing on it, upon terms of the personal representative accounting, and of the bond being a security for costs at law and in equity (*Thomas v. Canterbury (Archbishop)* (1787), 1 Cox, Eq. Cas. 399, explaining *Greenside v. Benson* (1745), 3 Atk. 248; and see *Bolton v. Powell* (1852), 2 De G. M. & G. 1, 21, C. A.).

(*h*) *Morrice v. Bank of England* (1735), 3 P. Wms. 402, n.; (1736) 3 Swahn. 573; (1737) 2 Bro. Parl. Cas. 465; *Barker v. Dumeres* (1740), Barn. (Ch.) 277; see *Alexander v. Alexander* (1669), 2 Rep. Ch. 20, [37]. Moreover, at law the creditor reached only legal assets (*Cox's (Sir Charles) Creditors' Case* (1734), 3 P. Wms. 341; p. 34, *post*).

(*i*) *A.-G. v. Cornthwaite* (1788), 2 Cox, Eq. Cas. 44; in such administration all debts of a higher or equal nature might be paid by the executor, and were allowed to him in his discharge (see *Anon.* (1747), 3 Atk. 572).

(*k*) Legislative sanction was given to administration decrees as to personal estate, and facility conferred for obtaining them, by the Court of Chancery Procedure Act, 1852 (15 & 16 Vict. c. 86) (now repealed), and since then the action has ceased to be brought on behalf of all creditors, unless real estate also is involved (*Re Greaves, deceased, Bray v. Tofield* (1881), 18 Ch. D. 551, 554; see *Wooldridge v. Norris* (1868), L. R. 6 Eq. 410, 414).

(*l*) *Pemberton v. Topham* (1838), 1 Beav. 316; *Re Greaves, deceased, Bray v. Tofield, supra*.

(*m*) *Handford v. Storie* (1825), 2 Sim. & St. 196; see *Re Alpha Co., Ltd., Ward v. Alpha Co., Ltd.*, [1903] 1 Ch. 203.

(*n*) *Deeks v. Strutt* (1794), 5 Term Rep. 690; see *Brown v. Elton* (1733), 3

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the machinery of that court was not adapted for securing a due distribution of the estate among the persons entitled. In particular, if there was an undisposed-of residue, the ecclesiastical court could not direct distribution among the next of kin (*o*). Consequently the jurisdiction of equity in administration extended to the distribution of the estate among the persons beneficially entitled (*p*). At first a legatee could sue for his own legacy solely (*q*), but the proceedings came to be enlarged in their scope as in the case of a creditor's action. If the executor admitted assets, the legatee continued to be entitled to a decree for payment (*r*). But otherwise an account of all the legacies was directed, with an order for payment rateably (*s*). The action involved an account of the personal estate, and also, since debts had priority over legacies, an account of debts, and hence a creditor could make his claim in the action (*t*). To a bill by a specific or pecuniary legatee neither the residuary legatees nor other legatees were necessary parties; but on a bill by one of several residuary legatees all other persons interested in the residue, after satisfaction of creditors and specific and pecuniary legatees, had to be brought before the court (*a*). Until decree other legatees or creditors could take proceedings in equity (*b*).

Restraining
proceedings
at law.

35. The jurisdiction of equity in administration being concurrent with that at law and in the ecclesiastical courts, simultaneous proceedings in these different courts had to be prevented. After the filing of a bill in equity a legatee was restrained from proceeding in the ecclesiastical court (*c*), and thus the Court of Chancery acquired exclusive control of the administration so far as legatees were concerned. Actions by creditors at common law were not restrained until there was a decree for general administration, and till such decree a creditor was entitled to proceed to judgment, and so obtain priority. As regards priority a decree in equity was

P. Wms. 202. But after executors had presented an account showing money to be in their hands on behalf of the legatee, they were liable to be sued at law (*Topham v. Morecraft* (1858), 8 E. & B. 972; see *Harding v. Harding* (1886), 17 Q. B. D. 442).

(*o*) Unless the will showed an intention that the executors should take the undisposed-of residue beneficially, they were trustees for the next of kin, but the ecclesiastical court could not enforce the execution of a trust (*Farrington v. Knightly* (1721), 1 P. Wms. 544, 549, 550, n. (1)).

(*p*) In *Adair v. Shaw* (1803), 1 Sch. & Lef. 243, 262, Lord REDESDALE, L.C., based the whole jurisdiction of equity in administration on the duty of the court to enforce the execution of trusts; but this was incorrect. The duties of a personal representative are to a large extent legal duties, and equity recognises this in requiring legal assets to be distributed in accordance with legal rules. The jurisdiction of equity was based on the superior advantages afforded by discovery, by the taking of accounts, and by the adjudication on the claims of creditors and beneficiaries in one action.

(*q*) *Haycock v. Haycock* (1682), 2 Cas. in Ch. 124.

Boys v. Ford (1819), 4 Madd. 40.

Mitford on Pleadings, 4th ed., p. 168.

(*r*) See *Sims v. Ridge* (1817), 3 Mer. 458.

(*s*) Mitford on Pleadings, p. 168, n. (p).

(*b*) *Handford v. Storie* (1825), 2 Sim. & St. 196, 198; *Martin v. Martin* (1749), 1 Ves. Sen. 211.

(*c*) *Stonehouse v. Stonehouse* (1745), 1 Dick. 98; *Smith v. Kempson* (1790), 2 Dick. 769.

equivalent to a judgment at law; and consequently a creditor suing for himself alone gained priority by the decree over a subsequent judgment creditor (*d*), provided the decree was for an ascertained sum, and not merely for an account with consequential direction for payment (*e*).

But where a general decree for administration was made, this operated as a judgment in favour of all the creditors who came in under it (*f*), and creditors were restrained from proceeding at law after such a decree (*g*); though, to prevent abuse in consequence of a decree being obtained by a friendly creditor, the executor, as a condition of the injunction, was required to make an affidavit of assets (*h*). A creditor, who had obtained judgment at law before the decree for administration, was *primâ facie* entitled to levy execution, either on the goods of the testator if the judgment was *de bonis testatoris*, or on the goods of the executor as well if it was also *de bonis propriis*. But in the former case the execution would be restrained, the creditor being at the same time allowed his legal priority as against the assets (*i*); in the latter case it seems that the execution against the assets of the testator would not be restrained, since this would prejudice the recourse to the goods of the executor (*k*).

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36. Formerly there was a difference between the rules of common law and equity with regard to the order of payment of debts. At common law specialty debts had priority over simple contract debts; in equity both were payable *pari passu* (*l*). And this difference gave importance to the distinction between legal and equitable assets. Legal assets were subject to the common law rule both when they were being dealt with at common law and in equity, since, as to them, equity followed the law (*m*). Equitable assets

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assets.

(*d*) *Morrice v. Bank of England* (1736), 3 Swan. 573, 576 *et seq.*

(*e*) *Perry v. Phelps* (1804), 10 Ves. 34.

(*f*) *Paxton v. Douglas* (1803), 8 Ves. 520.

(*g*) This was necessary, since the decree was not recognised at law (*Paxton v. Douglas, supra*), and was justified on the ground that, since the court had taken the administration into its own hands, the executor must be protected in obeying the decree (*Kenyon v. Worthington* (1786), 2 Dick. 668; *Brooks v. Reynolds* (1782), 1 Bro. C. C. 183; see *Martin v. Martin* (1749), 1 Ves. Sen. 211; *Coate v. Fryer* (1789), 3 Bro. C. C. 23).

(*h*) *Paxton v. Douglas, supra*; *Gilpin v. Southampton (Lady)* (1812), 18 Ves. 469.

(*i*) *Clarke v. Ormonde (Earl)* (1821), Jac. 108, 124 (though see *Lee v. Park* (1836), 1 Keen, 714, 724); and the creditor was entitled to the fruits of an execution levied and in the hands of the sheriff before decree (*Re Skiggs, Marriage v. Skiggs* (1859), 4 De G. & J. 4, C. A.).

(*k*) *Lee v. Park* (1836), 1 Keen, 714; *Drewry v. Thacker* (1819), 3 Swan. 529; *Lord v. Wormleighton* (1821), Jac. 148; see *Re Womersley, Etheridge v. Womersley* (1885), 29 Ch. D. 557, 559. Where judgment has not been obtained, see *Re Stubbs' Estate, Hanson v. Stubbs* (1878), 8 Ch. D. 154.

(*l*) See *Cox's (Sir Charles) Creditors' Case* (1734), 3 P. Wms. 341; *Turner v. Turner* (1819), 1 Jac. & W. 39, 45. "A debt without specialty is as much as a debt *jure naturali*, and in conscience as a debt by specialty, and therefore shall have an equality with debts by specialty where conscience is the judge" (*Hixon v. Wytham* (1675), 1 Cas. in Ch. 248).

(*m*) But if a specialty creditor had been partly paid out of legal assets, he was not allowed to participate in equitable assets until the other creditors had

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tion.

Land as
assets for
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were dealt with only in equity, and were subject to the equitable rule.

The distinction between legal and equitable assets referred to the remedies of the creditor, and not to the nature of the property. Assets which the creditor could make available for the satisfaction of his debt in an action at law were legal assets (*n*). These included all assets which an executor could recover *virtute officii*, notwithstanding that the executor might have to sue for them in equity, since at law the creditor could charge the executor with all such assets (*o*). Assets which a creditor could only reach by a suit in equity were equitable assets; of this nature were the proceeds of sale of land devised on trust for, or charged with, payment of the testator's debts (*p*).

Before 1833, unless land was made liable by the testator for payment of his debts, it did not constitute assets available for creditors generally, though it was liable in the hands of the heir or devisee to specialty debts by which the heirs were bound (*q*). By

received a like proportion (*Morrice v. Bank of England* (1736), *Cas. temp. Talb.* 217, 220; *Wride v. Clarke* (1766), 1 *Dick.* 382).

(*n*) *Cook v. Gregson* (1856), 3 *Drew.* 547, 549.

(*o*) See *Wilson v. Fielding* (1718), 2 *Vern.* 763; *Cox's (Sir Charles) Creditors' Case* (1734), 3 *P. Wms.* 341; *A.-G. v. Brunning* (1860), 8 *H. L. Cas.* 243, 258, 259.

(*p*) *Silk v. Prime* (1768), cited 1 *Bro. C. C.* 138, *n.*; *Foley's Case* (1679), *Freem. (cu.)* 49. It was at one time a question whether a devise to executors, or a power for them, to sell for payment of debts made the proceeds legal or equitable assets. At first they were treated as legal assets, since the proceeds came to the hands of the executors (*Blatch v. Wilder* (1738), *West temp. Hard.* 322); later a devise to executors made the land equitable assets, since the executors were treated, for the purpose of the devise, as trustees (*Silk v. Prime, supra*), and apparently a mere power for them to sell also made the land equitable assets (*Newton v. Bennet* (1782), 1 *Bro. C. C.* 135; *Barker v. Boucher* (1784), 1 *Bro. C. C.* 140, *n.* (4)). There was also an opinion that land was not made equitable assets unless the descent was broken, so that land charged with debts in the hands of the heir was legal assets, but this was overruled (*Bailey v. Elkins* (1802), 7 *Ves.* 319; *Shiphard v. Lutwidge* (1802), 8 *Ves.* 26; *Clay v. Willis* (1823), 1 *B. & C.* 364; *Barker v. May* (1829), 9 *B. & C.* 489). As to the whole subject see note to *Blatch v. Wilder, supra*.

Separate estate of a married woman was from its nature equitable assets, since it was not recognised at law (*Anon.* (1811), 18 *Ves.* 258; *Re Poole's Estate, Thompson v. Bennett* (1877), 6 *Ch. D.* 739); see *Owens v. Dickenson* (1840), *Cr. & Ph.* 48, 54. It appears to have been formerly considered that personal property, subject to a general power of appointment by will, became on appointment equitable assets, the appointee being treated as a trustee for the creditors (*Jenney v. Andrews* (1822), *Madd. & G.* 264; *Pardo v. Bingham* (1868), *L. R.* 6 *Eq.* 485); see *Townshend (Lord) v. Windham* (1750), 2 *Ves. Sen.* 1, 11. But such property is assets for payment of debts in the hands of the executor, and is, consequently, legal assets (*Re Hadley, Johnson v. Hadley*, [1909] 1 *Ch.* 20, *C. A.*, per COZENS-HARDY, *M.R.*, at p. 32; per FARWELL, *L.J.*, at p. 36); see *Beyfus v. Lawley*, [1903] *A. C.* 411). Under the Administration of Estates Act, 1833 (3 & 4 *Will.* 4, c. 104), real estate, subject to a general power of appointment by will, became, like real estate of the testator, assets for payment of his debts (*Fleming v. Buchanan* (1853), 3 *De G. M. & G.* 976, *O. A.*).

(*q*) Stat. (1691) 3 *Will. & Mar.* c. 14, repealed and re-enacted in altered form by the Debts Recovery Act, 1830 (11 *Geo.* 4 & 1 *Will.* 4, c. 47). A devise in trust for payment of debts took the land out of these statutes and made it equitable assets (*Spackman v. Timbrell* (1837), 8 *Sim.* 253; *Bailey v. Elkins, supra*). In proceedings at law to charge the lands in the hands of a devisee the heir was a necessary party, and, since proceedings in equity for the same

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the Administration of Estates Act, 1833, it was made liable, in proceedings in a court of equity, to specialty and simple contract debts generally, but the priority of specialty debts by which the heirs were bound was preserved (r). The effect was that land became assets to be dealt with in a court of equity in accordance with the statute (s), but if it had been made liable to debts by the will of the testator, it continued to be equitable assets apart from the statute (t). By the Administration of Estates Act, 1869 (u), specialty debts of all kinds and simple contract debts were put on the same footing for the purpose of administration, and the distinction between legal and equitable assets lost most of its importance.

37. A judgment obtained against a testator ranks before specialty and simple contract debts, and the executor cannot, as against a judgment creditor, discharge himself by showing payment of debts of an inferior nature. Originally this was so whether the executor had actual notice of the judgment or not, since he was presumed to have notice; and decrees in equity had the like priority, regardless also of actual notice (a). Then under successive statutes ending with the Law of Property Amendment Act, 1860 (b), judgments at law and decrees in equity had no priority unless they were registered (c). The repeal of the relevant sections of this Act has perhaps had the effect of reviving the priority of unregistered judgments (d).

Judgment
against
testator.

38. Formerly a judgment obtained against the executor gave the judgment creditor priority in his own class—that is, a judgment specialty creditor had priority as regards legal assets over other specialty creditors; and similarly for simple contract creditors. And a decree in equity for payment of an ascertained sum had a like effect (e), while a decree for general administration prevented any further priority from being gained. To obtain priority it was not necessary for the judgment or decree to be registered (f). The effect of placing specialty and simple contract debts on the same footing has been to give judgment creditors of either class priority

Judgment
against
executor.

purpose followed the analogy of the statute, he was a necessary party there also (*Gawler v. Wade* (1707), 1 P. Wms. 99).

(r) 3 & 4 Will. 4, c. 104 (Sir John Romilly's Act). There is no charge of debts on real estate under this statute till judgment for administration of the real estate has been obtained (*Re Moon, Holmes v. Holmes*, [1907] 2 Ch. 304).

(s) *Re Illidge, Davidson v. Illidge* (1884), 27 Ch. D. 478, 484, C. A.

(t) The Act is expressly confined to real estate which the testator had not by will charged with, or devised subject to, the payment of his debts (see *Ball v. Harris* (1839), 4 My. & Cr. 264). Compare *Turner v. Cox* (1853), 8 Moo. P. C. C. 288.

(u) 32 & 33 Vict. c. 46, known as *Hinde Palmer's Act*.

(a) *Searle v. Lane* (1688), 2 Vern. 88.

(b) 23 & 24 Vict. c. 38, ss. 3, 5, repealed by the Land Charges Act, 1900 (63 & 64 Vict. c. 26), which transferred the registry of judgments to the Land Registry Office, and made an order of the Court necessary for entries in the register.

(c) See *Van Gheluwe v. Nerinckx* (1882), 21 Ch. D. 189.

(d) See Land Charges Act, 1900 (63 & 64 Vict. c. 26), ss. 2(3), 5; and compare *Fuller v. Redman* (No. 1) (1859), 26 Beav. 600.

(e) *Morrice v. Bank of England* (1736), Cas. temp. Talb. 217.

(f) *Jennings v. Rigby* (1863), 33 Beav. 198.

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Executor's
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over all other specialty and simple contract creditors alike (*g*); save in the administration of an insolvent estate by the court, and then the judgment creditors have no priority (*h*).

39. An executor has always been entitled to pay creditors of the same class in such order as he pleases, although there may not be enough to pay all, and this is known as his right of preference (*i*). And now, under the Administration of Estates Act, 1869 (*j*), he can prefer a simple contract creditor to a specialty creditor (*k*). If a creditor commenced an action at law against the executor, the right of preference was stopped as against him as soon as the executor had notice of the action; but it was not stopped by proceedings in equity until decree (*l*). Since the Judicature Acts the equitable rule has prevailed, and the right of preference continues until a creditor has obtained judgment either in the Chancery or King's Bench Division (*m*). But a creditor who has been preferred as to part of his debt cannot receive anything further in an administration action until the other creditors have received the like proportion (*n*).

Executor's
right of
retainer.

40. Similar to the right of preference is the executor's right to retain out of the assets sufficient to satisfy a debt due to himself. It is a right of preferring himself, and has been also based on the impossibility of his suing himself (*o*). It is exercisable only out of legal assets (*p*), and as against creditors of the same degree. The Administration of Estates Act, 1869 (*q*), has not altered this rule. The entire assets are apportioned between the specialty and simple contract creditors, and the executor can retain his debt out of the part apportioned to debts of the same nature. If he is a simple contract creditor he gains incidentally through the fund available

(*g*) *Re Williams' Estate, Williams v. Williams* (1872), 1 L. R. 15 Eq. 270.

(*h*) This is the result of s. 10 of the Judicature Act, 1875 (38 & 39 Vict. c. 77) (*Re Whitaker, Whitaker v. Palmer*, [1901] 1 Ch. 9, C. A.; *M'Causland v. O'Callaghan*, [1904] 1 I. R. 376, C. A. (overruling in effect *Re Maggi, Winehouse v. Winehouse* (1882), 20 Ch. D. 545)).

(*i*) *Lyttleton v. Cross* (1824), 3 B. & C. 317, 322; see title EXECUTORS AND ADMINISTRATORS.

(*j*) 32 & 33 Vict. c. 46; see p. 35, *ante*.

(*k*) *Re Samson, Robbins v. Alexander*, [1906] 2 Ch. 584, C. A., overruling *Re Hankey, Cunliffe Smith v. Hankey*, [1899] 1 Ch. 541, and approving *Re Orsmond, Drury v. Orsmond* (1887), 58 L. T. 24. Formerly a payment to a simple contract creditor was only good as against a specialty debt of which the executor had no notice (*Hawkins v. Day* (1753), Amb. 160).

(*l*) *Orford (Earl) v. Daston* (1702), Colles, 229; *Maltby v. Russel* (1825), 2 Sim. & St. 227.

(*m*) *Re Radcliffe, deceased, European Assurance Society v. Radcliffe* (1878), 7 Ch. D. 733; *Vibart v. Coles* (1890), 24 Q. B. D. 364, C. A.

(*n*) *Wilson v. Paul* (1836), 8 Sim. 63; *Mitchelson v. Piper* (1836), 8 Sim. 64.

(*o*) The heir-at-law has no right of retainer out of proceeds of real estate or rents for a simple contract debt, since he could not be sued for a debt of the same nature owing by the testator (*Re Illidge, Davidson v. Illidge* (1884), 27 Ch. D. 478, C. A.); but he may retain in respect of specialty debts in which the heir is bound (*Solley v. Gower* (1688), 2 Vern. 62; *Loomes v. Stothard* (1823), 1 Sim. & St. 458), though not where the legal right to sue is in trustees (*Re Hayward, Tweedie v. Hayward*, [1901] 1 Ch. 221); see title EXECUTORS AND ADMINISTRATORS.

(*p*) *Anon.* (1681), 2 Cas. in Ch. 45; see *Walters v. Walters* (1881), 18 Ch. D. 182.

(*q*) 32 & 33 Vict. c. 46.

for simple contract debts being thus increased (*r*). The right of retainer is not stopped by an administration judgment and may be exercised against funds in court, if paid in by or on behalf of the executor (*s*). And it is exercisable as against a superior debt of which the executor has no notice (*t*).

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41. As regards the creditors all the assets of a deceased person are liable for the satisfaction of their debts in the manner above stated, subject to payment in the first instance of funeral and testamentary expenses out of the personal estate (*u*); but as regards the persons beneficially entitled to the assets, certain assets are liable before others, and the order of liability has been settled, in accordance with the presumed intention of the testator, as follows (*a*):—(1) the residuary personal estate; (2) real estate devised in trust for payment of debts; (3) real estate descended; (4) real estate devised and charged with payment of debts (*b*); (5) general pecuniary legacies; (6) specific legacies, and real estate devised specifically or by way of residue, and not charged with payment of debts; (7) real or personal estate expressly appointed under a general power of appointment (*c*). When the assets have not been applied in this order to the payment of debts, then the disappointed beneficiaries are entitled to have the assets marshalled, so that the actual incidence of the debts shall be in accordance with the due priority of liability. Thus, where debts are charged on real estate, but are in fact paid out of personalty, with the result that pecuniary legatees are disappointed, the legatees are entitled to have the assets marshalled so as to render the real estate charged with debts available for their legacies (*d*).

Order of
liability of
assets as
between
beneficiaries.

Under the Land Transfer Act, 1897 (*e*), the whole real and personal estate is subject to administration by the personal representatives of the deceased, but the order in which real and personal assets respectively are applicable in or towards the payment of funeral and testamentary expenses, debts or legacies, or the liability of real estate to be charged with the payment of legacies, is not altered. Consequently the assets can be applied in the above

(*r*) *Wilson v. Coxwell* (1883), 23 Ch. D. 764; approved in *Re Jones, Calvert v. Laxton* (1885), 31 Ch. D. 440; *Re Jennes, Oetzel v. Jennes* (1909), 53 Sol. Jo. 376.

(*s*) *Chisum v. Dewes* (1828), 5 Russ. 29; *Langton v. Higgs* (1832), 5 Sim. 228; *Richmond v. White* (1879), 12 Ch. D. 361; *Pulman v. Meadows*, [1901] 1 Ch. 233.

(*t*) *Re Fludyer, Wingfield v. Erskine*, [1898] 2 Ch. 562.

(*u*) See *Re Pullen, Parker v. Pullen*, [1910] 1 Ch. 564.

(*a*) See title EXECUTORS AND ADMINISTRATORS.

(*b*) The effect for this purpose of a charge of debts is preserved, notwithstanding that under the Land Transfer Act, 1897 (60 & 61 Vict. c. 65), s. 2 (3), the charge is no longer necessary (*Re Kempster, Kempster v. Kempster*, [1906] 1 Ch. 446).

(*c*) *Fleming v. Buchanan* (1853), 3 De G. M. & G. 976, 980; *Beyfus v. Lawley*, [1903] A. C. 411.

(*d*) *Re Stokes, Parsons v. Miller* (1892), 67 L. T. 223; *Re Salt, Brothwood v. Keeling*, [1895] 2 Ch. 203; *Re Roberts, Roberts v. Roberts*, [1902] 2 Ch. 834; *Re Kempster, Kempster v. Kempster*, [1906] 1 Ch. 446; *Re Bate, Bate v. Bate* (1890), 43 Ch. D. 600, *contra*, is overruled; see pp. 144, 145, *post*. And as to marshalling so as to throw estate duty in respect of specific legacies on descended real estate, see *Re Pullen, Parker v. Pullen*, *supra*.

(*e*) 60 & 61 Vict. c. 65, s. 2 (3).

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tion.

Partnership.

order by the personal representatives without the assistance of the Court.

(ix.) *Partnership (f).*

42. The Court of Chancery exercised jurisdiction in matters of partnership in consequence of the manifest superiority of the remedies which it could give over those available at law.

At law the only remedies open to a partner were an action of covenant or of *assumpsit* for breach of the partnership agreement, and an action of account (*g*). The former remedies did not suitably provide for all the questions which might arise as between the partners *inter se*, and as between the partners and their joint and separate creditors; and the action of account was open to objections which made it an impracticable remedy (*h*).

Rights of
partners
inter se.

In equity the special remedies and doctrines of the jurisdiction were and still are available in a variety of ways to adjust the rights and liabilities of partners. Although specific performance of an agreement to enter into partnership was not as a rule decreed, for the reason that a partnership could not be expected to be successful if it commenced in mutual distrust, dissatisfaction, or enmity (*i*), yet where the agreement was for a fixed term and had been already partly performed, and where it was necessary that the status of the partners should be determined, then the agreement would be specifically enforced (*j*). When a partnership had been established, discovery might be wanted to prove the fact of partnership, or to procure information of the partnership transactions. If there were reasons which prevented the effective carrying on of the partnership, there was jurisdiction in equity to order a dissolution although the stipulated period had not expired (*k*). Where a dissolution had occurred, the procedure in equity allowed of the partnership accounts being taken, and this might be done, if necessary, even without a dissolution (*l*). Both during the partnership and after its dissolution, the appointment of a receiver, or a receiver and manager, might be expedient (*m*), or it might be proper to restrain one of the partners by injunction from acting in violation of the partnership contract, or contrary to the interests of the other partners (*n*).

Rights of
creditors.

And the interference of equity was necessary when questions arose

(f) See title PARTNERSHIP.

(g) As to the action of account between partners, see Co. Litt. 172 a.

(h) See p. 27, *ante*.

(i) Story, s. 666.

(j) *Buxton v. Lister* (1746), 3 Atk. 383; *Crawshaw v. Maule* (1818), 1 Swan. 495, 509, n. (a); *England v. Curling* (1844), 3 Beav. 129; *Scott v. Rayment* (1868), L. R. 7 Eq. 112.

(k) *Waters v. Taylor* (1813), 2 Ves. & B. 299; *Anon.* (1856), 2 K. & J. 441, 447; *Jones v. Lloyd* (1874), L. R. 18 Eq. 265, 274.

(l) Lord ELDON refused an account unless a dissolution was prayed (*Forman v. Homfray* (1813), 2 Ves. & B. 329; see per SHADWELL, V.-C., in *Loscombe v. Russell* (1830), 4 Sim. 8; *contra*, per LEACH, V.-C., in *Harrison v. Armitage* (1819), 4 Madd. 143; per Lord COTTENHAM in *Wallworth v. Holt* (1844), 4 My. & Cr. 619, 635--639). As to the cases in which an account will now be ordered without a dissolution, see title PARTNERSHIP.

(m) See title RECEIVERS.

(n) See title INJUNCTION.

between partners and their creditors. A judgment creditor of one partner could take in execution, not his share in the partnership chattels, but only his interest after the accounts had been taken and the partnership liabilities provided for (o), and this could only be effectively done in equity. Equitable doctrines, moreover—e.g., the doctrine of marshalling—were required to give joint creditors a preference against the joint assets, and separate creditors against the separate assets (p); and in equity a joint covenant by partners was treated as several on the death of a partner, so that the covenantee could recover against his estate (q). In addition, real estate of the partnership, which was vested in one of the partners, or in the partners jointly, was treated as partnership assets, and the beneficial interest of the partners devolved as personality (r). These were some of the reasons which gave equity a concurrent, and in practice almost an exclusive, jurisdiction in partnership matters (s); and which led to the assignment of such matters to the Chancery Division of the High Court.

SECT. 1.
Nature and
Extent of
Equitable
Jurisdiction.

(x.) *Determination of Boundaries.*

43. The Court of Chancery exercised from early times a jurisdiction to determine boundaries where the lands of adjoining proprietors had become confused, and where there was also some special reason for the assistance of equity (a). To give jurisdiction the plaintiff must have shown, either by the defendant's admission or by evidence, that he had a clear legal title to some part of the land the boundaries of which were said to be confused (b), and further that the defendant was in possession of part of the land (c).

Determina-
tion of
boundaries.

(o) *Waters v. Taylor* (1813), 2 Ves. & B. 299, 301; *Re Wait* (1820), 1 Jac. & W. 605, 608; see *West v. Skip* (1749), 1 Ves. Sen. 239; *Dutton v. Morrison* (1810), 17 Ves. 193, 206; *Habershon v. Blurton* (1847), 1 De G. & Sm. 121.

(p) *Tuiss v. Massy* (1737), 1 Atk. 67; *Dutton v. Morrison*, *supra*, at p. 209.

(q) *Devaynes v. Noble* (1816), 1 Mer. 530, 539; *Devaynes v. Noble* (1831), 2 Russ. & M. 495; *Wilkinson v. Henderson* (1833), 1 My. & K. 582; *Thorpe v. Jackson* (1837), 2 Y. & O. (Ex.) 553; *Kendall v. Hamilton* (1876), 3 C. P. D. 403, 407, C. A., affirmed (1879), 4 App. Cas. 504, 517; *Re McKee, Forster v. Davis, Norden v. McKee* (1883), 25 Ch. D. 16, 19, C. A.; *Re Hodgson, Beckett v. Ramsdale* (1885), 31 Ch. D. 177, C. A.; *Re Doetsch, Matheson v. Ludwig*, [1896] 2 Ch. 836, 839; see *Ex parte Kendall* (1811), 17 Ves. 514.

(r) *Lake v. Craddock* (1732), 3 P. Wms. 158; *Jackson v. Jackson* (1804), 9 Ves. 591, 597, citing *Elliot v. Brown* (1791), unreported; *Houghton v. Houghton* (1841), 11 Sim. 491; *Davies v. Games* (1879), 12 Ch. D. 813. • But as to the limits of this application of the doctrine of conversion, see *Randall v. Randall* (1836), 7 Sim. 271; Partnership Act, 1890 (63 & 64 Vict. c. 39), s. 20 (3); *Davis v. Davis*, [1894] 1 Ch. 393.

(s) Story, s. 683.

(a) See title BOUNDARIES AND FENCES, Vol. III., pp. 116 *et seq.*, and the following cases.—*Spyer v. Spyer* (1631), Nels. 14; *Lethuellier v. Castlemain (Lord)* (1726), Dick. 46; *Darlington (Earl) v. Bowes* (1769), 1 Eden, 270; *Lascelles v. Butt* (1876), 2 Ch. D. 588; *A.-G. v. Fullerton* (1813), 2 Ves. & B. 263; *Aston v. Exeter (Lord)* (1801), 6 Ves. 288; *Leeds (Duke) v. Strafford (Earl)* (1798), 4 Ves. 180; *St. Luke's, Old Street v. St. Leonard's, Shoreditch* (1779), 1 Bro. C. C. 40.

(b) *Godfrey v. Little* (1831), 2 Russ. & M. 630.

(c) *A.-G. v. Stephens* (1855), 6 De G. M. & G. 111, 149. See *Busingstoke Corporation v. Dalton (Lord)* (1852), 1 Drew 270, 289; (1854) 3 Drew. 50, 63; *Hicks v. Hastings* (1857), 3 K. & J. 701.

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Partition.

(xi.) Partition (d).

44. The Court of Chancery assumed from early times a concurrent jurisdiction in partition (e). This was due partly to the inadequacy, and partly to the inconvenience, of the remedy at law (f). The writ of partition at law was originally only available for parceners (g), and though it was made available for joint tenants and tenants in common of estates of inheritance by 31 Hen. 8, c. 1, and for joint tenants and tenants in common for lives or years by 32 Hen. 8, c. 32, s. 1 (h), the extension of the remedy did not meet the objection that the remedy itself was difficult to apply. Accordingly the jurisdiction of the court was based not upon any equity, but upon the principle of convenience (i)—upon the extreme difficulty attending the process of partition at law (k).

The superiority of equity was shown in the facility for making inquiry into the titles of the persons interested (l) and for ascertaining the value of the different properties (a); in the power of awarding a sum to be paid for owelty of partition (b); and in the power

(d) See title PARTITION. As a rule a sale is now directed in lieu of partition under the Partition Acts, 1868 (31 & 32 Vict. c. 40) and 1876 (39 & 40 Vict. c. 17).

(e) Co. Litt. 169 a, Hargrave's note, referring to *Speke v. Walrond* (1598), Toth. 155; this learned writer seems to have regarded the jurisdiction as a usurpation; see 1 Fonblanque, Treatise of Equity, 5th ed., Vol. I., p. 9; Story, ss. 646, 647.

(f) See Mitford on Pleadings, p. 120.

(g) Littleton's Tenures, s. 264.

(h) *Baring v. Nash* (1813), 1 Ves. & B. 551; 555; *Miller v. Warmington* (1820), 1 Jac. & W. 484, 493.

(i) *Calmady v. Calmady* (1795), 2 Ves. 568, 570; *Strickland v. Strickland* (1842), 6 Beav. 77, 81.

(k) *Agar v. Fairfax*, *Agar v. Holdsworth* (1811), 17 Ves. 533, per Lord ELDON, L.C., at p. 552; *Manuton v. Squire* (1677), Freem. (CH.) 26. But the Court of Chancery had no jurisdiction to decree partition of copyholds (*Horncastle v. Charlesworth* (1840), 11 Sim. 315), or customary freeholds (*Jope v. Morshead* (1843), 6 Beav. 213), till jurisdiction was expressly conferred by the Copyhold Act, 1841 (4 & 5 Vict. c. 35), s. 85 (now repealed, and re-enacted by the Copyhold Act, 1894 (57 & 58 Vict. c. 46), s. 87). As to leaseholds, see *Baring v. Nash* (1813), 1 Ves. & B. 551. The writ of partition was abolished by the Real Property Limitation Act, 1833 (3 & 4 Will. 4, c. 27), s. 36; and from that time equity had technically, as before it had practically, exclusive jurisdiction in partition (see *Leigh v. Dickeson* (1884), 15 Q. B. D. 60, 65, C. A.; *Mayfair Property Co. v. Johnston*, [1894] 1 Ch. 508, 513). An attempt had been made by stat. (1696) 8 & 9 Will. 3, c. 31 (now repealed), to remove some of the difficulties at law; see as to the operation of this statute in equity, *Story v. Johnson* (1837), 2 Y. & C. (ex.) 586, 605.

(l) *Agar v. Fairfax*, *Agar v. Holdsworth*, *supra*. It is the duty of the court to ascertain the proportions and rights of the parties, and when that is done the duty of the commissioners begins, to make the division in those ascertained proportions (*ibid.*, per GRANT, M.R., at p. 543). A tenant for life might represent unborn remaindermen (*Gaskell v. Gaskell* (1836), 6 Sim. 643). The plaintiff had to show a title to his share before he could get a decree for partition (*Jope v. Morshead* (1843), 6 Beav. 213).

(a) *Calmady v. Calmady*, *supra*.

(b) This could not be done at law, since the exigency of the judgment required that the lands should be divided by the sheriff according to the oath of twelve men of the bailiwick (Littleton's Tenures, s. 248); and in equity it had to be

to direct conveyances (c). Originally the practice was to ascertain the interests and then issue a commission. Subsequently the commission was usually dispensed with to save expense and the partition made in chambers (d).

Partition was a matter of right, however difficult the actual partition might be (e), but it was not necessary to divide each separate property. The several properties included in the joint ownership might be assigned in their entirety among the co-owners (f); and in making the division regard might be paid to the circumstances of the owners and of the properties, so as to secure to each owner the greatest convenience and advantage (g). In partition, moreover, an account of rents and profits may be decreed against a co-owner who has been in possession of the whole or of more than his share (h), but who, on the other hand, may be entitled to a lien for money expended on improvements (i).

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(xii.) *Dower (k).*

45. In dower the Court of Chancery exercised a jurisdiction concurrent with that at law. This was based upon the difficulties which the widow might encounter if she was left to her remedy at law. She required discovery of the lands in the possession of the heir, and valuation of the different parts; and there might be legal impediments to her recovery of dower at law—such as the existence

done by the court, not by the commission (*Mole v. Mansfield* (1845), 15 Sim. 41; see *Lister v. Lister* (1839), 3 Y. & C. (EX.) 540, 545).

(c) *Whaley v. Dawson* (1805), 2 Sch. & Lef. 367, 371; see *Anon* (1742), 3 Swan. 139, n. This was said in *Miller v. Farmington* (1820), 1 Jac. & W. 484, 493, to be a reason for requiring the legal title to be before the court; but apparently the court would proceed on an equitable title in the plaintiff, on the ground that otherwise he would be without remedy (*Cartwright v. Pullney* (1742), 2 Atk. 380); and an outstanding legal title affecting the whole estate, as that of a mortgagee (*Swan v. Swan* (1819), 8 Price, 518; *Waite v. Bingley* (1882), 21 Ch. D. 674), need not be before the court, though the entire estate in a particular share should be (*Cornish v. Gest* (1788), 2 Cox, Eq. Cas. 27).

(d) *Greenwood v. Percy* (1859), 26 Beav. 572; *Clarke v. Clayton* (1860), 2 Giff. 333.

(e) *Parker v. Gerrard* (1754), Amb. 236; *Warner v. Baynes* (1750), Amb. 589; *Turner v. Morgan* (1803), 8 Ves. 143; *Mayfair Property Co. v. Johnston*, [1894] 1 Ch. 508.

(f) *Clarendon (Earl) v. Hornby* (1718), 1 P. Wms. 446; *Story v. Johnson* (1837), 2 Y. & C. (EX.) 586, 611.

(g) *Story v. Johnson* (1835), 1 Y. & C. (EX.) 538; (1837) 2 *ibid.*, 586; *Lister v. Lister* (1839), 3 Y. & C. (EX.) 540; *Canning v. Canning* (1854), 2 Drew. 434, 436. If there was nothing to guide the commissioners, as a last resort they might draw lots (*ibid.*).

(h) *Lorimer v. Lorimer* (1820), 5 Madd. 363; *Hill v. Fulbrook* (1822), Jac. 574; *Hill v. Hickin*, [1897] 2 Ch. 579, 581. But a tenant in common in occupation of the entirety is not chargeable with an occupation rent (*Al'Mahon v. Purchell* (1846), 5 Hare, 322; 2 Ph. 127); unless he has excluded the others (*Pascoe v. Swan* (1859), 27 Beav. 508; see *Porter v. Lopes* (1877), 7 Ch. D. 358).

(i) *Swan v. Swan*, *supra*; *Hill v. Hickin*, *supra*; *Leigh v. Dickeson* (1884), 15 Q. B. D. 60, C. A.; see *Re Leslie*, *Leslie v. French* (1883), 23 Ch. D. 552, 564. But a tenant in common in possession of more than his share cannot be allowed for improvements unless he is charged with an occupation rent (*Teasdale v. Sanderson* (1864), 33 Beav. 534; see *Re Jones*, *Farrington v. Forrester*, [1893] 2 Ch. 461, 477—479).

(k) See title HUSBAND AND WIFE.

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of a mortgage for a term of years (*l*), or a satisfied term (*m*)—which only equity could remove. In strictness these were grounds for the auxiliary jurisdiction of equity; but, dower being favoured in equity, the Court of Chancery gave substantial relief as well, and assigned to the widow her lands in dower, without sending her to recover final relief at law (*n*); though, if there were any doubt as to her legal title, this was a matter which had to be decided on an issue sent to law (*o*). A further reason for entertaining the claim in equity was that rents and profits from the death of the husband were only given at law as damages under the Statute of Merton, and the liability and the claim to damages were personal, and died respectively with the heir and the widow; but in equity an account was decreed against or in favour of the representatives, as might be necessary (*p*). A widow's title was legal, and hence she could recover in equity against a purchaser for value without notice, notwithstanding that he had got in the legal estate; but she was not entitled as against him to any special equitable relief, such as discovery (*q*).

SUB-SECT. 5.—The Auxiliary Jurisdiction in Equity.

The auxiliary jurisdiction.

46. The Court of Chancery exercised jurisdiction in aid of or supplementary to the jurisdiction at law for the purpose of (1) procuring or preserving evidence; (2) facilitating or restraining proceedings at law, as the justice of the case might require; (3) restraining the assertion of doubtful rights; (4) preventing instruments which were void or voidable from being a continuing source of peril; (5) providing for the safety of property either pending litigation or when it was in the hands of accounting parties or limited owners; (6) enforcing judgments obtained at law; (7) preventing injury to third persons by the assertion of conflicting claims; and (8) avoiding multiplicity of suits in respect of the same right. This jurisdiction was exercised by the following proceedings:—discovery, perpetuation of testimony, suits *de bene esse*, and commissions to take evidence abroad; injunctions and *quia timet* suits; the cancelling and delivery up of documents; receivers; interpleader; and bills of peace (*r*). The use of injunctions to prevent the oppressive enforcement of judgments at law may for convenience be classed under this head of the jurisdiction, though in effect it constituted an overriding jurisdiction. The procedure in

(*l*) See Co. Litt. 208 a, Butler's note (105).

(*m*) But the court would not remove a term of years as against a purchaser, even though he took an assignment of the term with notice of the right to dower (*Rudnor (Countess) v. Vandebendy* (1697), Show. Parl. Cas. 69; *Mole v. Smith* (1822), Jac. 490, 497).

(*n*) *Curtis v. Curtis* (1789), 2 Bro. C. C. 620, see judgment of Lord ALVANLEY, M.R., at pp. 630–634; *Pulteney v. Warren* (1801), 6 Ves. 72, 89; *Strickland v. Strickland* (1842), 6 Beav. 77, 81; Mitford on Pleadings, p. 123.

(*o*) Park on Dower, ch. 15, p. 329.

(*p*) *Curtis v. Curtis*, *supra*; *Dormer v. Fortescue* (1744), 3 Atk. 124, 130; and see *Williams v. Thomas*, [1809] 1 Oh. 713, 720, O. A.

(*q*) *Williams v. Lambe* (1791), 3 Bro. C. C. 264; *Collins v. Archer* (1830), 1 Russ. & M. 284; see p. 77, *post*.

(*r*) The writ of *ne exeat regno* also is for convenience treated under this head, though not strictly auxiliary to proceedings at law (see p. 59, *post*).

these matters was of course equally applicable when the rights in question were equitable, but in this case the procedure was available in the principal suit.

Where relief in equity depended upon a legal right, the Court of Chancery usually referred the ascertainment of the right to a court of law (a), and in such case the decision at law was binding in equity (t); but even in matters purely equitable an issue at law might be directed, or the opinion of a court of law taken, and then the object was to inform the conscience of the court, and the decision at law was not binding (a). In 1862 the Court of Chancery was empowered (b) to determine questions of law or fact on which the title to equitable relief depended; and now such power is vested in each Division of the High Court by the Judicature Act, 1873 (c). But in matters of legal right the principles of law still prevail (d).

(i.) *Discovery* (e).

47. One of the defects in proceedings at law arose from the want of power to compel the parties to an action to give discovery of the material facts in controversy, and of the documents in their power relating to the subject-matter of the action (f). Jurisdiction to compel such discovery on the oath of the defendant was assumed by equity (g), and formed one of the foundations on which equitable jurisdiction rested. In certain cases—in particular, in cases of account, accident, fraud, and mistake—the Court of Chancery, having acquired cognisance of the suit for the purpose of discovery, entertained the suit in its entirety, and, in order to avoid multiplicity of action, gave the substantial relief which was suitable (h).

(s) *Rigby v. Great Western Rail. Co.* (1846), 2 Ph. 44.

(t) *Coker v. Farewell* (1729), 1 Swan, 390, n. A right was not determined so as to be a ground for a perpetual injunction by one trial at law, except on an issue directed by the court (*Robinson v. Byron (Lord)* (1788), 2 Cox, Eq. Cas. 4). A verdict on such issue was not disturbed unless there was substantial ground for believing that, on a second trial, other weighty countervailing evidence would be produced (*Waters v. Waters* (1848), 2 De G. & Sm. 591, 618).

(a) *Coker v. Farewell*, *supra*; *Lansdowne (Marchioness) v. Lansdowne (Marquis)* (1820), 2 Bli. 60, 86, H. L.

(b) By the Chancery Regulation Act, 1862 (25 & 26 Vict. c. 42), known as Rolt's Act, now repealed by the Statute Law Revision and Civil Procedure Act, 1883 (46 & 47 Vict. c. 49).

(c) 36 & 37 Vict. c. 66; see p. 61, *post*.

(d) *Colls v. Home and Colonial Stores, Ltd.*, [1904] A. C. 179, 188.

(e) See title DISCOVERY, Vol. XI., pp. 36 *et seq.*

(f) 3 Bl. Com. 381, 382; Story, s. 1484.

(g) As to the dangers of the system, see Fonblanque, *Treatise of Equity*, 5th ed., Vol. II., p. 482; and as to bills for discovery, see Bray on Discovery, pp. 609—619.

(h) Fonblanque, *Treatise of Equity*, 5th ed., Vol. I., p. 9. See *Jesus College v. Bloom* (1745), 3 Atk. 262; "The right to discovery carries along with it the right to relief in equity" (*Adley v. Whitstable Co.* (1810), 17 Ves. 315, *per Lord Eldon*, L.C., at p. 324); "When it is admitted that a party comes here properly for the discovery, the court is never disposed to occasion a multiplicity of suits by making him go to a court of law for the relief" (*Ryle v. Haggie* (1820), 1 Jac. & W. 234, *per PLUMER*, M.R., at p. 237). A further reason for giving relief as well as discovery was that the discovery would otherwise be in any event at the cost of the plaintiff (*Mackenzie v. Johnston* (1819), 4 Madd. 373, 376). But the above *dicta* went beyond the actual practice; the necessity of coming into equity for discovery was only a circumstance to be regarded in

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In a sense every bill in equity was a bill of discovery, since it sought disclosure from the defendant on his oath of the truth of the circumstances constituting the plaintiff's case as stated in his bill; but a bill of discovery proper was one in which the plaintiff asked for no relief, and simply sought discovery of facts in the knowledge of the defendant, or of documents in his power, which were necessary to maintain the plaintiff's rights in another court (*i*). It followed from the nature of the bill that, when discovery had been obtained by the defendant's answer, there were no further proceedings (*k*).

To maintain the bill in equity it was in general necessary that an action at law should have been commenced to which it could be auxiliary, or that it was intended to bring such an action (*l*); and it was necessary that it should clearly appear on the bill that the plaintiff had an interest in the subject-matter of the discovery capable of assertion before a judicial tribunal (*m*). But the discovery of facts was limited to the material facts relating to the plaintiff's case, it did not extend to the discovery of the defendant's evidence, nor to the means by which he intended to establish his case (*n*). Discovery was allowed in aid of proceedings in equity, or of an action to maintain a civil right in a court of common law, but not to aid or defend an indictment, information, prohibition, or mandamus (*o*).

Where the claim was to recover property, and the defence was based on purchase for valuable consideration without notice, the Court of Chancery, in its regard for this defence, declined to compel the defendant to make any discovery which would hazard his title; and hence, provided the consideration had been actually paid, he might object to a bill of discovery that he was a purchaser for valuable consideration without notice, even though he had not obtained the legal estate (*p*).

(ii.) *Perpetuation of Testimony and Suits de bene esse (q).*

Suits to
perpetuate
testimony.

48. The Court of Chancery entertained suits the sole object of which was to obtain and perpetuate testimony in danger of being

deciding on the question of equitable jurisdiction to grant full relief (*Pearce v. Creswick* (1843), 2 Hare, 286, 294); see also title DISCOVERY, Vol. XI, pp. 37—39.

(*i*) Mitford on Pleadings, pp. 53, 183—185; Story, ss. 689, 1483. It has been pointed out that the true distinction was between bills for discovery only and bills for discovery and relief (Wigram, Law of Discovery, 2nd ed., p. 46).

(*k*) Mitford on Pleadings, p. 16; *Shaftesbury (Lady) v. Arrowsmith* (1798), 4 Ves. 66, 71.

(*l*) *London Corporation v. Levy* (1803), 8 Ves. 398, 404; Story, s. 1483.

(*m*) Mitford on Pleadings, pp. 154, 157; *Brownson v. Edwards* (1751), 2 Ves. Sen. 243, 247.

(*n*) See Wigram, Law of Discovery, p. 261.

(*o*) *Montague (Lord) v. Dudman* (1751), 2 Ves. Sen. 396, 398.

(*p*) "It is an infallible rule that a purchaser for valuable consideration shall never without notice discover anything to hurt himself" (*Perrat v. Ballard* (1681), 2 Cas. in Ch. 72, per Lord NOTTINGHAM, L.C., at p. 73); see *Collet v. De Gols* (1734), Cas. temp. Talb. 65, 69; *Jerrard v. Saunders* (1794), 2 Ves. 454, 458; Mitford on Pleadings, 199; Story, s. 1502; and p. 76, *post*.

(*q*) See title EVIDENCE, *post*.

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lost before the matter to which it related could be made the subject of judicial investigation (*r*). Hence it was in general essential for the maintenance of the suit that the plaintiff was not able to institute proceedings to have the matter in controversy immediately determined—where, for instance, he was in enjoyment of a right, such as a right of fishery, and feared that it might in the future be contested (*s*); and it was also essential that the matter should not be the subject of an existing action or suit against the plaintiff (*a*). If the matter was capable of immediate decision, the ground for the suit to perpetuate testimony failed (*b*). The bill prayed for no relief, but only for a commission for the examination of witnesses (*c*), and it was terminated by the examination and never brought to a hearing (*d*). There was no restriction as to age, health, or otherwise, on the witnesses who might be examined, the object being to preserve any available testimony which might be lost; but the depositions were sealed up, and only used if the witnesses were not alive or capable of giving *viâ voce* evidence at the time of the trial (*e*).

A suit to perpetuate testimony could be maintained in aid of any estate or interest in property, whether in possession or reversion, and whether vested or contingent (*f*); but not in respect of a mere *spes successionis* or expectation of an interest (*g*), nor of an interest which was liable to be immediately barred (*h*). Hence issue in tail could not maintain the suit in the lifetime of the ancestor (*i*). The procedure was extended to claims to titles, and was expressly applied by statute (*k*) to estates and interests in property depending on any future event. The same object may sometimes be obtained by an application for a declaration of legitimacy under the Legitimacy Declaration Act, 1858 (*l*). At the present time

(*r*) Story, s. 1505. The procedure appears to have been most frequently used when a devisee of land in possession desired to preserve evidence of the validity of the will for use in the event of any future claim by the heir-at-law (3 Bl. Com. 450).

(*s*) *Dorset (Duke) v. Girdler* (1720), Prec. Ch. 531; *Angell v. Angell* (1822), 1 Sim. & St. 83, 89; *Brooking v. Maudslay, Son, and Field* (1888), 38 Ch. D. 636, 644; *West v. Sackville (Lord)*, [1903] 2 Ch. 378, 384, C. A.; Story, s. 1508.

(*a*) *Spencer (Earl) v. Peek* (1867), L. R. 3 Eq. 415.

(*b*) *Ellice v. Roupell* (No. 1) (1863), 32 Beav. 299.

(*c*) *Dorset (Duke) v. Girdler*, *supra*; see *Dew v. Clarke* (1822), 1 Sim. & St. 108, 110. The defendant was also entitled to examine witnesses (*Abergavenny (Earl) v. Powell* (1816), 1 Mer. 434; *Skrine v. Powell* (1845), 15 Sim. 81).

(*d*) Mitford on Pleadings, 51.

(*e*) *Spencer (Earl) v. Peek*, *supra*. Hence the depositions were not published while the witness was alive (*Barnsdale v. Lowe* (1831), 2 Russ. & M. 142), unless he was unable to travel (*Morrison v. Arnold* (1817), 19 Ves. 670; *Biddulph v. Camoys (Lord)* (1855), 20 Beav. 402).

(*f*) *Dursley (Lord) v. Fitzhardinge Berkeley* (1801), 6 Ves. 251.

(*g*) *Smith v. A.-G.* (1777), cited 6 Ves. 260; 15 Ves. 133, 136; *Re Parsons, Stockley v. Parsons* (1890), 45 Ch. D. 51, 57.

(*h*) *Dursley (Lord) v. Fitzhardinge Berkeley*, *supra*.

(*i*) *Allan v. Allan* (1808), 15 Ves. 130.

(*k*) Stat. (1842) 5 & 6 Vict. c. 69, repealed by the Statute Law Revision and Civil Procedure Act, 1833 (46 & 47 Vict. c. 49); see *The Townshend Peerage* (1843), 10 Cl. & Fin. 289; *Campbell v. Dalhousie (Earl)* (1869), L. R. 1 Sc. & Div. 462.

(*l*) 21 & 22 Vict. c. 93; and where the question can be at once disposed of

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any person who would, in the circumstances alleged by him to exist, become entitled, upon the happening of any future event, to any honour, title, dignity, or office, or to any estate or interest in any property, real or personal, the right or claim to which cannot be brought to trial before the happening of such event, may commence an action to perpetuate the testimony material for establishing the right or claim (*m*).

Proceedings to perpetuate testimony are commenced by action, and are subject to the same principles as a suit for the purpose under the former practice (*n*).

Suits *de bene*
***esse* and for**
commissions.

49. Where an action at law had been commenced, and witnesses were too old or infirm to attend to give evidence, or where there was only a single witness as to a material point, the Court of Chancery entertained a bill *de bene esse* to enable depositions to be taken immediately for use at the trial (*o*); and where the witnesses were abroad, it entertained a suit for a commission to examine them abroad, and restrained by injunction the proceedings at law until the return of the commission. This jurisdiction was said to be based on accident (*p*). At law there was originally no power to issue such a commission, and when the common law courts interfered, they did so only with the consent of the adverse party (*q*). This interference did not lessen the jurisdiction in equity (*r*). Depositions taken in a suit *de bene esse* could not be used unless, when the cause came on for trial, the attendance of the witness could not in fact be then procured (*s*).

(iii.) *Injunction* (*t*).

Injunction.

50. The remedy by injunction was one of the foundations of the jurisdiction in equity, and cannot be classed exclusively under

under this statute perpetuation of testimony will not usually be granted (*West v. Sackville* (*Lord*), [1903] 2 Ch. 378, C. A.). A question of the legitimacy of one of several children can also be determined by settling property on the children, and then perpetuating testimony as to the right of the child whose legitimacy is disputed to share (*Re Storer* (1884), 9 P. D. 120).

(*m*) R. S. C., Ord. 37, r. 35, reproducing stat. (1842) 5 & 6 Vict. c. 69; as to making the Attorney-General a defendant, see r. 36.

(*n*) *Ibid.*, r. 37; see *Brooking v. Maudslay, Son, and Field* (1888), 38 Ch. D. 636; *West v. Sackville* (*Lord*), *supra*. As to the procedure where the defendant is in default in delivery of his defence, see *Bute (Marquis) v. James* (1886), 33 Ch. D. 157. The examination is referred to one of the examiners of the court, and not to a special examiner (*ibid.*).

(*o*) *Angell v. Angell* (1822), 1 Sim. & St. 83; Story, s. 1513.

(*p*) *Macaulay v. Shackell* (1827), 1 Bli. (N. S.) 96, 119, 130—132, H. L.

(*q*) *Angell v. Angell*, *supra*.

(*r*) *Macaulay v. Shackell*, *supra*, at p. 132. As to publication of the depositions in suits to perpetuate testimony, and suits *de bene esse*, see *Harris v. Cotterell* (1808), 3 Mer. 678, 680; *Ellice v. Roupell* (No. 1) (1863), 32 Beav. 299, 304; *Vane v. Vane* (1876), 24 W. R. 565; and as to publishing depositions in an ancient suit for the purpose of a modern suit, see *Moggridge v. Hall, Llanover (Lady) v. Homfray, Phillips v. Llanover (Lady)* (1879), 13 Ch. D. 380; *Llanover v. Homfray, Phillips v. Llanover (Lady)* (1881), 19 Ch. D., 224, C. A.; and see *Evans v. Merthyr Tydfil Urban Council*, [1899] 1 Ch. 241, C. A.

(*s*) Story, s. 1516. And as to evidence on commission, see title EVIDENCE, *post*.

(*t*) See title INJUNCTION.

either the exclusive, or the concurrent, or the auxiliary jurisdiction. One use of the remedy, indeed, added a fourth head of jurisdiction, since by means of injunctions the Court of Chancery exercised in substance, though not in form, a jurisdiction to override judgments at common law when they were made the instrument of oppression (u). Apart from this overriding jurisdiction, equity interfered in legal claims either to assist the prosecution of the claim, or to prevent irreparable injury or multiplicity of suits. When it did not itself decide upon the legal claim, this jurisdiction was auxiliary; when it decided on the rights in the subject-matter of the legal claim the jurisdiction was concurrent; and when an injunction was granted in a trust or other matter of cognisance only in equity, the jurisdiction was exclusive. For practical purposes it is sufficient to regard injunctions as having been designed (1) to prevent the improper use of legal proceedings, or to remove technical impediments to their proper use; and (2) to prevent the infringement of public or private rights, either temporarily before the right had been ascertained, or permanently after it had been ascertained. An injunction was granted only in negative terms, but the practice in this respect has been altered, and an injunction may now be mandatory in terms, as well as in substance (a).

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51. The practical importance of the first head has disappeared with the fusion of law and equity under the Judicature Acts. One of the reasons of the growth of equity being the necessity for correcting the strictness of the law, it was inevitable that equity should have the power of preventing the plaintiff at law from profiting by that strictness, and this it did by forbidding him to proceed on his legal judgment. But equity did not impugn the legal judgment as such. It recognised the judgment, but prevented its unconscientious use (b).

Interference
by injunction
in legal
proceedings.

The same principle enabled the Court of Chancery to remove technical impediments to prosecuting an action at law—as by preventing an outstanding term from being set up against a claim in ejectment (c)—and to prevent the prosecution of legal claims where they conflicted with the procedure or principles of equity (d). Thus, where an estate had fallen within the cognisance of the Court of Chancery by the making of an administration decree,

Removing
technical
impediments.

Restraining
proceedings
at law.

(u) Thus, where a judgment was obtained against conscience, equity would decree the party to acknowledge satisfaction, though he had received nothing; and if a fine had been obtained by fraud, equity would decree the party to be a trustee (*Barnes v. Powell* (1749), 1 Ves. Sen. 281; see *Baker v. Beaumont* (1668), 3 Rep. Ch. 7 [13]).

(a) *Jackson v. Normanby Brick Co.*, [1899] 1 Ch. 438, C. A.; compare *Davies v. Gas Light and Coke Co.*, [1909] 1 Ch. 708, C. A.; and see title INJUNCTION.

(b) *Orford's (Earl) Case* (1615), 1 Rep. Ch. 1; 1 White & Tud. L. C., 7th ed., p. 780; *Bushby v. Munday* (1821), 5 Madd. 297, 307.

(c) Mitford on Pleadings, p. 134.

(d) Equity did not interfere directly with other courts, but acted on the defendant in equity by punishing him for his contempt in disobeying its own decree (*Bushby v. Munday*, *supra*).

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proceedings at law were restrained (e); and in numerous cases the application of equitable doctrines required that parties should be restrained from enforcing their strict legal rights (f). Examples are furnished by the principles applicable in cases of fraud (g), of representation (h), of standing by (i), of accident (k), of marshalling assets and securities, of surtyship (l); and generally where it was necessary to make an equitable title prevail over a legal right (m), and the reason which gave the equitable title was not available at law (n); or where it was necessary to delay proceedings at law until after discovery or the examination of witnesses abroad (o).

Interference
only on
special
grounds.

But in matters of concurrent jurisdiction the Court of Chancery did not usually restrain proceedings in other courts. This was only done where, for some special reason, it was necessary to resort to equity; e.g., to obtain discovery or to secure protection for infants (p). And equity did not claim jurisdiction to retry matters which had been the subject of investigation at law in the ordinary way: thus a judgment at law was not interfered with merely on the ground of its being incorrect or of an omission to raise a particular defence (q). Relief, however, was granted where a receipt was discovered after judgment for a debt (r). And since equity, in restraining proceedings in other courts, acted *in personam*, it could grant an injunction against proceedings in a foreign court where the claim was unconscientious (s).

Legal remedy
lost through
interference
of equity.

Where a defendant had lost his legal remedy in consequence of a restraint put upon him in equity, the Court of Chancery gave him a remedy equivalent to that which he had lost (t). And though a plaintiff suing on a bond could not, either at law or in equity (a), recover in respect of principal and interest beyond the amount of

(e) See *Perry v. Phelps* (1804), 10 Ves. 34; see p. 33, ante.

(f) Story, s. 584.

(g) See *Lloyd v. Clark* (1843), 6 Beav. 309.

(h) That is, where the defendant is bound on equitable grounds to make good a representation as to existing facts: *Piggott v. Stratton* (1859), 1 De G. F. & J. 33, C. A.; see *Jorden v. Money* (1854), 5 H. L. Cas. 185.

(i) *Nicholson v. Hooper* (1838), 4 My. & Cr. 179.

(k) As where an executor lost assets through destruction by fire, but remained liable at law to creditors (*Craft's (Lady) Executors v. Lyndsey* (1676), Freem. (CH.) 1; see *Crosse v. Smith* (1806), 7 East, 246, 258). And now both at law and in equity an executor cannot be charged for loss of assets without wilful default (*Job v. Job* (1877), 6 Ch. D. 562; see p. 27, ante).

(l) Story, s. 883; see *Clarke v. Henty* (1838), 3 Y. & C. (ex.) 187.

(m) *Newlands v. Paynter* (1840), 4 My. & Cr. 408; see *Langton v. Horton* (1841), 3 Beav. 464.

(n) *Harrison v. Nettleship* (1833), 2 My. & K. 423. And a proceeding in equity might be restrained so as to compel interpleader (*Prudential Assurance Co. v. Thomas* (1867), 3 Ch. App. 74).

(o) See *Goldschmidt v. Marryat* (1809), 1 Camp. 559.

(p) *Rotherham v. Fanshaw* (1748), 3 Atk. 628.

(q) *Bateman v. Willoc* (1803), 1 Sch. & Lef. 201; Mitford on Pleadings, pp. 131, 132.

(r) *Gainsborough (Countess) v. Gifford* (1727), 2 P. Wms. 424, 426.

(s) *Portarlington (Lord) v. Soulby* (1834), 3 My. & K. 104, overruling *Lowe v. Baker* (1665), Freem. (CH.) 125; see *Carron Iron Co. v. Maclaren* (1855), 5 H. L. Cas. 416, 439; *Hope v. Carnegie* (1866), 1 Ch. App. 320.

(t) *Brown v. Newell* (1837), 2 My. & Cr. 558, 572; see *Bond v. Hopkins* (1802), 1 Sch. & Lef. 413, and title LIMITATION OF ACTIONS.

(a) *Clarke v. Seton* (1801), 6 Ves. 411.

the penalty, yet he was allowed to do so if he had been restrained from suing while the amount due was under the penalty (*b*). And as regards accounts of rents and profits (*c*), and interest (*d*), he was saved from any statutory bar which the delay had created.

52. Under the procedure of the Court of Chancery an injunction could in certain circumstances be obtained to restrain the infringement of public or private rights. But it was essential that the injunction should be specifically asked for by the bill (*e*), this being an exception to the efficacy of a general prayer for relief (*f*).

53. Injunctions to prevent the infringement of rights were granted in cases of waste, public and private nuisance, trespass, interference with easements, and infringements of patents and copyright, and of negative stipulations in contracts (*g*). In cases of waste equity interfered in aid of legal rights, on the ground of the inadequacy of the remedy at law (*h*), and it extended the remedy by injunction both to cases of legal titles where there was no remedy at law, and to cases where the waste—under the name of equitable waste—was only recognised in equity (*i*). In cases of public (*k*) and private nuisance, and of trespass (*l*), equity originally interfered either to prevent a multiplicity of suits or to prevent irreparable injury (*m*). The recurrent nature of the damage would have necessitated continual litigation if the wrongful act could not be stopped by injunction (*n*). But, apart from this, the plaintiff was entitled to an injunction if the injury would be irreparable, that is, if he could

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tion granted.

(*b*) *Duwall v. Terrey* (1694), Show. Parl. Cas. 15; *Grant v. Grant* (1830), 3 Sim. 340; (1827), 3 Russ. 598, 607.

(*c*) *Pulteney v. Warren* (1801), 6 Ves. 73.

(*d*) *Hull and Selby Rail. Co. v. North-Eastern Rail. Co.* (1854), 5 De G. M. & G. 872, C. A.

(*e*) *Savory v. Dyer* (1749), Amb. 70; see *Grimes v. French* (1740), 2 Atk. 141; see also title INJUNCTION.

(*f*) See *Cook v. Martyn* (1737), 2 Atk. 2; *Dormer v. Fortescue* (1744), 3 Atk. 124, 132; *Manaton v. Molesworth* (1757), 1 Eden, 18, 26.

(*g*) Save in cases of contract, the right to an injunction depends on proprietary rights, see *Baird v. Wells* (1890), 44 Ch. D. 661. The use of injunctions in libel is an innovation introduced under the Judicature Acts; the Court of Chancery did not restrain a libel, apparently, because a libel was a crime, and it did not interfere in regard to crimes by injunction (*Gee v. Pritchard* (1818), 2 Swan. 402, 413).

(*h*) As to the remedy at law, see *Jefferson v. Durham (Bishop)* (1797), 1 Bos. & P. 105, 120.

(*i*) Mitford on Pleadings, pp. 138—140; Story, ss. 913, 914; *Garth v. Cotton* (1750), 1 Ves. Sen. 524, 555 (legal remedy not applicable); *Vane v. Barnard (Lord)* (1716), 2 Vern. 738; *Morris v. Morris* (1847), 15 Sim. 505 (equitable waste).

(*k*) As to the jurisdiction in case of public nuisances, see *A.-G. v. Cleaver* (1811), 18 Ves. 211, 217; as to apprehended public or private nuisance, see *A.-G. v. Manchester Corporation*, [1893] 2 Ch. 87.

(*l*) Injunction against trespass was a late development of equity; originally the party was left to his action at law (see *Mogg v. Mogg* (1786), 2 Dick. 670; *Mortimer v. Cottrell* (1789), 2 Cox, Eq. Cas. 205), unless the trespass was repeated (*Weller v. Smeaton* (1784), 1 Bro. C. O. 572; Story, s. 928; Ashb., p. 9). See also *Lowndes v. Bettle* (1864), 33 L. J. (CH.) 451.

(*m*) See *Welby v. Rutland (Duke)* (1773), 2 Bro. Parl. Cas. 39.

(*n*) See *Broudbent v. Imperial Gas Co.* (1857), 7 De G. M. & G. 436, 462, C. A.

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 must be
 established.

not be adequately compensated in damages (o); and this latter reason was the ground of the jurisdiction as regards interference with easements—such as rights of light—and infringements of patents and copyrights.

As to all these matters, the general rule was that the plaintiff in equity must have established his right at law before he could be entitled to an injunction (p); and an injunction was not granted before this was done, if the plaintiff could be sufficiently protected by directing the defendant to keep an account (q); but an injunction might be granted before answer, and before the title was established at law, if the result of the defendant's conduct would be to inflict irreparable injury on the plaintiff (a). And though the High Court has now all the jurisdiction of the Court of Chancery and the several courts of law, yet so far as the right in question is a legal right, the court in the exercise of its jurisdiction must be guided by the principles established at law (b). An injunction may be refused in the case of trespass, if no injury is in fact done to the landowner (c). An interim injunction is granted only on an undertaking as to damages (d).

Negative
 stipulations.

Equity interferes by injunction to enforce the observance of agreements which are in substance negative (e); and where an agreement contains a positive and a correlative negative stipulation, it will enforce the negative stipulation and thereby secure indirectly the performance of the positive stipulation (f). Where the

(o) *A.-G. v. Nichol* (1809), 16 Ves. 338, 342; *Wyntanley v. Lee* (1818), 2 Swan. 333, 335. The test of the right to an injunction in legal claims is whether the plaintiff could get damages (*White v. Mellin*, [1895] A. C. 154, 167). As to the present power of the court to grant damages in lieu of an injunction, see *Shelfer v. City of London Electric Lighting Co., Meux's Brewery Co. v. Same*, [1895] 1 Ch. 287, O. A.; and as to injunction against a public body, see *A.-G. v. Birmingham etc. Drainage Board*, [1910] 1 Ch. 48.

(p) *Whitchurch v. Hyde* (1742), 2 Atk. 391; *Bacon v. Jones* (1839), 4 My. & Cr. 433; *Imperial Gas Light and Coke Co. (Directors) v. Broadbent* (1859), 7 H. L. Cas. 600, 612; *Cardiff Corporation v. Cardiff Waterworks Co.* (1859), 4 De G. & J. 596, O. A. As to relaxations of this rule, see Ashb., p. 6, and as to the later extension of the auxiliary jurisdiction, *ibid.*, pp. 8—9. Under the Chancery Regulation Act, 1862 (25 & 26 Vict. c. 42), repealed Statute Law Revision and Civil Procedure Act, 1883 (46 & 47 Vict. c. 49), the Court of Chancery was empowered to determine legal questions on which equitable relief depended; see p. 43, ante.

(q) *Cory v. Yarmouth and Norwich Rail. Co.* (1844), 3 Hare, 593; *Spottiswoode v. Clarke* (1846), 2 Ph. 154; *Rigby v. Great Western Rail. Co.* (1846), 2 Ph. 44, 49.

(a) Immediate injunctions were granted in plain cases of waste (*Anon.* (1750), 1 Ves. Sen. 476); or nuisance (*A.-G. v. Doughty* (1752), 2 Ves. Sen. 453); see *Rushmer v. Polue and Alfieri*, [1906] 1 Ch. 234. See also title INJUNCTION,

(b) *Colls v. Home and Colonial Stores Ltd.*, [1904] A. C. 179, 188.

(c) *Behrens v. Richards*, [1905] 2 Ch. 614.

(d) *Chappell v. Davidson* (1856), 8 De G. M. & G. 1, O. A. See *Oberrheinische Metallwerke v. Cocks*, [1906] W. N. 127.

(e) *Martin v. Nulkin* (1724), 2 P. Wms. 266; *Barrett v. Blagrove* (1800), 5 Ves. 555; *Catt v. Tourle* (1869), 4 Ch. App. 654; *Metropolitan Electric Supply Co. v. Ginder*, [1901] 2 Ch. 799. This is equivalent to specific performance. But the court interferes less readily where the negative covenant is not express, but is only inferred from a positive contract (*Peto v. Brighton etc. Rail. Co.* (1863), 32 L. J. (Ch.) 677); see *Holford v. Acton Urban Council*, [1898] 2 Ch. 240; *Measures, Brothers, Ltd. v. Measures*, [1910] 2 Ch. 248.

(f) *Lumley v. Wagner* (1862), 1 De G. M. & G. 604; see *Whitwood Chemical Co. v. Hardman*, [1891] 2 Ch. 416, C. A.; *Davis v. Forman*, [1894] 3 Ch. 654.

agreement is restrictive of the user of land, the effect of the remedy is to create a negative easement (g).

54. Power to grant injunctions was given to the courts of common law by the Common Law Procedure Act, 1854 (h), and now all divisions of the High Court are empowered to grant an injunction by interlocutory order "in all cases in which it shall appear to the court to be just and convenient that such order should be made" (i). Power to give damages either in addition to or in substitution for an injunction was given by Lord Cairns' Act (k) in cases where the court had jurisdiction to entertain an application for an injunction. This Act has been repealed (l), but the jurisdiction under it has been preserved (m), and, apart from this special jurisdiction, the High Court, under its general jurisdiction to give all remedies to which the parties are entitled, may award damages, whether there is or is not a case for an injunction (n).

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tion.

Present
jurisdiction.

(iv.) *Quia Timet Actions.*

55. It was recognised at common law that a man was entitled to be protected against unlawful disturbance of his rights and against vexatious litigation, and remedies in this respect were given by certain "writs of prevention" (o). To some extent the remedy in equity by injunction, and by the appointment of a receiver, had the same object; but in addition to these remedies a plaintiff might maintain a suit *quia timet* in order to secure himself against a future apprehended loss.

Quia timet
actions.

Thus a surety might file a bill to compel the debtor on a bond in which he was joined to pay the debt when due, whether the surety had been actually sued for it or not; and upon a covenant of indemnity, a bill might be filed to relieve the covenantee under similar circumstances (p).

To protect
surety.

(g) *Re Nisbet and Potts' Contract*, [1906] 1 Ch. 386, O. A.

(h) 17 & 18 Vict. c. 125, ss. 79, 81, 82; repealed by Statute Law Revision and Civil Procedure Act, 1883 (46 & 47 Vict. c. 49).

(i) Judicature Act, 1873 (36 & 37 Vict. c. 66), s. 25 (8); see title INJUNCTION.

(k) Chancery Amendment Act, 1858 (21 & 22 Vict. c. 27), s. 2.

(l) Statute Law Revision and Civil Procedure Act, 1883 (46 & 47 Vict. c. 49).

(m) *Sayers v. Collyer* (1884), 28 Ch. D. 103, O. A. As to the principle on which damages are given in lieu of an injunction, see *Shelfer v. City of London Electric Lighting Co.*, *Meux's Brewery Co. v. Same*, [1895] 1 Ch. 287, O. A. In negative covenants an injunction is granted as a matter of course to secure the observance of the contract; in positive covenants, it is not granted if damages are a sufficient compensation (*Doherty v. Allman* (1878), 3 App. Cas. 709, 720; see *Kine v. Jolly*, [1905] 1 Ch. 480, 496, 504, O. A.; *Elliston v. Reacher*, [1905] 2 Ch. 374, 395). It has been held that damages in lieu of an injunction cannot be given where the injury is only threatened (*Dreyfus v. Peruvian Guano Co.* (1889), 43 Ch. D. 316, 333, O. A.); but this has been doubted (*Martin v. Price*, [1894] 1 Ch. 276, O. A.).

(n) *Elmore v. Pirrie* (1887), 57 L. T. 333.

(o) Co. Litt. 100 a. These writs were:—A writ of mesne, before the plaintiff be distrained; a *Warrantia Cartæ*, before he be impleaded; a *Monstraverunt*, before any distress or vexation; an *Audita Querela*, before any execution sued; a *Curia Ulaudenda*, before any default of inclosure; and a *Ne injuste vexes*, before any distress or molestation.

(p) *Mitford on Pleadings*, p. 148; *Randolph v. Hayes* (1683), 1 Vern. 189; *Nisbet v. Smith* (1789), 2 Bro. O. C. 579; *Woodbridge v. Norris* (1868), L. R. 6 Eq. 410.

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To preserve
property.

Present
practice.

56. A *quia timet* bill might also be filed to secure property which was not transferable or payable to the plaintiff till a future date, as in the case of a future legacy (*q*), or a future interest in personal property (*r*). But where, under covenant, money was payable *in futuro*, the court did not interfere unless the covenantor had in some way placed the future payment in hazard (*s*). Where an annual charge on land had to be kept down by a tenant for life, the reversioner might bring a bill *quia timet* to compel payment of arrears (*a*).

57. Relief of the nature of that obtainable in a *quia timet* suit is still afforded by the granting of an injunction (*b*), or the appointment of a receiver (*c*), or an order to pay a fund into court (*d*); and where the plaintiff is entitled to indemnity, whether as surety or under a contract of indemnity, he may maintain a *quia timet* action (*e*). But the debt or the liability against which he seeks to be indemnified must be actually due or have actually arisen (*f*). And if the debt is due and the surety admits liability, it is not necessary, in order to maintain the action, that the creditor shall have declined to sue the principal debtor (*g*). The action does not lie in respect of a future contingent liability, such as a liability on shares where there is no probability of a call being made (*h*); but it lies if a call is probable (*i*). And in general, in order to obtain this relief, which is not readily given, the plaintiff must be able to show imminent danger of a substantial kind for which damages will be no adequate redress (*k*).

(v.) *Delivery up and Cancelling of Documents.*

Instruments
voidable for
fraud etc.

58. The circumstances in which a document, whether a contract (including a negotiable instrument) or conveyance, has been obtained may be such as to entitle one party to it to have the transaction rescinded or set aside, and the document delivered up

(*q*) *Johnson v. Mills* (1749), 1 Ves. Sen. 282; *Green v. Pigot* (1781), 1 Bro. C. C. 103; see *Brown v. Dudbridge* (1788), 2 Bro. C. C. 321.

(*r*) See as to such interests 1 Eq. Cas. Abr. p. 360, pl. 4; *Fearn, Contingent Remainders*, 7th ed., pp. 401—415.

(*s*) *Flight v. Cook* (1755), 2 Ves. Sen. 619.

(*a*) *Hayes v. Hayes* (1673), 1 Cas. in Ch. 223.

(*b*) See *Siddons v. Short* (1877), 2 C. P. D. 572; *A.-G. v. Manchester Corporation*, [1893] 2 Ch. 87; *A.-G. v. Nottingham Corporation*, [1904] 1 Ch. 673.

(*c*) *Charrington & Co., Ltd. v. Camp*, [1902] 1 Ch. 386; *Leney & Sons, Ltd. v. Cullingham and Thompson*, [1908] 1 K. B. 79, C. A. (receiver of licences and rents); *Dreyfus v. Peruvian Guano Co.* (1889), 42 Ch. D. 66 (receiver of cargo in action of trover or detinue brought *quia timet*).

(*d*) *Re Carroll, Brice v. Carroll*, [1902] 2 Ch. 175.

(*e*) *Ascherson v. Tredegar Dry Dock and Wharf Co., Ltd.*, [1909] 2 Ch. 401.

(*f*) *Dale v. Lolley* (1808), 2 Bro. C. C. (5th ed. by Belt), 582, n., 291; see *Wolmershausen v. Gullick*, [1893] 2 Ch. 514.

(*g*) *Mathews v. Saurin* (1893), 31 L. R. Ir. 181; *Ascherson v. Tredegar Dry Dock and Wharf Co., Ltd.*, *supra*, not following the limitation to this effect suggested in *Padwick v. Stanley* (1852), 9 Hare, 627.

(*h*) *Hughes-Hallett v. Indian Mammoth Gold Mines Co.* (1882), 22 Ch. D. 561.

(*i*) *Hobbs v. Wayet* (1887), 36 Ch. D. 256.

(*k*) *Fletcher v. Bealey* (1885), 28 Ch. D. 688; *A.-G. v. Manchester Corporation*, *supra*; see *Crowder v. Tinkler* (1816), 19 Ves. 617; *Pattison v. Gifford* (1874), L. R. 18 Eq. 259.

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to be cancelled. In cases of actual fraud the party defrauded can, under the fundamental jurisdiction of equity, maintain an action for this purpose; and in cases of constructive fraud, also—that is, where, on the ground of undue influence, unconscionable bargain, public policy, or otherwise, it is inequitable that the transaction should be allowed to stand—the party complaining of the transaction is entitled to be relieved against it in equity, and, as incidental to such relief, the document which is impeached may be ordered to be delivered up (*l*). In these cases the plaintiff has a right to equitable relief which he may assert at any time, provided (1) that he is not guilty of laches; (2) that he has not disqualified himself from suing by his own participation in the transaction (*m*), and (3) that he submits to any equitable terms which may be imposed upon him by the court (*n*).

An agreement will not be ordered to be delivered up merely because it is unenforceable. To justify this remedy there must either be fraud in obtaining it, or it must form a cloud upon the title to land (*o*).

59. Where a transaction is void at law, because it is founded on an illegal consideration, or otherwise, and the defect appears on the face of the document, equity does not interfere to order the instrument to be cancelled (*p*). But where the defect does not appear on the face of the instrument, the party desiring to defeat it is not bound to wait till the instrument is used against him, but may anticipate this danger and institute an action to have the instrument delivered up to be cancelled (*q*); and upon such cancellation he will be put upon equitable terms to repay money provided by the other party (*r*).

Instrument
void at law.

(*l*) *Duncan v. Worrall* (1822), 10 Price, 31; *Brooking v. Mawslay, Son & Field* (1888), 38 Ch. D. 636, 643; Story, s. 695; see *Thornton v. Knight* (1849), 16 Sim. 509.

(*m*) *Franco v. Bolton* (1797), 3 Ves. 368; see note (*g*), p. 73. *post*.

(*n*) See p. 70, *post*.

(*o*) *Onions v. Cohen* (1865), 2 Hem. & M. 354; see *Hilton v. Barrow* (1791), 1 Ves. Jun. 284.

(*p*) *Simpson v. Howden (Lord)* (1837), 3 My. & Cr. 97; see *Gray v. Mathias* (1800), 5 Ves. 286; *Hoare v. Bremridge* (1872), 8 Ch. App. 22, 26.

(*q*) See with regard to negotiable instruments, *Winchester (Bishop) v. Fournier* (1752), 2 Ves. Sen. 445; *Bromley v. Holland* (1802), 7 Ves. 3, 20; *Servis v. White* (1802), 7 Ves. 413; *Wynne v. Callander* (1826), 1 Russ. 293; with regard to a deed which might form a cloud upon title to land, *Hayward v. Dimsdale* (1810), 17 Ves. 111; *Bromley v. Holland, supra*, at p. 21; with regard to forged instruments, *Peake v. Highfield* (1826), 1 Russ. 559; with regard to policies of insurance, *Bromley v. Holland, supra*; *Kemp v. Pryor* (1802), 7 Ves. 237, 249. It was at one time doubtful whether equity would interfere to order delivery up of an instrument which was void at law (*Ryan v. Mackmath* (1789), 3 Bro. C. C. 15 (5th ed. by Belt), n. (1)), but the doubt has long been removed (see *Ryan v. Mackmath, supra*; *Davis v. Marlborough (Duke)* (1819), 2 Swan. 108, 167, note (*b*); Story, s. 700).

(*r*) As to the adjustment of payments by either party on setting aside an annuity deed, which was void for non-compliance with the statutory requirements as to registration, see *Byne v. Vivian* (1800), 5 Ves. 604; *Bromley v. Holland, supra*; *Holbrook v. Sharpey* (1812), 19 Ves. 13; *Davis v. Marlborough (Duke), supra*. Where a lease by charity trustees is set aside as improper, it is set aside *in toto*, and the personal covenants of the trustees are not preserved for the benefit of the lessee (*A.-G. v. Morgan* (1826), 2 Russ. 306).

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Defence to
 instrument.

In cases of illegal consideration the plaintiff will not be debarred from relief on the ground that he is *particeps criminis*, if the transaction is such that, on grounds of public policy, it ought not to stand (s).

60. Where an instrument is neither void nor voidable, but a party has a good legal defence to any claim which may be made upon it, the proper remedy is not an action to have the instrument delivered up to be cancelled, but an action to perpetuate the testimony necessary for the defence (t).

(vi.) *Receivers.*

Receivers.

61. Equity exercised jurisdiction to preserve property in the interest of those entitled to it, either because it was in the hands of limited owners, or of trustees or other accountable persons, and was in danger of being lost, or because the right to it was the subject of pending litigation. In such cases courts of equity interfered, sometimes by the appointment of a receiver to receive rents or other income, sometimes by an order to pay a pecuniary fund into court, sometimes by directing security to be given, or money to be paid over, and sometimes by the mere granting of an injunction or other remedial process, thus adapting their relief to the precise nature of the particular case, and the remedial justice required by it (a).

Preservation
 of property.

62. Apart from orders for payment into court—a remedy specially applicable in the case of trustees and personal representatives—this jurisdiction to preserve property was usually exercised by the appointment of a receiver, and the Court of Chancery also appointed receivers for the purpose of enforcing equitable securities, and of giving effect to judgments at law where the remedy of the judgment creditor was hindered by a prior legal interest (b).

As regards the preservation of personal property pending litigation, the court readily appointed a receiver where no one was in lawful possession, as where litigation was pending in the ecclesiastical court with respect to the right to probate or administration (c). But

(s) *W. v. B.* (1863), 32 Beav. 574; see *St. John (Lord) v. St. John (Lady)* (1805), 11 Ves. 526, 535; and this is so in the case of instruments given in gambling transactions (*Wynne v. Callander* (1826), 1 Russ. 293; *Milltown (Earl) v. Stewart* (1837), 3 My. & Cr. 18; compare *Ayerst v. Jenkins* (1873), L. R. 16 Eq. 275, 282). Illegality of consideration is not necessarily a ground for setting aside a settlement where there has been an actual transfer of property (*Ayerst v. Jenkins, supra*).

(t) *Brooking v. Maudslay, Son, and Field* (1888), 38 Ch. D. 636; not following the dictum in *Cooper v. Joel* (1859), 27 Beav. 313, at p. 317, that "if there be a good legal defence, not appearing on the instrument itself, which the lapse of time may cause the person chargeable on the instrument, from loss of the evidence necessary for his defence at law, to be unable to make available, then this court will interfere and order the instrument to be delivered up to be cancelled"; and which Lord CAMPBELL, L.C., on the appeal in that case considered to go too far (1 De G. F. & J. 240). The difficulty arising from loss of evidence is met by perpetuation of testimony.

(a) Story, s. 826.

(b) For receivers generally, see title RECEIVERS; for receivers by way of equitable execution, see p. 56, *post*, and title EXECUTION.

(c) *Owen and Gutch v. Homan* (1853), 4 H. L. Cas. 997, *per* Lord CRANWORTH,

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where the defendant was in possession, it exercised a discretion according to the circumstances of the case (*d*). As regards real property, if the plaintiff was claiming land under a legal title, the court did not interfere with the person in possession by appointing a receiver of the rents and profits, unless there was some matter, such as fraud, affecting the conscience of the defendant (*e*), or unless the court could see a reasonable probability that the plaintiff would ultimately succeed (*f*). And even if no one was in receipt of rents from the tenants, the court would not interfere in favour of a legal title supported by no special equity (*g*). At present the court can appoint a receiver if it is "just and convenient" to do so (*h*), and it interferes more readily than formerly in favour of a legal title (*i*).

The appointment of a receiver is for the benefit of the person ultimately found to be entitled, and does not at all affect the right (*k*); and when the receiver is in possession, he cannot be interfered with without the leave of the court, even by the commencement of an action of ejectment (*l*).

63. As regards the enforcement of securities by the appointment of a receiver, the Court of Chancery did not, except under special circumstances (*m*), act at the instance of a mortgagee having the legal estate, since he was sufficiently protected by his right to take possession under his legal title. But taking possession is burdensome, and since the Judicature Acts it has been the usual practice to grant a receiver at the instance of a legal mortgagee (*n*). If the legal mortgagee was not in possession, an appointment might be made at the instance of a subsequent incumbrancer, but subject to the legal mortgagee's right to possession (*o*). The court would not interfere with a mortgagee in possession, unless he declined to swear that anything was due to him (*p*).

Enforcement
of securities.

L.C., at p. 1032: "Where the property is as it were *in medio*, in the enjoyment of no one, the court can hardly do wrong in taking possession. It is the common interest of all parties that the court should prevent a scramble" (see *Rendall v. Rendall* (1841), 1 Hare, 152, 154).

- (*d*) *Owen and Gutch v. Homan* (1853), 4 H. L. Cas. 997.
- (*e*) *Talbot (Earl) v. Hope Scott* (1858), 4 K. & J. 96, 112, 114.
- (*f*) *Bainbrigge v. Baddeley* (1851), 3 Mac. & G. 413, 420.
- (*g*) *Carrow v. Ferrior, Dunn v. Ferrior* (1868), 3 Ch. App. 719, 728.
- (*h*) Judicature Act, 1873 (36 & 37 Vict. c. 66), s. 25 (8); see p. 56; *post*.
- (*i*) See *Foxwell v. Van Grutten*, [1897] 1 Ch. 64, C. A.; *John v. John*, [1898] 2 Ch. 578, C. A., *per* LINDLEY, M.R., at p. 578.
- (*k*) *Skip v. Hurwood* (1747), 3 Atk. 564.
- (*l*) *Angel v. Smith* (1804), 9 Ves. 335; *Lane v. Capsey*, [1891] 3 Ch. 411, 414.
- (*m*) *Ackland v. Gravenor* (1862), 31 Beav. 482; see *Fripp v. Chard Rail. Co.* (1853), 11 Hare, 241.
- (*n*) *Re Pope* (1886), 17 Q. B. D. 748, 749, C. A.
- (*o*) *Bernay v. Sewell* (1820), 1 Jac. & W. 647; *Norway v. Rowe* (1812), 19 Ves. 144, 153; see *White v. Peterborough (Bishop)* (1818), 3 Swan. 109.
- (*p*) *Quarrell v. Beckford* (1807), 13 Ves. 377; *Codrington v. Parker* (1810), 16 Ves. 469; see *Rowe v. Woad* (1822), 2 Jac. & W. 553. The rule was thus expressed in *Davis v. Marlborough (Duke)* (1819), 2 Swan. 108, by Lord Eldon, L.C., at p. 187: "The court will on motion appoint a receiver for an equitable creditor, or a person having an equitable estate, without prejudice to persons

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64. The Court of Chancery enforced its own decrees by sequestration (*q*). But where there was a hindrance to legal execution, it lent its aid to enforce a judgment at law by appointing a receiver. This exercise of the jurisdiction was, however, strictly auxiliary to the legal remedy. The creditor was bound to show by his bill that he had proceeded at law to the extent necessary to give him a complete legal title to execution (*r*); consequently he could not obtain a receiver of his debtor's equitable interest in freehold estate without suing out an *elegit*, or, in the case of personalty, a *fi. fa.* (*s*). Since the Judicature Acts it has become unnecessary to sue out these writs (*t*), or to institute a fresh action, in order to obtain the benefit of equitable execution. The appointment of a receiver can be made on motion or summons in the action in which judgment was obtained (*u*). It may extend to a debtor's equitable reversionary interest (*a*). But notwithstanding the power of the court to appoint a receiver in all cases in which it shall appear "just and convenient" (*b*), a receiver will not be appointed by way of equitable execution except in a case where such an appointment could be made before the Acts—that is, where the only difficulty was an impediment which the Court of Chancery could remove (*c*)—and it is still necessary to show to the court "the existence of the circumstances creating the equity on which alone the jurisdiction arises" (*d*).

(vii.) *Interpleader* (*e*).

Interpleader.

Legal
remedy.

65. The Court of Chancery exercised a jurisdiction in interpleader supplementary to that at law. At law the remedy by interpleader was confined to cases where property had been delivered on a joint bailment, to be held by the bailee until some condition or covenant had been performed by one of the bailors. Whether this performance had taken place was a question in which only the

who have prior estates; in this sense, without prejudice to persons having prior legal estates, that it will not prevent their proceeding to take possession if they think proper; and with regard to persons having prior equitable estates, the court takes care in appointing a receiver not to disturb prior equities, and for that purpose directs inquiries to determine priorities among equitable incumbrancers; permitting legal creditors to act against the estates at law, and settling the priorities of equitable creditors."

(*q*) See title EXECUTION.

(*r*) Mitford on Pleadings, p. 124.

(*s*) *Neate v. Marlborough (Duke)* (1838), 3 My. & Cr. 407; *Anglo-Italian Bank v. Davies* (1878), 9 Ch. D. 275, C. A., per JESSEL, M.R., at p. 283; see *Angell v. Draper* (1886), 1 Vern. 399; *Bulch v. Wastall* (1718), 1 P. Wms. 445; *Shirley v. Watts* (1744), 3 Atk. 200.

(*t*) *Re Watkins, Ex parte Evans* (1879), 13 Ch. D. 252, C. A.

(*u*) *Smith v. Cowell* (1880), 6 Q. B. D. 75, C. A.; *Salt v. Cooper* (1880), 16 Ch. D. 544, 554, C. A.; *Holmes v. Millage*, [1893] 1 Q. B. 551, C. A.

(*a*) *Ideal Bedding Co., Ltd. v. Holland*, [1907] 2 Ch. 157, 169.

(*b*) Judicature Act, 1873 (36 & 37 Vict. c. 66), s. 25 (8).

(*c*) *Holmes v. Millage*, *supra*; *Cadogan v. Lyric Theatre, Ltd.*, [1894] 3 Ch. 338, C. A.; see *Manchester and Liverpool District Banking Co. v. Parkinson* (1888), 22 Q. B. D. 173, C. A.; *Harris v. Beauchamp Brothers*, [1894] 1 Q. B. 801, C. A.; *Edwards & Co. v. Picard*, [1909] 2 K. B. 903, C. A.

(*d*) *Re Shephard, Atkins v. Shephard* (1889), 43 Ch. D. 131, C. A., per FRY, L.J., at p. 138; see title EXECUTION.

(*e*) See title INTERPLEADER.

bailors were concerned; but in the event of dispute between them, each might bring an action of detinue claiming the property against the bailee. In such case the bailee might at law require them to settle the dispute between themselves; and the process of interpleader applied also in cases of finding, where two parties claimed the thing found against the finder (*f*). But the process was only available in detinue, and when detinue fell into disuse and was replaced by trover, interpleader at common law became still further restricted, and in practice recourse was had to the similar relief afforded in equity (*g*).

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66. Subject to certain restrictions as to the nature of the claims made against the person desiring to interplead, the Court of Chancery extended the remedy to all cases to which in conscience it ought to extend—that is, where a person not interested was exposed to conflicting claims (*h*)—whether an action or suit had been commenced by any claimant or only a claim made (*i*). Thus it applied to cases where two or more persons severally claimed delivery of the same property, or payment of the same debt, or rendering of the same duty, under different titles or in separate interests, from another person, and the latter did not know to which of the claimants he ought to deliver the property, or pay the debt, or render the duty (*k*). The jurisdiction in equity was supplementary to that at law in the sense that a bill of interpleader would not lie where there was a remedy by interpleader at law (*l*), and to some extent equity followed in interpleader the analogy of the remedy at law (*m*).

Equitable
remedy.

67. To maintain a bill of interpleader it was necessary that the plaintiff should himself claim no interest in the subject-matter of the suit (*n*). And interpleader did not lie where the person holding the property, or owing the debt or duty, was under a contract with, or in a relation to, one of the claimants which rendered him personally liable to that claimant apart from the question of property (*o*). Thus it did not lie where an agent was exposed to claims by his principal and also by a third party (*p*), unless an

Cases of
interpleader
in equity.

(*f*) Mitford on Pleadings, p. 141; *Crawshay v. Thornton* (1837), 2 My. & Cr. 1, 21.

(*g*) Story, s. 805; see as to interpleader at law, Reeves, History of English Law (Finlason), Vol. II., pp. 637 *et seq.*

(*h*) See *Langston v. Boylston* (1793), 2 Ves. 101.

(*i*) Mitford on Pleadings, p. 141; *Jones v. Thomas* (1854), 2 Sm. & G. 186. In *Pearson v. Cardon* (1831), 2 Russ. & M. 606, 613, Lord BROUGHAM described the jurisdiction in interpleader as strictly a concurrent jurisdiction; but there was no exact line of demarcation between the concurrent and auxiliary jurisdictions, and it is needless now to attempt to draw one.

(*k*) Story, s. 806; Mitford on Pleadings, p. 48; *Crawshay v. Thornton*, *supra*, at p. 21; *Glyn v. Duesbury* (1840), 11 Sim. 139, 147; *Sieveling v. Behrens* (1837), 2 My. & Cr. 581; *Hoggart v. Cutts* (1841), Cr. & Ph. 197; *Desborough v. Harris* (1855), 5 De G. M. & G. 439. As to conflicting claims to money due under a charterparty, see *Rusden v. Pope* (1868), L. R. 3 Exch. 269.

(*l*) *Langston v. Boylston*, *supra*; *Burnett v. Anderson* (1816), 1 Mer. 405.

(*m*) *Metcalf v. Hervey* (1749), 1 Ves. Sen. 248.

(*n*) *Mitchell v. Hayne* (1824), 2 Sim. & St. 63; *Moore v. Usher* (1835), 7 Sim. 383.

(*o*) See *per* Lord COTTENHAM, L.C., in *Crawshay v. Thornton*, *supra*.

(*p*) *Cooper v. De Tastet* (1829), Tambl. 177; *Pearson v. Cardon* (1831), 2 Russ. & M. 606, 609; *Crawshay v. Thornton* (1837), 2 My. & Cr. 1, 22–24.

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interest had been created by the principal in favour of the third party (*q*); or where a person claimed rent from a tenant adversely to the person whom the tenant had recognised as landlord (*r*), unless such claim arose derivatively out of the lessor's title (*s*). But interpleader lay in favour of a tenant where conflicting claims were made by persons entitled to annuities, or to divided parts of a rentcharge secured on the land (*a*). Interpleader lay also where one of the conflicting claims was legal and the other equitable; and where both were equitable (*b*). In the last case the proceedings were entirely in equity. Where the claims, or one of them, were legal, they were, as far as practicable, adjudicated upon in equity; but where necessary the parties were ordered to interplead at law, or an issue at law was directed (*c*).

(viii.) *Bills of Peace.*

Bills of peace.

68. The principle that the Court of Chancery would interfere to prevent multiplicity of suits was the foundation of the jurisdiction to entertain bills of peace. By a bill of peace the plaintiff sought to establish a right which was capable of being, or had actually been, disputed in several actions, and claimed a perpetual injunction against future litigation (*d*). It might be resorted to either where one person claimed or defended a right against many, or where many claimed or defended a right against one (*e*). It lay, for instance, where one person claimed a right of way extending over the lands of several landowners, and the bill might be filed before any action had been commenced at law (*f*). It was sufficient

(*q*) *Smith v. Hammond* (1833), 6 Sim. 10; *Wright v. Ward* (1827), 4 Russ. 215, 220. And if, after a deposit, the depositor assigned his interest, and a dispute as to the assignment arose between him and the assignee, the depository might interplead (*Crawford v. Fisher* (1842), 1 Hare, 436, 440).

(*r*) *Metcalf v. Hervey* (1749), 1 Ves. Sen. 248; *Pungey v. Angove* (1794), 2 Ves. 304, 310; *Crawshay v. Thornton*, *supra*; *Suart v. Welch* (1839), 4 My. & Cr. 305, 316, 317; *Cook v. Rosslyn (Earl)* (1859), 1 Giff. 167. "The true doctrine, supported by the authorities, would seem to be, that in cases of adverse independent titles, the party holding the property must defend himself as well as he can at law; and he is not entitled to the assistance of a court of equity; for that would be to assume the right to try merely legal titles upon a controversy between different parties, where there is no privity of contract between them and the third person, who calls for an interpleader" (Story, s. 820).

(*s*) *Hodges v. Smith* (1787), 1 Cox, Eq. Cas. 357; *Clarke v. Byne* (1807), 13 Ves. 883; *Jew v. Wood* (1841), Cr. & Ph. 185.

(*a*) *Aldrich v. Thompson* (1787), 2 Bro. C. O. 149; *Angell v. Hadden* (1808), 15 Ves. 244; (1809), 18 Ves. 202; (1817), 2 Mer. 164; Mitford on Pleadings, p. 142, n. (p); Story, s. 811.

(*b*) Story, s. 808; *Paris v. Gilham* (1813), Coop. G. 56; *Bolton (Duke) v. Williams* (1793), 4 Bro. C. O. 297, 309; 2 Ves. 138, 151, 152; *Morgan v. Marsack* (1816), 2 Mer. 107; *Wright v. Ward* (1827), 4 Russ. 215; see *Martinus v. Helmuth* (1817), 2 Ves. & B. (2nd ed.) 412, n.

(*c*) Story, s. 822.

(*d*) Story, s. 853.

(*e*) Story, s. 854; Mitford on Pleadings, p. 146; *Tenham v. Herbert* (1742), 2 Atk. 483.

(*f*) *York Corporation v. Pilkington* (1737), 1 Atk. 282; see *Sheffield Waterworks v. Yeoman* (1866), 2 Ch. App. 8; *City of London Sewers Commissioners v. Glasse* (1872), 7 Ch. App. 456. A plaintiff could come into equity on a legal title before establishing his title at law, in order to prevent multiplicity of suits or irremediable injustice; otherwise he had to establish his title at law before

to make some only of the adverse claimants parties, and an issue was in general directed to settle the question of title at law. If the result was favourable to the plaintiff's title, a decree was made restraining further litigation upon it (*g*). Similarly, where some persons sued on behalf of themselves and others in respect of the same right, as where certain of the tenants of a manor sued the lord on behalf of all the tenants to establish a right of common (*h*).

In certain cases—notably in ejectment—the courts of common law did not treat one action as finally determining the right as between the parties or their successors in title, but allowed the same question to be repeatedly litigated (*i*). In equity, however, after a question had been satisfactorily settled at law, a perpetual injunction would be granted to restrain further litigation (*k*). And in suitable cases the remedy by injunction is still available to prevent vexatious litigation (*l*).

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(ix.) *Ne exeat regno*.

69. The writ of *ne exeat regno*, which was issued in certain cases to prevent a defendant from leaving the country during the pendency of the suit, was chiefly incidental to the exclusive jurisdiction. Formerly, where a claim was made at law, the plaintiff could arrest the defendant on mesne process and require him to give bail for his appearance (*m*). The writ of *ne exeat regno* was used for

Writ of *ne exeat regno*.

obtaining relief in equity by way of perpetual injunction (*Welby v. Rutland (Duke)* (1773), 2 Bro. Parl. Cas. 39). Consequently where a legal right was in dispute between two only, one of them could not sue in equity to establish his right and be quieted in the possession of it (*Tenham v. Herbert* (1742), 2 Atk. 483; *Weller v. Smeaton* (1784), 1 Bro. C. C. 572).

(*g*) Story, s. 854.

(*h*) *Smith v. Brownlow (Earl)* (1870), L. R. 9 Eq. 241. It is sufficient if the plaintiffs sue in respect of a common right, although they may have different rights *inter se* (*Warrick v. Queen's College, Oxford* (1871), 6 Ch. App. 716, *per* Lord HATHERLEY, L.C., at p. 726). So, to prevent a multiplicity of suits, several copyholders might file a bill to be relieved from an excessive fine, though such a bill could not be filed by one only (*Couper v. Clerk* (1732), 3 P. Wms. 155). A similar object is now attained by the joinder of plaintiffs or defendants under R. S. C., Ord. 16, rr. 1, 4; see title PRACTICE AND PROCEDURE.

(*i*) *Bath (Earl) v. Sherwin* (1706), Prec. Ch. 281, where Lord COWPER, L.C., considered that this was a grievance which Parliament, and not the Court of Chancery, should correct, but his refusal to interfere was overruled by the House of Lords (see next note).

(*k*) *Bath (Earl) v. Sherwin* (1709), 4 Bro. Parl. Cas. 373, n. In this case there had been five trials. In *Leighton v. Leighton* (1720), 1 P. Wms. 671; 4 Bro. Parl. Cas. 378, the injunction was granted after two trials, both adverse to the defendant in equity; see *Devonsher v. Newenham* (1804), 2 Sch. & Lef. 199, 208.

(*l*) *Grepe (J. S.) v. Loam, Bulteel v. Grepe (J.)* (1887), 37 Ch. D. 168, O. A.; *Kinnaird (Lord) v. Field*, [1905] 2 Ch. 306, O. A.; or an action may be dismissed on this ground (*Egbert v. Short*, [1907] 2 Ch. 205). See R. S. C., Ord. 25, r. 4; *Re Norton's Settlement, Norton v. Norton*, [1908] 1 Ch. 471, O. A.; *Re Page, Hill v. Fladgate*, [1910] 1 Ch. 489, O. A.

(*m*) Arrest on mesne process at law has been abolished, and a corresponding but more restricted process is given by s. 6 of the Debtors Act, 1869 (32 & 33 Vict. c. 62). Where a plaintiff at law proves on oath that he has a good cause of action for £50 or upwards against the defendant, and that there is probable cause for believing that the defendant is about to leave England, and that his absence will materially prejudice the plaintiff in the prosecution of the action, the

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a corresponding purpose in equitable demands (*n*). It was only issued after a bill had been filed, and was not available in cases of legal demand (*o*), except where equity had concurrent jurisdiction, as in account (*p*). It thus constituted a species of equitable bail (*q*). For the writ to be issued it was essential that the claim should be a debt or pecuniary demand; certain in its nature and not contingent; and presently due. Hence the writ was not available where the claim was unliquidated or in the nature of damages (*r*). And it had to be clearly established by the evidence that the amount claimed was due (*s*), and that the defendant was about to leave the country (*t*). It was not necessary to show that he was going abroad to avoid the demand; it was sufficient if the debt would be in danger (*a*). The writ was also available for the purpose of enforcing alimony ordered to be paid by the Ecclesiastical Court, since that court could not compel the husband to find bail (*b*); but it was available only for arrears and costs (*c*).

The writ of *re exeat regno* is, since the Judicature Acts, still available in the case of equitable claims, but apparently it is restricted to claims which, if they were legal, would fall within s. 6 of the Debtors Act, 1869 (*d*). Otherwise the principles governing the former practice prevail, and the writ is only issued where the demand is a liquidated pecuniary demand, not contingent, and presently payable (*e*); though, where a peremptory time for

defondant may be arrested and imprisoned for not more than six months till he gives security not to go out of England without the leave of the court. But he cannot be kept in prison after final judgment (*Hume v. Druyff* (1873), L. R. 8 Exch. 214). As to the practice, see R. S. C., Ord. 69; and title PRACTICE AND PROCEDURE.

(*n*) The writ was a prerogative writ, and was originally used for political purposes. In the sixteenth century it came to be used in equity in aid of civil process (Story, s. 1467); but it was applied in cases of private right with great caution and jealousy (*Tomlinson v. Harrison* (1802), 8 Ves. 32; see *Whitehouse v. Partridge* (1818), 3 Swan. 365, 379).

(*o*) *Ex parte Bruncker* (1734), 3 P. Wms. 312; see *Jackson v. Petrie* (1804), 10 Ves. 164.

(*p*) *Jones v. Alephsin* (1810), 16 Ves. 470; *Flack v. Holm* (1820), 1 Jac. & W. 405, 414; *Lees v. Patterson* (1878), 7 Ch. D. 866. Since there was concurrent jurisdiction in matters of account, the writ was allowed in a case where the defendant admitted a balance to be due from him, though the plaintiff alleged that the amount due was greater (*Jones v. Sampson* (1803), 8 Ves. 593).

(*q*) *Etches v. Lance* (1802), 7 Ves. 417; see *Ex parte Bruncker*, *supra*. After bail given at law, the writ was not issued (*Amsinck v. Barklay* (1803), 8 Ves. 594).

(*r*) *Cock v. Ravie* (1801), 6 Ves. 283; *Blaydes v. Calvert* (1820), 2 Jac. & W. 211.

(*s*) *Jenkins v. Parkinson* (1833), 2 My. & K. 5, 13; but with respect to the balance of an account, it was enough to swear to belief that a certain sum was due (*Hyde v. Whitfield* (1815), 19 Ves. 342; *Jenkins v. Parkinson*, *supra*).

(*t*) *Etches v. Lance*, *supra*; *Hyde v. Whitfield*, *supra*; *Jones v. Alephsin*, *supra*.

(*a*) *Tomlinson v. Harrison*, *supra*.

(*b*) *Vandergucht v. De Blaquiére* (1838), 8 Sim. 315, 322.

(*c*) *Dawson v. Dawson* (1803), 7 Ves. 173.

(*d*) *Drover v. Beyer* (1879), 13 Ch. D. 242, C. A., *per* JESSEL, M.R., at p. 243:—
 "Under the present practice the writ of *re exeat regno* is not to be issued except in cases which come within the provisions of s. 6 of the Debtors Act, 1869,"
 See title CONSTITUTIONAL LAW, Vol. VII., p. 84.

(*e*) *Colverson v. Bloomfield* (1885), 29 Ch. D. 341, C. A.

payment of money already due has been fixed by the court, this last requirement does not prevent the issue of the writ before that time (*f*).

SECT. 1.
Nature and
Extent of
Equitable
Jurisdic-
tion.

SECT. 2.—*The Present Exercise of Equitable Jurisdiction by all Divisions of the High Court.*

70. The twofold system of jurisdiction at law and in equity was put an end to by the Judicature Act, 1873 (*g*). The general scope of the Act was to enable a suitor to obtain by one proceeding in one court the same ultimate result as he would previously have obtained either by having selected the right court, as to which there was frequently a difficulty, or after—as was sometimes necessary—having been to two courts in succession (*h*). This was effected by uniting the High Court of Chancery, the superior courts of common law, and the other superior courts into one Supreme Court of Judicature (*i*), which was divided into the High Court and the Court of Appeal (*k*), and transferring to the High Court the jurisdictions of these various courts, including the jurisdiction of the High Court of Chancery as a common law court as well as a court of equity (*l*). Certain matters, comprising the chief heads of the jurisdiction of the old Court of Chancery—administration of estates, partnerships, mortgages, raising of portions and other charges on land, realisation of property subject to liens and charges, execution of trusts, rectification and cancellation of deeds, specific performance, partition, and wardship of infants—were specially assigned to the Chancery Division of the High Court (*m*).

Union of the
Courts of Law
and Equity.

71. The fundamental idea of the Judicature Act, 1873, is to avoid multiplicity of proceedings (*n*). This is expressed in the provision that the High Court and Court of Appeal, in every cause or matter pending before them, shall grant all such remedies as any of the parties may appear to be entitled to in respect of every legal or equitable claim properly brought forward by them in the

All remedies,
legal and
equitable,
granted
in same
proceedings.

(*f*) *Sobey v. Sobey* (1873), L. R. 15 Eq. 200. If the defendant does not move to discharge the writ, it will be deemed to have been properly issued, and he cannot recover damages for any irregularity (*Lees v. Patterson* (1878), 7 Ch. D. 866).

(*g*) 36 & 37 Vict. c. 66; and see title COURTS, Vol. IX., pp. 51—65.

(*h*) *Torkington v. Magee*, [1902] 2 K. B. 427, per CHANNELL, J., at p. 430.

(*i*) Judicature Act, 1873 (36 & 37 Vict. c. 66), s. 3.

(*k*) *Ibid.*, s. 4. "The court is now not a court of law or a court of equity; it is a court of complete jurisdiction" (*Pugh v. Heath* (1882), 7 App. Cas. 235, per Earl CAIRNS, at p. 237); see *Salt v. Cooper* (1880), 16 Ch. D. 544, 553, O. A.; *Antrim Land etc. Co. v. Stewart*, [1904] 2 I. R. 357, O. A., per PALLES, C.B., at p. 364.

(*l*) Judicature Act, 1873 (36 & 37 Vict. c. 66), s. 16.

(*m*) The effect of the Judicature Acts is frequently referred to as "the fusion of law and equity," but exception has been taken to the accuracy of this phrase. "It was not any fusion or anything of the kind; it was the vesting in one tribunal the administration of law and equity in every cause, action, or dispute which should come before that tribunal" (*Salt v. Cooper*, *supra*, per JESSEL, M.R., at p. 549).

(*n*) *McGowan v. Middleton* (1883), 11 Q. B. D. 464, O. A., per BRETT, M.R., at p. 468.

**SECT. 2.
Present
Exercise of
Equitable
Jurisdiction
of High
Court.**

Claims which
may be
adjudicated
on.

cause or matter (o); so that, as far as possible, all the matters so in controversy between the parties may be completely and finally determined, and all multiplicity of legal proceedings concerning any of such matters avoided (p).

72. This general declaration of the policy of the Act is preceded by particular provisions: (1) that a plaintiff claiming to be entitled to any equitable estate or right, or to relief upon any equitable ground against any deed, instrument, or contract, or against any right, title, or claim asserted by the defendant, or to any relief founded on a legal right which formerly could only have been given in equity, shall receive in the High Court the same relief as would formerly have been given by the Court of Chancery (q); (2) that a defendant claiming to be entitled to any equitable estate or right, or to relief upon any equitable ground against any deed, instrument, or contract, or against any right, title, or claim asserted by the plaintiff, or alleging any ground of equitable defence to any claim of the plaintiff, may use such claim or such ground of equitable defence by way of defence to the claim of the plaintiff as effectively as he could have done in a suit in Chancery (r); (3) that a defendant may counterclaim in respect of

(o) Judicature Act, 1873 (36 & 37 Vict. c. 66), s. 24 (7); see *O'Keeffe v. Walsh*, [1903] 2 L. R. 681, C. A., per Lord O'BRIEN, C.J., at p. 709. But this clause does not extend the remedies previously available. It only enables the High Court and every branch of it to give effect to all the remedies which could have been given before the Act by any court which was made a member of the High Court (*The James Westoll*, [1905] P. 47, at p. 51); see *The Receipts*, [1893] P. 255.

(p) The provision of s. 24 (7) is expressed in wide terms, and applies to any remedy whatever, and to any claim, whether the original claim or not, which is brought forward in the cause and relates to the matter in dispute in the cause. The cause is pending so long as the final judgment remains unsatisfied, and hence a receiver may be appointed by way of equitable execution upon application in the action, although there was originally no claim for a receiver (*Salt v. Cooper* (1880), 16 Ch. D. 544, 550, C. A.). But this principle has not been applied to a charging order on shares obtained by a judgment creditor, and to enforce the order a new action must be brought (*Leggott v. Western* (1884), 12 Q. B. D. 287; *Kolchmann v. Meurice*, [1903] 1 K. B. 534, C. A.).

(q) Judicature Act, 1873 (36 & 37 Vict. c. 66), s. 24 (1). But an equitable claim is still subject to the rule that a plaintiff who comes for equity must do equity, and he may be put upon terms (*Lodge v. National Union Investment Co., Ltd.*, [1907] 1 Ch. 300); though he may get a declaration of his mere legal right without terms (*Chapman v. Michaelson*, [1909] 1 Ch. 238, C. A.; see note (g), p. 71, post).

(r) Judicature Act, 1873 (36 & 37 Vict. c. 66), s. 24 (2). Thus in a foreclosure action the mortgagor may raise questions as to the mortgagee's charges which would formerly have required the filing of a cross bill (*Eyre v. Hughes* (1876), 2 Ch. D. 148); in an action for a debt by a trustee, the defendant may set up a claim of his own against the *cestui que trust* (*Banks v. Jarvis*, [1903] 1 K. B. 549); a legal right to possession of land cannot be enforced if the defendant has an equitable right to prevent its enforcement (*Warren v. Murray*, [1894] 2 Q. B. 648, C. A., per Lord JESSEL, M.R., at p. 652); where there is an equitable claim by the defendant to have a deed set aside, the King's Bench Division can treat it as set aside for the purpose of the action, though an action in the Chancery Division must be brought to set it aside in the future (*Mostyn v. West Mostyn Coal and Iron Co.* (1876), 1 C. P. D. 145, 150); and the court, if there is evidence on which it can rectify an instrument on the ground of mistake, can treat it as rectified (*Breblauer v. Barwick* (1876), 24 W. R. 901), and order performance of an agreement thus rectified (*Olley v. Fisher* (1886), 34 Ch. D. 367;

any equitable estate or right, or other matter of equity, and also in respect of any legal estate, right, or title, and may obtain relief accordingly to the same extent as in an action instituted by him against the plaintiff; and also may claim and obtain relief against other persons, whether already parties or not (s); (4) that the High Court shall recognise and take notice of equitable estates, titles, and rights, and equitable duties and liabilities appearing incidentally in the course of any cause or matter, in the same manner as the Court of Chancery would have recognised and taken notice of the same in a suit in Chancery (a). Since full legal and equitable relief can now be given in the same court, it follows that it is no longer necessary, as under the former practice (b), for a court administering equity to restrain by injunction the prosecution of proceedings at law; and injunctions for this purpose are accordingly abolished, it being provided that any matter of equity which would have afforded ground for an injunction may be relied on by way of defence (c); but the former right to apply for a stay of proceedings is preserved (d).

Borrowes v. Delaney (1889), 24 L. R. Ir. 503; *Shrewsbury and Talbot Cab and Noiseless Tyre Co. v. Shaw* (1890), 89 L. T. Jo. 274; doubted by NEVILLE, J., in *Thompson v. Hickman*, [1907] 1 Ch. 550, 561. But effect will be given to the defence only upon equitable terms. Thus a defendant setting up an equitable right to a lease must consent to accept a legal lease on the terms of the equitable lease (*Thellusson v. Liddard*, [1900] 2 Ch. 635, 646). And a defendant resorting to equity for his defence must take the equitable principles applicable to the circumstances in their entirety (*Steeds v. Steeds* (1889), 22 Q. B. D. 537, 541).

(s) Judicature Act, 1873 (36 & 37 Vict. c. 66), s. 24 (3). The mere fact that a defendant counterclaims in an action in the King's Bench Division for rectification of a deed or specific performance is not in itself a ground for transferring the action to the Chancery Division (*Storey v. Waddle* (1879), 4 Q. B. D. 289, C. A.); and as to counterclaims, see *McGowan v. Middleton* (1883), 11 Q. B. D. 464, C. A.

(a) Judicature Act, 1873 (36 & 37 Vict. c. 66), s. 24 (4). Thus, a legal right, such as that of an execution creditor, is subject to all equities affecting the property (*Simultaneous Colour Printing Syndicate v. Fowleraker*, [1901] 1 K. B. 771; compare *Re Standard Manufacturing Co.*, [1891] 1 Ch. 627, 641, C. A.); where money is borrowed without authority, the equitable right of subrogation is recognised (*Bannatyne v. MacIver*, [1906] 1 K. B. 103, 109, C. A.); where an instrument has been obtained by undue influence, the equity arising therefrom renders it unenforceable (*Chaplin & Co., Ltd. v. Brammall*, [1908] 1 K. B. 233, C. A.); and effect is given to equities in interpleader proceedings (*Usher v. Martin* (1889), 24 Q. B. D. 272; *Jennings v. Mather*, [1901] 1 K. B. 108, 116).

(b) See p. 47, ante.

(c) Judicature Act, 1873 (36 & 37 Vict. c. 66), s. 24 (5); *Garbutt v. Fawcus* (1876), 1 Ch. D. 165, C. A.; *Wright v. Redgrave* (1879), 11 Ch. D. 24, C. A.; and this applies also to the Probate, Divorce and Admiralty Division; *Marshall v. Marshall* (1879), 5 P. D. 19 (defendant in a suit for restitution of conjugal rights setting up a deed binding the plaintiff not to sue).

(d) proviso to Judicature Act, 1873 (36 & 37 Vict. c. 66), s. 24 (5). Consequently where an injunction could formerly have been obtained to restrain a suit, the defendant can now apply at once for an order staying the action instead of waiting till he has delivered his defence; see *White v. Harrow* (1901), 50 W. R. 166. But an injunction could not have been obtained if there was a good defence to the action at law; the plaintiff in equity was bound to show some equitable ground for relief; and, apparently, this is still necessary in order to procure a stay of proceedings (*Brooking v. Maudslay, Son and Field* (1888), 38 Ch. D. 635, 644). The proviso simply keeps alive the jurisdiction

SECT. 2.
Present
Exercise of
Equitable
Jurisdiction
of High
Court.

Rules of
 equity to
 prevail.

Distinction
 between legal
 and equitable
 rights not
 abolished.

73. The Judicature Act, 1873 (*e*), lays down certain rules, either varying or affirming the previous rules in equity or at law as to specific matters—administration of insolvent estates, exemption of express trusts from the Statutes of Limitation, equitable waste, merger, actions by mortgagors in respect of the mortgaged land, assignments of choses in action, stipulations not of the essence of a contract, injunctions and receivers, and the custody and education of infants; and then provides generally that in all other matters in which there is any conflict between the rules of equity and the rules of the common law, the rules of equity shall prevail (*f*). This provision relates to matters of substantive law and not of mere practice (*g*); it does not mean that the procedure of the Court of Chancery is to be followed in ordinary common law actions (*h*).

74. It is not provided by the Act that legal and equitable rights shall be treated as identical (*i*); and the same distinction exists between legal and equitable estates and interests as before the Act (*k*).

which existed before the passing of the Act. It confers no new jurisdiction to stay proceedings (*The James Westall*, [1905] P. 47, C. A.).

(*e*) 36 & 37 Vict. c. 66, s. 25 (1)—(8), (10); see *Torkington v. Magee*, [1902] 2 K. B. 430, 431. Sub-s. 1, as to the administration of insolvent estates, is replaced by s. 10 of the Judicature Act, 1875 (38 & 39 Vict. c. 77).

(*f*) Judicature Act, 1873 (36 & 37 Vict. c. 66), s. 25 (11); see *Lugh v. Heath* (1882), 7 App. Cas. 235, 237, where it was said that the effect of the Judicature Acts has not been to abolish the distinction between law and equity. Both legal and equitable principles are now administered by the same tribunal, and where the rules of equity and the rules of law are at variance with reference to the same matter, the rules of equity are to prevail. It has been questioned whether this provision has any substantial operation (Maitland, *Equity*, pp. 156—159), and in general the rules of equity are concerned with different matters from those at law and do not conflict with them; see *Powell v. Brodhurst*, [1901] 2 Ch. 160, 164, that payment of a debt to one of two joint creditors is still a discharge of the debt; but instances of the prevalence of an equitable rule will be found in *Job v. Job* (1877), 6 Ch. D. 562, p. 48, note (*k*), *ante*; *Lowe v. Dixon* (1885), 16 Q. B. D. 455, p. 30, note (*s*), *ante*; *Vibart v. Coles* (1890), 24 Q. B. D. 364, C. A., p. 36, note (*m*), *ante*; *Steeds v. Steeds* (1889), 22 Q. B. D. 537, p. 164, note (*n*), *post*; and in *Gibbs v. Guild* (1882), 9 Q. B. D. 59, C. A. (Statutes of Limitation excluded by fraud).

(*g*) *La Grange v. McAndrew* (1879), 4 Q. B. D. 210. "Practice" and "Procedure" denote the mode of proceeding by which a right is enforced, as distinguished from the law which gives or defines the right (*Poyser v. Minors* (1881), 7 Q. B. D. 329, 335, C. A.).

(*h*) *Harrison v. Rutland (Duke)*, [1893] 1 Q. B. 142, 149, C. A. Thus, in an action on a money bond accord and satisfaction may now be pleaded without any release under seal, in accordance with the former rule in equity (*Steeds v. Steeds*, *supra*); and payment to one of two obligors is not necessarily a defence to a claim by the other, since in equity they are *prima facie* interested as tenants in common (*Steeds v. Steeds*, *supra*; see *Powell v. Brodhurst*, *supra*).

(*i*) *Joseph v. Lyons* (1884), 15 Q. B. D. 280, 286, C. A.

(*k*) Thus, an assignment of after-acquired chattels still gives only an equitable interest (*Joseph v. Lyons*, *supra*; *Hallas v. Robinson* (1885), 15 Q. B. D. 288, C. A.); an equitable assignment of leaseholds does not operate as a legal assignment (*Gentle v. Faulkner*, [1900] 2 Q. B. 267, 275, 277, C. A.); the owner of an equity of redemption has, apart from statute, only equitable rights, and cannot enforce his rights against a tenant as though he were legal owner (*Matthews v. Usher*, [1900] 2 Q. B. 535, C. A.). Though, where a person entitled in equity to an interest in land under an agreement is also entitled to specific performance, and to have his interest turned into a legal interest, he will, in a court having jurisdiction to order specific performance, be treated as having

Where the court is dealing with questions of legal right, the principles established at law prevail (*l*).

Moreover, relief on equitable grounds is only obtainable in cases where it would have been granted by a court of equity before the Act. Consequently the equitable doctrine that part performance will take a contract for sale of land out of the Statute of Frauds has not been extended by the Act to other contracts generally, such as a contract of service (*m*). But in matters of procedure a person equitably entitled may have an advantage by reason of the fusion of jurisdiction. Thus the plea of purchase for value without notice is now no bar to discovery in aid of the legal title (*n*).

SECT. 2.
Present
Exercise of
Equitable
Jurisdiction
of High
Court.

Part II.—Principles Affecting Relief in Equity.

SECT. 1.—Equity acts in Personam.

75. A court of equity operates primarily *in personam* and not *in rem* (*o*); and in the exercise of its jurisdiction *in personam* it will compel the performance of contracts and trusts relating to property which is not locally within the jurisdiction (*p*). And actions for foreclosure of mortgages (*q*), or for accounts between

Equity acts
in personam.

the rights of a legal owner (*Walsh v. Lonsdale* (1882), 21 Ch. D. 9, C. A.); see *Manchester Brewery Co. v. Coombs*, [1901] 2 Ch. 608, 617.

(*l*) *Colls v. Home and Colonial Stores, Ltd.*, [1904] A. C. p. 179, 188.

(*m*) *Britain v. Rossiter* (1879), 11 Q. B. D. 123, C. A. "The true construction of the Judicature Acts is that they confer no new rights; they only confirm the rights which previously were to be found existing in the courts either of law or of equity; if they did more, they would alter the rights of parties, whereas in truth they only change the procedure," *per* BRETT, L.J., at p. 129; and see *per* COTTON, L.J., at p. 131; *Stumore v. Campbell & Co.*, [1892] 1 Q. B. 314, 316, C. A. But the doctrine of part performance probably applies to all contracts of which the Court of Chancery would have granted specific performance, and apparently these were not confined to contracts for sale of land (*Maddison v. Alderson* (1883), 8 App. Cas. 467, 474; *McManus v. Cooke* (1887), 35 Ch. D. 681, 690).

(*n*) *Ind, Coope & Co. v. Emmerson* (1887), 12 App. Cas. 300; and see p. 78, *post*.

(*o*) See Ashb., p. 51. But the Court of Chancery found it necessary to enforce its decrees by process against the property of the defendant, and this it did by sequestration (*ibid.*, p. 41); and see title EXECUTION.

(*p*) *Archer v. Preston* (undated), cited in *Arglasse v. Muschamp* (1682), 1 Vern. 75, 77; *Penn v. Baltimore* (Lord) (1750), 1 Ves. Sen. 444; 1 White & Tud. L. C., 7th ed., p. 755 (as to the specific performance of a contract relating to land situate abroad); *Kildare (Earl) v. Eustace* (1686), 1 Vern. 419; *Ewing v. Orr Ewing* (1883), 9 App. Cas. 34, *per* Lord SELBORNE, L.O., at p. 40; *Re Clinton, Clinton v. Clinton* (1903), 51 W. R. 316 (as to the execution of trusts of property situate abroad). See notes to *Arglasse v. Muschamp*, *supra*; and see the statement of the limits of the doctrine in *Deschamps v. Miller*, [1908] 1 Ch. 856, *per* PARKER, J., at p. 863.

(*q*) *Toller v. Carteret* (1706), 2 Vern. 494 (foreclosure of mortgage of Island of Sark); *Paget v. Ede* (1874), L. R. 18 Eq. 118 (land in the West Indies); *Athol (Earl) v. Derby (Earl)* (1672), 1 Cas. in Ch. 220 (portions charged on Isle of Man); *Re Courtney, Ex parte Pollard* (1840), Mont. & Ch. 239 (enforcement of equitable mortgage of land in Scotland); *Duder v. Amsterdamsch Trustees Kantoor*, [1902] 2 Ch. 132 (equitable charge); compare *British South Africa Co. v. De Beers Consolidated Mines, Ltd.*, [1910] 1 Ch. 354 (clog on the equity of redemption of foreign property declared invalid); in C. A. (1910), 54 Sol. Jo. 679.

SECT. 1.
Equity
acts in
Personam.

Limits of the
 jurisdiction.

mortgagor and mortgagee(r), or for a receiver(s), are entertained in this country though the mortgaged property is out of the jurisdiction. The same is the case with regard to actions relating to property abroad in which relief is sought on the ground of fraud, since fraud is upon the conscience of the party(a); or where relief is sought on the ground that a judgment obtained abroad is being made the instrument of gross injustice(b).

But the court will only intervene where the defendant is resident here(c); and where its order can be executed by the process of the court. Consequently there can be no order for partition of property abroad, since this would involve the sending of a commission out of the jurisdiction(d); nor can there be a decree for delivery of possession of land situated abroad(e), nor for recovery of a rentcharge, for which the proper remedy is a local action(f); nor would a court of equity under the former practice direct an issue at law to try the validity of a will of lands abroad(g); nor will it determine a claim depending on the title to land in a foreign country strictly so called—that is, being no part of the British dominions or possessions—simply because the parties happen to be here(h); unless, having jurisdiction as to personalty, it extends its jurisdiction to the realty because the two are so mixed together that it is impossible to separate them(i). And the court will not interfere where there is already litigation in the appropriate foreign court(j). Nor will it make an order which involves a breach of the foreign law properly governing the property or its disposition(k).

Where the relief prayed falls within the above principles, the jurisdiction is exercisable not only in respect of property in the dominions of the Crown, but also in foreign countries(l).

(r) *Scott v. Nesbitt* (1808), 14 Ves. 438; see also titles MORTGAGE; RECEIVERS.

(s) *Mercantile Investment Trust Co. v. River Plate Trust Co.*, [1892] 2 Ch. 303.

(a) *Angus v. Angus* (1737), West temp. Hard. 23; see *Argllass v. Muschamp* (1862), 1 Vern. 75.

(b) *Cranstown (Lord) v. Johnston* (1790), 3 Ves. 170, 183.

(c) *Matthaei v. Galitzin* (1874), L. R. 18 Eq. 340; see *Cookney v. Anderson* (1863), 1 De G. J. & Sm. 365.

(d) *Cartwright v. Pettus* (1675), 2 Cas. in Ch. 214; S. C., *sub. nom. Carteret v. Petty*, 2 Swan. p. 323, n.

(e) *Roberdeau v. Rous* (1738), 1 Atk. 543. Partly on account of the difficulty of dealing with the possession, an action does not lie here for trespass to land abroad (*British South Africa Co. v. Companhia de Moçambique*, [1893] A. C. 602, 625; and as to the jurisdiction in equity, see *per* Lord HERSHELL, L.C., at p. 626); see also title ACTION, Vol. I., p. 51.

(f) *Whitaker v. Forbes* (1875), 1 O. P. D. 51, O. A.

(g) *Pike v. Hoare* (1763), 2 Eden, 182.

(h) *Re Hawthorne, Graham v. Massey* (1883), 23 Ch. D. 743. And the court will not make an order establishing a lien on foreign land (*Norris v. Chambers* (1861), 29 Beav. 246).

(i) *Re Clinton, Clinton v. Clinton* (1903), 51 W. R. 316.

(j) *Norton v. Florence Land and Public Works Co.* (1877), 7 Ch. D. 332.

(k) *Waterhouse v. Stansfield* (1851), 9 Hare, 234; see generally title CONFLICT OF LAWS, Vol. VI., pp. 798 *et seq.*

(l) *Angus v. Angus*, *supra*; though some of the cases confined the jurisdiction to dominions of the Crown by the principle that the different courts of equity derive their jurisdiction from the same source (*Foster v. Vasall* (1747), 3 Atk. 587); and as regards Ireland the additional reason was used that the English courts had a superintendent power over those in Ireland

SECT. 2.—*Equity gives Account of Profits, not Damages.*

SECT. 2.

**Equity gives
Account of
Profits, not
Damages.**

76. The principle underlying relief at law is that the plaintiff has suffered loss by the breach of contract or wrongful conduct of the defendant, and damages are awarded for the purpose of making good this loss. The principle underlying relief in equity is that the defendant has improperly received or withheld property, or profits from property—such property or profits belonging to the plaintiff—and he is required to restore the property, or to account for the profits (*m*). Thus at law the extent of the remedy is measured by the loss to the plaintiff, and this is covered by the damages awarded; in equity the extent of the remedy is measured by the gain to the defendant, and this is ascertained by directing an account against him (*n*). These two measures may have quite different results (*o*). Hence, where damages were claimed the appropriate remedy was at law, and equity declined jurisdiction (*p*); and *prima facie* this was so in cases of breach of contract, and in ordinary cases of fraud (*q*). The remedy of specific performance in equity might carry, as incidental to it, a right to compensation (*r*); but, apart from statute, ordinary damages could not be given, either in substitution for or in addition to specific performance (*s*). So, a breach of trust does not give a remedy in damages, but a remedy by making the trustee restore the property with which he is chargeable, and account for profits which he has made, or which he is to be taken to have made (*t*). And an agent is

(*Fryer v. Bernard* (1724), 2 P. Wms. 261), a reason which of course is obsolete; see *Portarlington (Lord) v. Soulby* (1834), 3 My. & K. 104, 109.

(*m*) "The Court of Chancery never entertained a suit for damages occasioned by fraudulent conduct or for breach of trust. The suit was always for an equitable debt or liability in the nature of a debt. It was a suit for the restitution of the actual money or thing, or value of the thing, of which the cheated party had been cheated" (*Re Collie, Ex parte Adamson* (1878), 8 Ch. D. 807, 819, C. A.).

(*n*) See Ashb., p. 52.

(*o*) *Nelson v. Bridges* (1839), 2 Beav. 239, per Lord LANGDALE, M.R., at pp. 243, 244.

(*p*) *Clifford v. Brooke* (1806), 13 Ves. 131; *Blore v. Sutton* (1817), 3 Mer. 237, 248; Story, s. 794. Or equitable relief might be granted so far as appropriate without prejudice to an action for damages (*Gwillim v. Stone* (1807), 14 Ves. 128. Equity did not interfere with damages at law on the ground of their being excessive (*Hooker v. Arthur* (1671), 2 Rep. Ch. 33 [62]).

(*q*) *Newham v. May* (1824), 13 Price, 749, 752; see as to damages for loss caused by fraudulent prospectus, *Twycross v. Grant* (1877), 2 C. P. D. 469, C. A.

(*r*) *Newham v. May*, *supra*; though compensation is ordinarily to be sought at law and cannot be obtained in equity (*Clinan v. Cooke* (1802), 1 Sch. & Lef. 22; 25).

(*s*) See *Todd v. Gee* (1810), 17 Ves. 273; *Sainsbury v. Jones* (1839), 5 My. & Cr. 1; and as to the statutory jurisdiction to give damages in addition to or in lieu of an injunction or specific performance, see pp. 12, 51, *ante*.

(*t*) *Ludlow Corporation v. Greenhouse* (1827), 1 Bli. (N. S.) 17, 58, H. L.; *Re Collie, Ex parte Adamson, supra*. Since the remedy is by way of account, it is not in the nature of a penal remedy (see *A.-G. v. Alford* (1855), 4 De G. M. & G. 843, 851; *Re Barclay, Barclay v. Andrew*, [1899] 1 Ch. 674, 683). It follows that the *cestui que trust*, getting the benefit of the breach of trust, may be better off than if the breach of trust had not been committed (see per Lord COTTENHAM, L.C., in *Greenlaw v. King* (1841), 5 Jur. 18, at p. 19).

SECT. 2.
Equity gives
Account of
Profits, not
Damages.

accountable in equity to his principal for secret profits which he has made (*a*).

The same principle attended the granting of injunctions, and an injunction against breach of copyright or infringement of patent was accompanied by an account of the profits made by the defendant, not of the actual loss to the plaintiff (*b*). At the present time all divisions of the High Court have jurisdiction to give damages, and hence a plaintiff has his option either to have an account of profits or to have damages, but he cannot have both. If he takes an account of profits he condones the infringement (*c*).

Death of
wrongdoer.

77. Where an action of the nature of tort is brought for unliquidated damages, the death of the wrongdoer is a defence available for his legal personal representatives, in accordance with the maxim *actio personalis moritur cum persona*; and in matters within the concurrent jurisdiction, the same principle applies to the corresponding equitable remedy (*d*). Where, however, as a result of the tort, property, or the proceeds or value of property, belonging to another have been appropriated by the deceased person, and added to his own estate or money, so that his estate has been directly benefited, then a claim for the amount thus appropriated can be maintained against his assets (*e*).

SECT. 3.—Equity follows the Law.

Equity
follows the
law.

78. Jurisdiction in equity is exercised upon the principle that "equity follows the law." But this maxim of course is not universally true, or there would never have been occasion for the development of a separate code of equitable principles (*f*). It means that equity treats the common law as laying the foundation of all jurisprudence, and it does not depart unnecessarily from legal principles (*g*). In matters coming before it which depend solely on legal rights—as in legal claims arising in the course of an administration action—equity applies the rules of law as the appropriate system; in such cases the rules of law are in fact binding in equity. And, when equity has to regulate the equitable interests which it has itself created, it acts, so far as possible, on the analogy of the legal rules applicable to the corresponding legal interests, and only departs from this analogy in exceptional cases (*h*).

(*a*) *Parker v. McKenna* (1874), 10 Ch. App. 96, 118; *Hay's Case* (1875), 10 Ch. App. 593; see title AGENCY, Vol. I., pp. 189, 190.

(*b*) *Hogg v. Kirby* (1803), 8 Ves. 215, 223.

(*c*) *Neilson v. Betts* (1871), L. R. 5 H. L. 1; *De Vitre v. Betts* (1873), L. R. 6 H. L. 319.

(*d*) *Peck v. Gurney* (1873), L. R. 6 H. L. 377; *Re Duncan, Terry v. Sweeting*, [1899] 1 Ch. 387.

(*e*) *Phillips v. Hemfray* (1883), 24 Ch. D. 439, 454, C. A.; see *Winchester (Bishop) v. Knight* (1717), 1 P. Wms. 406; see also title TORT.

(*f*) "When the court finds the rules of law right, it will follow them; but then it will likewise go beyond them (*Paget v. Gee* (1753), Amb. 807, *per* Lord HARDWICKE, at p. 810).

(*g*) *Burgess v. Wheate, A.-G. v. Wheate* (1759), 1 Eden, 177, *per* CLARKE, M.B., at p. 195.

(*h*) "The law is clear, and courts of equity ought to follow it in their judgments concerning titles to equitable estates; otherwise great uncertainty and

SECT. 3.
Equity
follows the
Law.

Thus in regard to the limitations and incidents of equitable estates the rules of law are in general followed, and departures from them are exceptional. Such exceptions occurred when equity declined to allow dower out of equitable estates, or to make an equitable contingent remainder depend for its validity on a sufficient preceding vested interest, or to allow an equitable estate to escheat (*i*). Equity also followed the law as regards limitation of actions, and it applied the Statutes of Limitation as a bar to equitable estates, either by way of analogy, or, as it was sometimes said, because they were binding on a court of equity (*j*).

Where a covenant is void at law, a court of equity will not attempt to enforce it by injunction. In such cases it is the duty of equity to follow the law (*k*). And where there can be no action on the covenant at law, because the same person is a party to it both as covenantor and covenantee, an action does not lie on the covenant in equity. If an equitable claim can be supported, it must be in respect of a liability existing independently of the covenant (*l*).

SECT. 4.—*Equality is Equity.*

79. The maxim that "equality is equity" (*m*) expresses in a general way the object both of law (*n*) and equity, namely, to effect a distribution of property and losses proportionate to the several claims or to the several liabilities of the persons concerned. For equality in this connection does not mean literal equality, but proportionate equality (*o*). This doctrine of equality, however, operated more effectually in a court of equity than a court of law (*p*), and was exemplified in many departments of equitable jurisprudence. Thus, equity preferred a tenancy in common to a joint tenancy, whether as between purchasers, mortgagees, or partners, with a view to excluding the right of survivorship (*q*); and a joint account

Equality is
equity.

confusion would ensue" (*Cowper v. Cowper (Earl)* (1731), 2 P. Wms. 720, *per* JERMYN, M.R., at p. 753; see *Bath (Earl) v. Sherwin* (1710), 10 Mod. Rep. 1, 3).

(*r*) See pp. 93, note (*r*), 95, notes (*d*), (*e*), *post*.

(*j*) *Cholmondeley (Marquis) v. Clinton (Lord)* (1821), 4 Bli. 1, 11. L., *per* Lord REDESDALE, at p. 119; *Hovenden v. Annesley (Lord)* (1806), 2 Sch. & Lef. 607, *per* Lord REDESDALE, at p. 630; and see p. 174, *post*.

(*k*) *Nordenfelt v. Maxim Nordenfelt Guns and Ammunition Co.*, [1894] A. C. 535, 563.

(*l*) *Ellis v. Kerr*, [1910] 1 Ch. 529.

(*m*) Or "equity delights in equality." The maxim in this form was attributed to Lord SOMERS, L.O. (*Petit v. Smith* (1695), 1 P. Wms. 7, 9). See also *Re Accrington Corporation Steam Tramways Co.*, [1909] 2 Ch. 40, *per* SWINFEN EADY, J., at p. 44.

(*n*) In the form "equity is equality" the maxim was current at law from the time of Bracton; but in this connection "equity" appears to have referred to the equitable construction of statutes, so as to include cases omitted by the legislature, though within the spirit of the statute; "*in paribus rationibus, paria jura*" (Co. Litt. 21 b; 2 Plowd. 467). The law, however, recognised the equity of proportionate distribution of benefit and loss. "*In equali jure* the law requires equality; one shall not bear the burden in ease of the rest, and the law is grounded in great equity" (*Dering v. Winchelsea (Earl)* (1787), 1 Cox, Eq. Cas. 318; 2 White & Tud. L. C., 7th ed., p. 538).

(*o*) See *Steel v. Dixon* (1831), 17 Ch. D. 825, 830; *Ker v. Ker* (1869), 4 I. R. Eq. 15, 28.

(*p*) *Dering v. Winchelsea (Earl)*, *supra*.

(*q*) *Lake v. Craddock* (1732), 3 P. Wms. 158; 2 White & Tud. L. C., 7th ed., 952; *Petty v. Styward* (1632), 1 Ch. Rep. 31 [57]; *Jeffereys v. Small* (1683), 1

SECT. 4.
Equality is
Equity.

clause in a mortgage is not treated as necessarily excluding several titles to the mortgage money (*r*). So, in the distribution of property, the highest equity is to make an equality between parties standing in the same relation, though this cannot be done contrary to the plain meaning of a deed (*s*).

Upon the same principle equity formerly intervened to set aside an illusory appointment, and to compel an equal appointment under a power (*t*); and the rule gave rise to the rateable distribution of equitable assets between specialty and simple contract creditors (*u*).

In like manner a court of equity, more effectually than a court of law, adjusts losses so that they shall fall in due proportion upon the persons liable; and upon this equity is grounded the doctrine of contribution as between sureties (*a*), and also other doctrines which are intended to apportion losses, such as average (*b*), and abatement of legacies; and perhaps, also, the doctrines of marshalling (*c*) and refunding (*d*) have the same origin.

SECT. 5.—He who seeks Equity must do Equity. He who comes into Equity must come with Clean Hands.

Equity and
good conduct
required in
plaintiff.

80. A court of equity in granting relief peculiar to its own jurisdiction acts upon the rule that he who seeks equity must do equity (*e*). By this it is not meant that the court can impose arbitrary conditions upon a plaintiff simply because he stands in that position on the record (*f*). The rule means that a man who comes to seek the aid of a court of equity to enforce a claim must

Vern. 217; *Usher v. Ayleward* (1685), 1 Vern. 360; *Lake v. Gibson* (1729) 1 Eq. Cas. Abr. 291; *Rigden v. Vallier* (1751), 2 Ves. Sen. 252, 258; *Morley v. Bird* (1798), 3 Ves. 628, 631; *Steeds v. Steeds* (1889), 22 Q. B. D. 537, 511; and a joint tenancy, where it exists both at law and in equity, is severed by a contract for sale (*Brown v. Raindle* (1796), 3 Ves. 256); or other contract for value, such as an ante-nuptial marriage settlement (*Coldwell v. Fellowes* (1870), L. R. 9 Eq. 410; *Re Hewett, Hewett v. Hallett*, [1894] 1 Ch. 362); but not by the marriage by itself unless the effect is to vest the interest of the wife in the husband (*Re Butler's Trusts, Hughes v. Anderson* (1888), 38 Ch. D. 286, C. A.).

(*r*) *Re Jackson, Smith v. Sibthorpe* (1887), 34 Ch. D. 732.

(*s*) *Hulme v. Chitty* (1846), 9 Beav. 437, per Lord LANGDALE, M.R., at p. 443.

(*t*) *Gibson v. Kinven* (1682), 1 Vern. 66; *Wall v. Thurborne* (1686), 1 Vern. 355, 414; see *Craker v. Parrott* (1677), 2 Cas. in Ch. 228, 230. And the court, if it has itself to exercise a power, does so on this principle (*Salisbury v. Denton* (1867), 3 K. & J. 529, 538; see title POWERS).

(*u*) *Wolestoncroft v. Long* (1663), 1 Cas. in Ch. 32; *Hixon v. Wytham* (1675), 1 Cas. in Ch. 248; *Anon.* (1681), 2 Cas. in Ch. 54.

(*a*) *Dering v. Winchelsea (Earl)* (1787), 1 Cox, Eq. Cas. 318; 1 White & Tud. L. C., 7th ed., p. 538. Early cases on the subject are *Peter v. Rich* (1630), 1 Rep. Ch. 19 [34]; *Morgan v. Seymour* (1638), 1 Rep. Ch. 64 [120]; *Swain v. Wall* (1641), 1 Rep. Ch. 80 [149]; see also title GUARANTEE.

(*b*) See *Sheppard v. Wright* (1693), Show. Parl. Cas. 18.

(*c*) *Kennoule (Lord) v. Bedford (Earl)* (1676), 1 Cas. in Ch. 295.

(*d*) Francis, *Maxims of Equity*, pp. 9 *et seq.* As to the early doctrine of refunding, see *Noel v. Robinson* (1682), 1 Vern. 90. But the doctrines both of marshalling and refunding only illustrate the maxim in the sense that they secure ultimately the proper distribution of property.

(*e*) "The principle of this court is not to give relief to those who will not do equity" (*Davis v. Marlborough (Duke)* (1819), 2 Swan. 108, per Lord ELDON, L.C., at p. 157; see *Portsea Island Building Society v. Barclay*, [1895] 2 Ch. 298, 308, C. A.).

(*f*) *Hanson v. Keating* (1844), 4 Hare, 1, 6.

be prepared to submit in such proceedings to any directions which the known principles of a court of equity may make it proper to give (*g*); he must do justice as to the matters in respect of which the assistance of equity is asked (*h*). In a court of law it is otherwise: when the plaintiff is found to be entitled to judgment, the law must take its course; no terms can be imposed (*i*).

Thus, where a husband has to come into equity to recover property to which he is entitled in right of his wife, the court only assists him on terms of his making a suitable settlement out of the property in favour of his wife (*k*). And the rule was, probably, the foundation of the doctrines of the consolidation (*l*) and tacking of mortgages (*m*); and after the Statute of Frauds a charge arising by way of deposit of deeds without any memorandum in writing was sometimes founded on the same principle (*n*). Where a person in possession of property has, under a mistaken belief that he is entitled to it, expended money in permanent improvements, the true owner, if he has to assert his title in equity, is required to do equity by repaying this money (*o*); and, generally, one who in good faith incurs expense in dealing with the property of another—as in getting coal—is allowed his expenses (*p*). And a borrower who seeks for equitable relief against a security which is voidable in equity, or which is void by statute, obtains it only on the terms of paying the money which is properly due (*q*). Similarly, when a

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(*g*) *Colvin v. Hartwell* (1837), 5 Cl. & Fin. 484, 522; see *Shish v. Foster* (1748), 1 Ves. Sen. 88.

(*h*) *Gibson v. Goldsmid* (1854), 5 De G. M. & G. 757, 765, C. A.

(*i*) *Deeks v. Strutt* (1794), 5 Term Rep. 690, 693.

(*k*) *Tidd v. Lister* (1852), 10 Hare, 140, 153; *Sturgis v. Chamneys* (1839), 5 My. & Cr. 97, 105; *Hanson v. Keating* (1844), 4 Hare, 1, 4; see title HUSBAND AND WIFE.

(*l*) *Mills v. Jennings* (1880), 13 Ch. D. 639, 646, C. A.

(*m*) *St. John v. Holford* (1668), 1 Cas. in Ch. 97; *Dacres (Lord) v. Crompe* (circ. 1668), 2 Cas. in Ch. 87; *Bromley v. Hamond* (1679), 2 Cas. in Ch. 23. Hence originally the mortgagee might tack a bond debt against the mortgagor (*Anon.* (1698), 3 Salk. 84). Subsequently this was not allowed, since the bond debt was not a charge on the land; and, though tacking was allowed as against an heir or devisee in whose hands the land was subject to payment of bond debts, this was put on the ground of avoiding circuity of action (see *Shuttleworth v. Laycock* (1684), 1 Vern. 245; *Troughton v. Troughton* (1748), 1 Ves. Sen. 86; *Elvy v. Norwood* (1852), 5 De G. & Sm. 240; see *Coleman v. Winch* (1721), 1 P. Wms. 775); see also title MORTGAGE.

(*n*) *Keys v. Williams* (1838), 3 Y. & C. (ex.) 55, 60. But more usually it is based on part performance (*Whitmore v. Farley* (1881), 29 W. R. 825; and see p. 92, *post*).

(*o*) *Nesom v. Clarkson* (1815), 4 Hare, 97, 101; see *Davey v. Durrant* (1857), 1 De G. & J. 535; *Plimmer v. Wellington Corporation* (1884), 9 App. Cas. 699, P. C. But this application of the rule depends on the possessor's ignorance of his want of title (*Ramsden v. Dyson* (1866), L. R. 1 II. L. 129, 141; compare *Clavering's Case* (undated), cited in *Jackson v. Cator* (1800), 5 Ves. 687, 690); and see p. 168, *post*.

(*p*) *Peruvian Guano Co. v. Dreyfus Brothers & Co.*, [1892] A. C. 166, 170 n. (1). See also *Trotter v. Maclean* (1881), 13 Ch. D. 574; *Joicey v. Dickinson* (1881), 26 Sol. Jo. 109; *Livingstone v. Rawyards Coal Co.* (1880), 5 App. Cas. 25; *Brown v. Dibbs* (1877), 25 W. R. 776; *Ashton v. Stock* (1877), *ibid.* 862; *Jegon v. Vivian* (1871), 6 Ch. App. 742.

(*q*) *Waller v. Dalt* (1676), 1 Cas. in Ch. 276; *Bill v. Price* (1687), 1 Vern. 467; *Mason v. Gardiner* (1793), 4 Bro. O. C. 436. Where a security is void under s. 2 of the Money-lenders Act, 1900 (63 & 64 Vict. c. 51), the borrower, if

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He who comes into equity must come with clean hands.

purchase is set aside, this is on terms of repaying the purchase-money with interest^(r); and one who seeks an account must be prepared himself to account^(s).

81. A court of equity refuses relief to a plaintiff whose conduct in regard to the subject-matter of the litigation has been improper. This was formerly expressed by the maxim "He who has committed iniquity shall not have equity," and relief was refused where a transaction was based on the plaintiff's fraud or misrepresentation (*t*), or where the plaintiff sought to enforce a security improperly obtained (*a*), or where he claimed a remedy for a breach of trust which he had himself procured, and whereby he had obtained money (*b*). Later it was said that the plaintiff in equity must come with perfect propriety of conduct (*c*), or with clean hands (*d*). But this does not mean a general depravity; the conduct complained of must have an immediate and necessary relation to the equity sued for; it must be depravity in a legal as well as in a moral sense (*e*): thus, fraud on the part of a person under disability deprives him of his right to equitable relief, notwithstanding his disability (*f*). Where the transaction is itself unlawful it is not necessary to have recourse to this principle. In equity, just as at law, no suit lies in general in respect of an illegal

he asks only for a declaration that it is void, asserts a legal right, and is not put upon terms (*Chapman v. Michaelson*, [1909] 1 Ch. 238, C. A.); but if he goes further and asks for equitable relief—as if he asks for the security to be given up—he must be prepared to repay the loan (*Jodge v. National Union Investment Co., Ltd.*, [1907] 1 Ch. 300); and see title MONEY AND MONEY-LENDING.

(*r*) *Pearcock v. Evans* (1809), 16 Ves. 512; see *Priestly v. Wilkinson* (1790), 1 Ves. 214.

(*s*) *Hanson v. Keating* (1844), 4 Hare, 1, 5.

(*t*) *Jones v. Lenthall* (1669), 1 Cas. in Ch. 154; see *Small v. Brackley* (1707), 2 Vern. 602; Francis, Maxims of Equity, p. 5.

(*a*) *Rich v. Sydenham* (1671), 1 Cas. in Ch. 202. So relief was not given against a wilful forfeiture (*Thomas v. Porter* (1668), 1 Cas. in Ch. 95); and as to suppression of title deeds, see *Gartside v. Hatchiff* (1676), 1 Cas. in Ch. 292.

(*b*) *Nail v. Punter* (1832), 5 Sim. 545.

(*c*) *Harnett v. Yielding* (1805), 2 Sch. & Lef. 549, 554.

(*d*) *Cadman v. Horner* (1810), 18 Ves. 10; *Clermont (Viscount) v. Tasburgh* (1819), 1 Jac. & W. 112, p. 121 (both cases where specific performance was refused on the ground of misrepresentation); *Roberts v. Cooper*, [1891] 2 Ch. 335, C. A. (wife debarred by her conduct from equity to settlement). The phrase "with clean hands" has acquired currency in text-books, but is not often used judicially, or expressly made the ground of judicial decision, and it is sometimes used as the equivalent of the principle stated in the previous paragraph; see *Fitzroy v. Gwillim* (1786), 1 Term Rep. 153, where it was said by Lord MANSFIELD, C.J., that in an equitable action the plaintiff must "come with clean hands according to the principle that those who seek equity must do equity."

(*e*) *Dering v. Wainchelsea (Earl)* (1787), 1 Cox, Eq. Cas. 318, *per EYRE*, C.B., at p. 319; compare *Jones v. Lenthall*, *supra*, where it is said by the reporter that the iniquity must be done to the defendant himself.

(*f*) *Overton v. Danister* (1844), 3 Hare, 503; *Nelson v. Stocker* (1859), 4 De G. & J. 458, 465, C. A. (as to infants); *Savage v. Foster* (1722), 9 Mod. Rep. 35; *Vaughan v. Vanderstegen* (1854), 2 Drow. 363, 379; *Re Lush's Trusts* (1869), 4 Ch. App. 591 (as to married women). A married woman restrained from anticipation cannot bind her separate estate by admission, any more than by assignment, and is therefore not debarred from claiming it by reason of her having by deed mistakenly admitted her interest to have ceased (*Buteman (Lady) v. Faber*, [1897] 2 Ch. 223; see *Cahill v. Cahill* (1883), 8 App. Cas. 420; and compare *Macnaghten v. Paterson*, [1907] A. C. 483, P. C.).

transaction, but this is on the ground of its illegality, not by reason of the demerits of the plaintiff (g).

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He who
seeks

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do Equity.

Equity looks
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done which
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done.

SECT. 6.—Equity looks on that as done which ought to be done.

82. Equity looks upon that as done which ought to be done, or which is agreed to be done. But the maxim does not extend to things which might have been done; nor will equity apply it in favour of everybody, but only of those who had a right to pray that the thing should be done (h): thus, where the obligation arises from contract, that which ought to be done is only treated as done in favour of some person entitled to enforce the contract as against the person liable to perform it (i). The true meaning of the maxim is that equity will treat the subject-matter, as to collateral consequences and incidents, in the same manner as if the final acts contemplated by the parties had been done exactly as they ought to have been (k).

(g) Thus a suit in equity is not maintainable in respect of a gambling transaction made unlawful by statute (see *Quarrier v. Colston* (1842), 1 Ph. 147); or where the intended use of property is immoral (*Smith v. White* (1866), L. R. 1 Eq. 626); or where the claim is against an illegal company (*Re South Wales Atlantic Steamship Co.* (1876), 2 Ch. D. 763, C. A.); or is to protect the copyright in a libellous or immoral publication (*Walcot v. Walker* (1802), 7 Ves. 1); or to enforce a contract which is against public policy (*Thomson v. Thomson* (1802), 7 Ves. 470, 473), where, for instance, it is an agreement involving the abandonment of a criminal prosecution (*Whitmore v. Farley* (1881), 29 W. R. 825, C. A.; *Windhill Local Board of Health v. Vint* (1890), 45 Ch. D. 351, C. A.). The objection that a bond given in consideration of future cohabitation is void prevails equally at law and in equity, and if the illegal consideration appears on the face of the instrument, relief is not given against it (*Gray v. Mathias* (1800), 5 Ves. 286); if the illegal consideration had to be proved by evidence outside the instrument, discovery was formerly granted in aid of this defence at law (*Benyon v. Nettlefold* (1850), 3 Mac. & G. 91; compare *Franco v. Bolton* (1797), 3 Ves. 368). In general, in such cases, the defendant is protected by the maxims *ex turpi causâ actio non oritur*, and *in pari delicto melior est conditio possidentis*, which apply both in equity and at law; and the principle that equity requires clean hands does not prevent the defendant from pleading the illegality, if he does not also require to set up any equity on his own account (*Moulis v. Owen*, [1907] 1 K. B. 746, C. A.). But in some circumstances, when the consideration is unlawful, and does not appear on the face of the instrument, relief may be given in equity although the plaintiff is *particeps criminis* (*Ayerst v. Jenkins* (1873), L. R. 16 Eq. 275, per Lord SELBORNE, L.C., p. 282; see *Re Vallance*, *Vallance v. Blayden* (1884), 26 Ch. D. 353; *Phillips v. Probyn*, [1899] 1 Ch. 811; and compare *Batty v. Chester* (1842), 5 Beav. 103); and as to delivery up of deeds founded on illegal considerations, see *Hayward v. Dimsdale* (1810), 17 Ves. 111; *Simpson v. Howden (Lord)* (1837), 3 My. & Cr. 97; *Lound v. Grimwade* (1888), 39 Ch. D. 605; and see p. 53, ante. A covenant in a separation deed that the parties shall live separate is enforceable in equity by an injunction against proceedings in the Divorce Court for the restitution of conjugal rights (*Hunt v. Hunt* (1882), 4 De G. F. & J. 221). As to the limits of the maxim *ex turpi causâ actio non oritur*, see *Gordon v. Metropolitan Police (Chief Commissioner)* (1910), 26 T. L. R. 645, C. A.

(h) *Burgess v. Wheate*, A.-G. v. *Wheate* (1759), 1 Eden, 177, per CLARKE, M.R., at p. 186. The maxim that equity imputes an intention to fulfil an obligation is of very limited application, and does not require explanation here; see p. 139, post.

(i) *Re Anstis*, *Chetwynd v. Morgan*, *Morgan v. Chetwynd* (1886), 31 Ch. D. 596, C. A., per LINDLEY, L.J., at p. 605; *Re Plumtre's Marriage Settlement*, *Underhill v. Plumtre*, [1910] 1 Ch. 609, 619.

(k) Fonblanque, *Treatise of Equity*, Vol. I., p. 419; Story, s. 649. The rule was said by Lord HARDWICKE, L.C., to hold in every case, except in dower

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Equity looks
on that as
done which
ought to be
done.

The leading examples of the application of the maxim are in cases (1) where land has been directed by settlement or will to be turned into money, and *vice versâ*; and (2) where a contract remains executory on one side, but has been executed on the other. The rule in all cases of the first kind is that what ought to have been done shall be taken as done—a rule so powerful as to alter the very nature of things, to make money land, and, on the contrary, to turn land into money (l).

Examples.

So in cases of contract, where the consideration has been paid or performed by one party, that party is treated as being entitled in equity to the same rights as if the contract had been performed by the other party, even though the contract has become in fact incapable of performance (m). And money which would have become due if the defendant had performed his contract will be treated as a debt in equity, although not a debt at law (n). Upon the same principle is based the efficacy of an assignment of after-acquired property. Neither in equity nor at law can there be an assignment of what has no existence. The assignment operates as a contract, and if it is for value, then when the property comes into existence equity, treating that as done which ought to be done, fastens upon the property, and the contract to assign becomes in equity a complete assignment (o). And a security given by a company for money advanced, though in law defective, is good in equity (p) if it is *intra vires*; and it may be *intra vires* to the extent to which the company has actually received money, and *ultra vires* as regards money advanced upon it to some other company (q).

(Crabtree v. Bramble (1747), 3 Atk. 680, 687). Dower was not allowed out of equitable estates; see p. 95, *post*.

(l) *Lechmere v. Carlisle (Earl)* (1733), 3 P. Wms. 211, *per* JEKYLL, M.R., at p. 215; *A.-G. v. Hubbuck* (1884), 13 Q. B. D. 275, C. A., *per* BOWEN, L.J., at p. 289.

(m) Thus, where one in consideration of marriage agreed to take up his freedom of the city of London within a year, but died after the year without having done so, his personal estate was divisible as if he had been a freeman (*Frederick v. Frederick* (1721), 1 P. Wms. 710). And the principle has been applied so as to give a wife a jointure under a power to jointure, though the power was not expressly exercised, an agreement to exercise the power having been made by the husband on the marriage (*Coventry (Countess) v. Coventry (Earl)* (1724), 2 P. Wms. 222). "In all cases where an agreement is entered into in contemplation of a valuable consideration, when that is performed, it is but justice and convenience that the purchaser should have an immediate right and ownership in what he hath so purchased" (S. C., *per* GILBERT, B., Francis, *Maxims of Equity*, Appendix, p. 4). The conversion which is effected by a contract of sale rests upon different grounds; it is contingent upon the parties being ultimately entitled to specific performance; if this is the case, then, for certain purposes there is a retrospective conversion from the date of the contract; see pp. 98, 110, *post*.

(n) See *London, Chatham and Dover Rail. Co. v. South Eastern Rail. Co.*, [1892] 1 Ch. 120, 143, C. A.

(o) *Collyer v. Isaacs* (1881), 19 Ch. D. 342, C. A., *per* JESSEL, M.R., at p. 351; see *Langton v. Horton* (1842), 1 Hare, 549; *Hobroyd v. Marshall* (1862), 10 H. L. Cas. 191; *see p. 104, *post*.

(p) *Re Strand Music Hall Co.* (1865), 3 De G. J. & Sm. 147, 158, C. A.; *Re Queensland Land and Coal Co.*, *Davis v. Martin*, [1894] 3 Ch. 181; *Pegge v. Neath and District Tramways Co., Ltd.*, [1898] 1 Ch. 183.

(q) *Re Johnston Foreign Patents Co., Ltd.*, *Re Johnston Die Press, Ltd.*, *Re*

SECT. 7.—*Equity does not allow a Statute to be made an Instrument of Fraud.*

SECT. 7.
Equity does not allow a Statute to be made an Instrument of Fraud.

83. Equity does not allow a statute to be made an instrument of fraud (r). Under the Statute of Frauds trusts of land can be created only in writing (s), and under the Wills Act, 1837 (t), all testamentary dispositions must be in writing. Thus a person who takes real estate by instrument *inter vivos*, or real or personal estate upon an intestacy or under a will, and in either case in pursuance of a parol arrangement, of which he was cognizant, that the property should be held by him upon trust, is not allowed to use the statute as a means of avoiding the performance of the trust. A court of equity does not set aside the statute, but it fastens on the individual who gets a title under it, and imposes on him a personal obligation because he applies the statute as an instrument for accomplishing a fraud (a).

Thus, where a voluntary conveyance has been made upon a verbal arrangement that the grantee shall in certain events reconvey, a reconveyance can be required notwithstanding the Statute of Frauds (b); and where the arrangement is that the grantee shall hold in trust for the grantor (c), or for another person (d), the trust will be enforced. Upon the same ground a conveyance absolute in form has been held to be a mortgage (e), and an agent for purchase appointed by parol has not been allowed to retain the benefit of the purchase against his principal (f). In case of devolution on death the circumstances may be that the heir has procured an intestacy by representing that he would carry out his ancestor's wishes (g), or that a devisee or legatee has assented to the gift to himself being upon the terms of a parol trust (h); in either case the legal owner of the property is precluded from setting up the statute, and he must carry out the wishes of the deceased, so far as they are legal. Assent on his part during the testator's lifetime is equivalent for this purpose to an actual promise to carry

Johnstonia Engraving Co., Ltd., J. P. Trust Co., Ltd. v. Above Cos., [1901] 2 Ch. 234, C. A.; see title COMPANIES, Vol. V., pp. 340, 739.

(r) *Re Marlborough (Duke)*, *Davis v. Whitehead*, [1894] 2 Ch. 133, 141.

(s) 29 Car. 2, c. 3, s. 7.

(t) 7 Will. 4 & 1 Vict. c. 26, s. 9.

(a) *McCormick v. Grogan* (1869), L. R. 4 H. L. 82, per Lord WESTBURY, at p. 97.

(b) *Hutchins v. Lee* (1737), 1 Atk. 447; *Davies v. Otty* (1865), 35 Beav. 208;

Haigh v. Kaye (1872), 7 Ch. App. 469, per JAMES, L. J., at p. 474: "The Statute of Frauds was never intended to prevent the court of equity from giving relief in a case of plain, clear, and deliberate fraud"; *Re Marlborough (Duke)*, *Davis v. Whitehead*, *supra*.

(c) *Booth v. Turtle* (1873), L. R. 16 Eq. 182.

(d) *Rochefoucauld v. Boustead*, [1897] 1 Ch. 196, 206, C. A.

(e) *Lincoln v. Wright* (1859), 4 De G. & J. 16, C. A.

(f) *Heard v. Pilley* (1869), 4 Ch. App. 548; but see *James v. Smith*, [1891] 1 Ch. 384.

(g) *McCormick v. Grogan*, *supra*, at p. 88; see *Caton v. Caton* (1866), 1 Ch. App. 137, 149; *French v. French*, [1902] 1 L. R. 172, H. L.; *Sullivan v. Sullivan*, [1903] 1 L. R. 193.

(h) *Thynn v. Thynn* (1684), 1 Vern. 296; *Stickland v. Aldridge* (1804), 9 Ves. 516; *Wallgrave v. Tebbis* (1855), 2 K. & J. 313, 321; *Jones v. Badley* (1868), 3 Ch. App. 362; *Re Maddock*, *Llewellyn v. Washington*, [1902] 2 Ch. 220, C. A.; see *Re Pitt Rivers*, *Scott v. Pitt Rivers*, [1902] 1 Ch. 403, C. A.

SECT. 7.
Equity does not allow a Statute to be made an Instrument of Fraud.

Plea of purchase for value without notice.

out the testator's wishes (i). Possibly the doctrine of part performance excluding the Statute of Frauds is based upon the same principle (k).

SECT. 8.—Equity favours a Purchaser for Value without Notice.

84. The plea of "purchase for value without notice" is looked upon with favour in equity. Under the former practice it was frequently effectual in defeating claims against a purchaser who could set it up; and though, since the Judicature Acts, its use has been greatly restricted, it is still available for a purchaser who has got in the legal estate, and will usually give him priority over equitable claims which rank before him in point of time; and it is also available, without the legal estate, against equities as distinguished from equitable interests.

Formerly a court of equity refused to give any assistance against a purchaser for value without notice (l). Thus it would not, against him, remove an outstanding term which hindered the plaintiff's action at law (m), or order discovery (n), or deprive him of the possession of title deeds (o). The court did not inquire into the adequacy of the consideration (p); though it was necessary that it should have been actually paid before notice, and not merely secured (q); and the plea was available for any person entitled to rank as a purchaser—such as a mortgagee (r), or a person entitled under a marriage settlement (s)—as well as for a purchaser on sale. The plea in substance admitted that the defendant had, as against

(i) *Russell v. Jackson* (1852), 10 Hare, 204; *Moss v. Cooper* (1861), 1 John. & H. 352.

(k) *Frame v. Dawson* (1807), 14 Ves. 386; *Caton v. Caton* (1866), 1 Ch App. 137, at p. 148; but compare *Maddison v. Alderson* (1883), 8 App. Cas. 467, per Lord SELBORNE, L.C., at p. 476.

(l) *Jerrard v. Saunders* (1794), 2 Ves. 451, per Lord LOUGHBOROUGH, L.C., at p. 458. The plea was originally regarded as a shield to the possession (*Strode v. Blackburne* (1796), 3 Ves. 222, per Lord LOUGHBOROUGH, L.C., at p. 225); and hence it only protected a purchaser who had got into possession. But this theory was discarded; and, indeed, the plea was usually required in the interest of an incumbrancer who had not obtained possession (*Wallwyn v. Lee* (1803), 9 Ves. 24, 32; *Joyce v. De Moleyns* (1845), 2 Jo. & Lat. 374).

(m) *Wallwyn v. Lee*, *supra*, at p. 31.

(n) *Basset v. Nosworthy* (1673), Cas. temp. Finch, 102; 2 White & Tud. L. C., 7th ed., p. 150.

(o) *Hcad v. Egerton* (1734), 3 P. Wms. 280; *Wallwyn v. Lee*, *supra*; *Joyce v. De Moleyns*, *supra*.

(p) *Bassett v. Nosworthy*, *supra*.

(q) *Hardingham v. Nicholls* (1745), 3 Atk. 304; *Tourville v. Naish* (1734), 3 P. Wms. 307; see *Molony v. Kernan* (1842), 2 Dr. & War. 31, 38. It was said that the denial of notice must be a denial of notice at the execution of the deed and at the payment of the money (*Story v. Windsor (Lord)* (1743), 2 Atk. 630; *Jones v. Thomas* (1733), 3 P. Wms. 243). But the material date is clearly that of the payment of the money, and in practice this is contemporaneous with or subsequent to the execution of the conveyance; see Ashb., p. 74, note (b).

(r) *Willoughby v. Willoughby* (1756), 2 Ves. Sen. 684; *Brace v. Marlborough (Duchess)* (1728), 2 P. Wms. 491.

(s) *Harding v. Hardrett* (1673), Cas. temp. Finch, 9; see *Lord Keeper v. Wyld* (1682), 1 Vern. 139. As to lessees, see *Re King's Leasehold Estates, Ex parte East of London Rail. Co.* (1873), L. R. 16 Eq. 521, 525.

the plaintiff, no title, and its effect was simply to deny that the plaintiff was entitled to the special remedies provided in equity. If he had a legal title he was at liberty to assert this in the proper forum (*t*).

85. Originally the plea was available against both equitable and legal claims (*a*). But it came to be restricted to cases where the defendant himself had the legal estate (*b*), or where the legal owner was suing, under the auxiliary jurisdiction in equity, to obtain assistance, such as discovery, in his action at law. Hence in later times the plea was not admitted against an equitable claimant (*c*), nor against a legal owner who sued on his legal title under the concurrent jurisdiction in equity (*d*), or who sued in equity for an equitable remedy—such as foreclosure—incident to his legal title (*e*). In other words, apart from the case where the plea was set up by a defendant who had the legal estate, it was only an absolute bar in equity when it was set up against a plaintiff who came into equity for assistance in an action at law without claiming substantial relief. If the plaintiff came into equity for substantial relief, and if his claim was based on a legal title, the court did not allow the plea to be a bar to the declaration of his right; but it so

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Changes in
the avail-
ability of the
plea.

(*t*) *Wallwyn v. Lee* (1803), 9 Ves. 24, at p. 31.

(*a*) There was a tendency at first to restrict the plea to cases where it was used as a defence to equitable claims; see *Burlace v. Cooke* (1677), Freem. (CH.) 24; *Rogers v. Seale* (1681), Freem. (CH.) 84. But its validity against legal claims came to be firmly established (*Jerrard v. Saunders* (1794), 2 Ves. 454; *Wallwyn v. Lee*, *supra*; *Joyce v. De Moleyns* (1815), 2 Jo. & Lat. 374; *A.-G. v. Wilkins* (1853), 17 Beav. 285).

(*b*) The position of the defendant was, of course, stronger if he himself had the legal estate or the best right to call for it (*Wilkes v. Bodington* (1707), 2 Vern. 599); and he could then maintain his priority for all purposes; see p. 81, *post*. But even without the legal estate he could use the plea for the purposes stated in the text; see *Colyer v. Finch* (1856), 5 II. L. Cas. 905, 920.

(*c*) *Phillips v. Phillips* (1861), 4 De G. F. & J. 208.

(*d*) This was ultimately held to be the effect of *Williams v. Lambe* (1791), 3 Bro. O. C. 264, where the plaintiff sued in equity for dower; and of *Collins v. Archer* (1830), 1 Russ. & M. 284, where the plaintiff sued in equity for an account of tithes. Apparently these cases were decided on the ground that the plea was no defence to a legal claim; but in fact they were instances of claims made under the concurrent jurisdiction, and they were explained subsequently on this ground (*Phillips v. Phillips*, *supra*). So soon, indeed, as substantial relief is asked for in equity, the plea is bound to be rejected, for it means that a *bona fide* purchaser for value can get a title from a vendor without title, an extension to equity of the principle of sale in market overt for which there is no warrant; see Ashb., p. 68. It follows that the plea can be no more a defence to an equitable claim than to a legal claim under the concurrent jurisdiction. In each case substantial relief is asked for, and the plea is therefore overruled. This appears to have been first perceived by Lord WESTBURY, L.C., in *Phillips v. Phillips*, *supra*, but his decision involved a breach with current notions, and it did not pass without protest; see Sugden, Vendors and Purchasers, 14th ed., p. 796. The course of the practice as to the plea was as follows: It was at first good against equitable claims; then against both legal and equitable claims; then against legal claims under the auxiliary jurisdiction only, and equitable claims; and ultimately only against legal claims under the auxiliary jurisdiction; but for some purposes it continued to be effective against legal claims under the concurrent jurisdiction; and it also remained effective against equities as distinguished from claims to equitable interests; see p. 78, *post*.

(*e*) *Finch v. Shaw, Colyer v. Finch* (1854), 19 Beav. 500, *per* ROMILLY, M.R., at p. 509; affirmed *sub nom. Colyer v. Finch*, *supra*.

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Notice.

Abolition of
 effect of the
 plea under
 the auxiliary
 jurisdiction.

far gave effect to the plea as to refuse to interfere with the defendant by depriving him of any advantage he had obtained, such as the possession of title deeds, and it would not order them to be given up (*f*). If, however, the plaintiff's claim was not based on a legal title, but was merely equitable, this distinction was not observed, and the court both declared who was entitled (*g*) and gave possession of the title deeds as well (*h*).

86. The effect of the Judicature Acts has been to give to all divisions of the High Court jurisdiction both at law and in equity, and consequently relief is now granted in each division in respect of legal titles upon the same principles as formerly governed the granting of relief to a legal title under the concurrent jurisdiction in equity. Hence the plea of purchase for value without notice is no bar to discovery in aid of a legal title (*i*), and, as before the Acts, it is no bar to discovery in aid of an equitable title. The court in which the action is brought gives the full appropriate relief to the legal or equitable title, and as incident to this relief it grants discovery (*k*). Moreover, since complete relief is to be given in the same court, it has become impracticable for the court to declare the title of the plaintiff, and at the same time leave him to recover the title deeds elsewhere. The court in declaring the title of the plaintiff to the land must declare also his right to the title deeds, and must order them to be delivered to him accordingly (*l*).

Plea still
 avails
 against a
 mere equity.

87. But the plea of purchase for value without notice still avails against a plaintiff who is not seeking to establish a claim to an equitable estate or interest, but merely to enforce an equity, such as an equity to set aside a conveyance. Ordinarily an assignee takes subject to all equities to which the assignor was subject; and this is the case where the assignee is a volunteer, and also where he is a purchaser for value if he has notice of the circumstances which raise the equity (*m*). But if he is a purchaser for value without notice, the equity cannot be asserted against him (*n*).

(*f*) "It is the practice of the court of equity to take nothing away from a purchaser for valuable consideration of that which he has bought and holds" (*Heath v. Crealock* (1874), 10 Ch. App. 22, *per* Lord CAIRNS, L.C., at p. 32); see *Heath v. Pugh* (1881), 6 Q. B. D. 315, C. A.; affirmed *sub nom. Pugh v. Heath* (1882), 7 App. Cas. 235. And hence the court would not order sale in lieu of foreclosure, since it could not order delivery of the title deeds to the purchaser (*Heath v. Crealock, supra*).

(*g*) *Stackhouse v. Jersey (Countess)* (1861), 1 John. & H. 721.

(*h*) *Newton v. Newton* (1868), L. R. 6 Eq. 135; reversed on facts (1868), 4 Ch. App. 143.

(*i*) *Ind, Coope & Co. v. Emmerson* (1887), 12 App. Cas. 300.

(*k*) *Ibid.*, *per* Lord SELBORNE, at p. 306.

(*l*) *Re Cooper, Cooper v. Vesey* (1882), 20 Ch. D. 611, C. A.; *Manners v. Mew* (1885), 29 Ch. D. 725, 732-735; *Re Ingham, Jones v. Ingham* (1893), 41 W. R. 235, at p. 237.

(*m*) "A purchaser with notice is liable to the same equity, stands in the same place, and is bound to do that which the vendor would be bound to do by the decree" (*Taylor v. Stibbert* (1794), 2 Ves. 437, 439).

(*n*) *Hamilton v. Royce* (1804), 2 Sch. & Lef. 315, 327; *Dunbar v. Tredennick* (1813), 2 Ball & B. 304, 319; *Garrard v. Frankel* (1862), 30 Beav. 445; *Bainbrigg v. Brown* (1881), 18 Ch. D. 188. But where the equity to set aside a conveyance is enforced against a purchaser, this will, as a rule, only be upon

Trustees in bankruptcy and judgment or execution creditors take only what was vested in the bankrupt or debtor; hence they do not rank as purchasers, but take subject to prior equities (*o*). A vendor's lien appears to be not a mere equity, but an equitable estate, and it avails against the purchaser and persons claiming under him, whether as volunteers or for value, other than a subsequent purchaser who takes the legal estate without notice (*p*); but the vendor may be postponed by his conduct (*q*).

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favours a
Purchaser
for Value
without
Notice.

SECT. 9.—Equities rank in Order of Time.

88. Where the legal estate is outstanding the priority of equitable interests is *primâ facie* governed by the rule *qui prior est tempore, potior est jure* (*r*). To depart from the rule there must be an act or omission by the prior equitable owner of such a character as to justify his title being postponed (*s*). The rule follows from the principle that equitable interests depend on the creation of a trust. The creation of a trust vests an estate or interest in the subject-matter of the trust in the *cestui que trust*; and this estate or interest cannot be postponed to a subsequent interest except upon grounds which justify the interference with it as a vested interest (*t*). Against the enforcement of the prior equitable estate the plea of purchase for value without notice is, in the absence of the legal estate, no defence (*a*). In the case of a chose in action or trust fund a subsequent equitable incumbrancer without notice can gain priority if he is the first to give notice to the debtor or trustee (*b*);

*Qui prior est
tempore,
potior est
jure.*

the terms of repaying to him the purchase-money (*Aldborough (Earl) v. Trye* (1840), 7 Cl. & Fin. 436, 463).

(*o*) *Whitworth v. Gaugain* (1846), 1 Ph. 728; *Kinderley v. Jervis* (1856), 22 Beav. 1, 27; *Beavan v. Oxford (Earl)* (1856), 6 De G. M. & G. 507, 517; *Madell v. Thomas & Co.*, [1891] 1 Q. B. 230, 238, C. A.; see titles BANKRUPTCY AND INSOLVENCY, Vol. II., p. 154; EXECUTION.

(*p*) *Mackreth v. Symmons* (1808), 15 Ves. 329; *Rice v. Rice* (1853), 2 Drew. 73; *Kettlewell v. Watson* (1882), 21 Ch. D. 685; affirmed (1884) 26 Ch. D. 501, C. A.; see *Fraill v. Ellis* (1852), 16 Beav. 350.

(*q*) *Rice v. Rice*, *supra*; and see p. 80, *post*.

(*r*) "Wherever the legal estate is standing out, either in a prior incumbrancer, or in such a trustee as against whom the puisne incumbrancer has not the best right to call for the legal estate, the whole title and consideration is in equity, and then the general maxim must take place, *qui prior est tempore, potior est jure*" (*Willoughby v. Willoughby* (1756), 1 Term Rep. 763, *per* Lord HARDWICKE, L.C., at p. 173; see *Brace v. Marlborough (Duchess)* (1728), 2 P. Wms. 491, 496; *Phillips v. Phillips* (1861), 4 De G. F. & J. 208, 215). In *Rice v. Rice* (1853), 2 Drew. 73, KINDERSLEY, V.-C., spoke of the rule as being the rule of last resort, when there was no other ground for preferring one equity to the other; but in fact it is the *primâ facie* rule, and is only to be departed from on sufficient grounds.

(*s*) *Taylor v. London and County Banking Co., London and County Banking Co. v. Nixon*, [1901] 2 Ch. 231, C. A., *per* STIRLING, L.J., at p. 260.

(*t*) *Cory v. Eyre* (1863), 1 De G. J. & Sm. 149, *per* TURNER, L.J., at p. 167. "Every conveyance of an equitable interest is an innocent conveyance, that is to say, the grant of a person entitled merely in equity passes only that which he is justly entitled to, and no more" (*Phillips v. Phillips*, *supra*, *per* Lord WESTBURY, L.C., at p. 215; *Cave v. Cave* (1880), 15 Ch. D. 639, 646).

(*a*) *Phillips v. Phillips*, *supra*; *Re Vernon, Ewens & Co.* (1886), 33 Ch. D. 402, C. A.; and see p. 77, *ante*.

(*b*) See p. 103, *post*.

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Equities
rank in
Order of
Time.

Postponement
of equitable
claimant.

but this doctrine does not apply to land, and a subsequent incumbrancer does not gain priority by giving notice to the person in whom the legal estate is vested (c).

89. In a contest between an equitable incumbrancer and a legal mortgagee, the latter will not be postponed on the ground of his conduct unless he has been guilty either of direct fraud, or of such gross negligence as would render it unjust to deprive the prior incumbrancer of his priority (d). As between equitable claims the question is, whether one party has acted in such a way as to justify him in insisting on his equity as against the other (e), and it is possible that a less degree of negligence will suffice to postpone an equitable than a legal incumbrancer (f). But whatever may be the abstract test, an equitable mortgagee who is entitled to the title deeds as part of his security, and who omits to get them, is postponed to a subsequent equitable mortgagee who takes the deeds without notice (g); and similarly, where the prior mortgagee, having obtained the deeds, parts with them, or allows them unduly to remain out of his possession, and thereby enables the subsequent advance to be obtained (h).

On the other hand, an equitable owner or incumbrancer whose interest is such that he does not require the possession of the title deeds to support it—as in the ordinary case of trustee and *cestui que trust*, where the deeds are with the trustee—cannot be charged with any negligence if the trustee makes use of his possession of the deeds to commit a fraud, and is not postponed to a subsequent equitable owner who has parted with his money on the faith of the title deeds (i); unless the trustee purports to act under a

(c) *Jones v. Gibbons* (1804), 9 Ves. 407; *Jones v. Jones* (1838), 8 Sim. 633; *Wilmot v. Pike* (1845), 5 Hare, 14; *Re Richards, Thumber v. Richards* (1890), 45 Ch. D. 589; *Hopkins v. Hemsworth*, [1898] 2 Ch. 347. This applies to equitable interests in leaseholds (*Wiltshire v. Rabbits* (1844), 14 Sim. 76; *Union Bank of London v. Kent* (1888), 39 Ch. D. 238, C. A.; and see *Taylor v. London and County Banking Co., London and County Banking Co. v. Nixon*, [1901] 2 Ch. 231, C. A.)

(d) *Oliver v. Hinton*, [1899] 2 Ch. 264, 274, C. A.; *Northern Counties of England Fire Insurance Co. v. Whipp* (1884), 26 Ch. D. 482, C. A.; *Manners v. Mew* (1883), 29 Ch. D. 725. The omission to inquire for title deeds will postpone a legal mortgagee to a prior equitable estate and will also postpone him to a subsequent equitable interest (*Walker v. Linom*, [1907] 2 Ch. 104, 114). In *Mocatta v. Murgatroyd* (1717), 1 P. Wms. 393, a first mortgagee who attested the second mortgage was postponed for not giving to the second mortgagee notice of his mortgage. But it has been recognised that this went too far (see the reporter's note).

(e) *National Provincial Bank of England v. Jackson* (1886), 33 Ch. D. 1, C. A., per COTTON, L.J., at p. 13.

(f) In *Taylor v. Russell*, [1891] 1 Ch. 8, C. A., KAY, J., at p. 17, considered that the test was the same in each case; but this was doubted by Lord MACNAGHTEN in the House of Lords, [1892] A. C. 244, at p. 262; see *Taylor v. London and County Banking Co., London and County Banking Co. v. Nixon*, *supra*, at p. 260.

(g) *Farrand v. Yorkshire Banking Co.* (1888), 40 Ch. D. 182; *Re Castell and Brown, Ltd., Roper v. Castell and Brown, Ltd.*, [1898] 1 Ch. 315; *Re Valletort Sanitary Steam Laundry Co., Ltd., Ward v. Valletort Sanitary Steam Laundry Co., Ltd.*, [1903] 2 Ch. 654.

(h) *Waldron v. Sloper* (1852), 1 Drew. 193.

(i) *Cory v. Eyre* (1863), 1 De G. J. & Sm. 149, per TURNER, L.J., at p. 169;

power vested in him—such as a trust or* power of sale—and conveys the land by a deed containing a proper receipt clause (*k*). If, however, the owner of property hands over title deeds to an agent in order to enable him to dispose of the property, but subject to restrictions, and the agent creates an interest in disregard of the restrictions, then the owner, whether his estate is legal (*l*) or equitable, is bound by the act of his agent, and is postponed to the interest thus created (*m*).

SECT. 9.
Equities
rank in
Order of
Time.

SECT. 10.—*The Legal Estate gives Priority.*

90. When there is an existing equitable interest in property, and an interest is subsequently created in favour of a purchaser for value without notice of the earlier interest (*n*), and such purchaser either gets in the legal estate at the time of his purchase, or, in certain circumstances, after his purchase, his possession of the legal estate gives him priority over the earlier equitable owner (*o*). The equities being equal except as regards time, the legal estate, properly got in by the owner of the later equitable interest, entitles him to hold the property either as absolute owner, or until his mortgage is discharged, as the case may be (*p*). There is, in the absence of notice or of any other circumstance to postpone him, other than that of being later in point of time, no equity attaching upon his conscience by virtue of which the court will deprive him of his legal advantage; and the subsequent purchaser is entitled to the like priority if he has the better right to call for a conveyance of the legal estate (*q*). The importance which courts of equity, in

The legal
estate gives
priority

Shropshire Union Railways and Canal Co. v. R. (1875), 11 R. 7 H. L. 496, per Lord CAIRNS, L.C., at p. 507; *Carritt v. Real and Personal Advance Co.* (1889), 42 Ch. D. 263; see *Newton v. Newton* (1868), 4 Ch. App. 143.

(*k*) *Lloyds Bank, Ltd. v. Bullock*, [1896] 2 Ch. 192; but not where, the power being to sell only, the transaction is in effect one of mortgage (*Cupell v. Winter*, [1907] 2 Ch. 376).

(*l*) *Perry Herrick v. Atwood* (1857), 2 De G. & J. 21; *Brocklesby v. Temperance Building Society*, [1895] A. C. 173.

(*m*) *Rimmer v. Webster*, [1902] 2 Ch. 163; see *Truman v. Attenborough* (1910), 54 Sol. Jo. 682; and title AGENCY, Vol. I., pp. 201, 205.

(*n*) A purchaser who has notice of an equitable interest must not rely on the assurance of the vendor that it has been got in, but must ascertain this for himself (*Jared v. Clements*, [1903] 1 Ch. 428, C. A.). A contract which is merely personal and collateral does not create an equitable interest in the land so as to bind a purchaser taking with notice of it (*Phillips v. Miller* (1875), 11 R. 10 C. P. 420, Ex. Ch.); but a hire-purchase agreement as to machinery to be affixed to the land is not such a contract, and a purchaser with notice, or who has only an equitable estate, takes subject to it (*Re Samuel Allen & Sons, Ltd.*, [1907] 1 Ch. 575). The term "purchaser for value" includes a mortgagee (*Berwick & Co. v. Price*, [1905] 1 Ch. 632).

(*o*) *Marsh v. Lee* (1670), 2 Vent. 337. This is "by reason of that force this court necessarily and rightly allows to the common law and to legal titles" (*Wortley v. Birkhead* (1754), 2 Ves. Sen. 571, per Lord HARDWICKE, L.C., at p. 574).

(*p*) *Bates v. Johnson* (1859), John. 304, 314; *Bailey v. Barnes*, [1894] 1 Ch. 25, 36, C. A.

(*q*) *Wilkes v. Bodington* (1707), 2 Vern. 599. This is so, for instance, where the legal estate is held upon trust for the subsequent purchaser (*Stanhope v. Verney (Earl)* (1761), 2 Eden, 81; *Maundrell v. Maundrell* (1805), 10 Ves. 246, 270; *Buckle v. Mitchell* (1812), 18 Ves. 100; *Wilmot v. Pike* (1845), 5 Hare, 14; *Taylor v. London and County Banking Co., London and County Banking Co.*

SECT. 10.
The Legal
Estate gives
Priority.

Entire want
 of title in
 vendor.

Purchaser
 with notice
 from pur-
 chaser with-
 out notice.

Legal estate
 got in at time
 of purchase

Legal estate
 got in after
 purchase.

deciding priorities, attach to the legal estate, is an instance of the general principle that equity follows the law (*r*).

Moreover, the legal estate affords protection to a purchaser, not only where his title is impeached by reason of some secret act done by the vendor whereby he deprived himself of the right to dispose of the estate, but also where the vendor never had such right, but induced the purchaser by falsehood as to a fact of title to believe that he had the right; provided that the pretended title was clothed with possession, and that the falsehood could not have been discovered by reasonable diligence (*s*). The legal estate protects both against secret incumbrances on the vendor's title and against entire want of title in the vendor (*t*).

A purchaser with notice can protect himself by getting in the legal estate from a purchaser who took without notice (*u*), unless the later purchaser is a trustee buying back trust property which he has sold, or there are other circumstances of fraud (*u*).

91. If the later purchaser obtains a conveyance of the legal estate at the time of his purchase, and can support the plea of purchase for valuable consideration without notice, then the legal estate affords him an absolute protection (*b*). He does not lose the protection because the person conveying to him is a trustee holding upon an express trust; and if the deeds offered to, and properly accepted by, him do not give notice of the trust, he is not deemed to take with notice because he subsequently uses as a link in his title a deed which discloses the trust but which was unknown to him when he purchased (*c*). The doctrine is also available for a trustee with the legal estate who makes an advance to the *cestui que trust* without notice of a prior charge on the equitable interest; the legal estate gives him priority (*d*).

92. When a purchaser does not get in the legal estate at the time of his purchase, he may get it in subsequently from any person who is able to convey it to him without committing a breach of trust, and he thereby gains priority over any earlier equitable

v. Nixon, [1901] 2 Ch. 231, 263, C. A.). The legal estate is not available where it passes by estoppel only, and where the estoppel is not binding on the prior claimant (*Eyre v. Burmester* (1862), 10 H. L. Cas. 90).

(*r*) See p. 68, *ante*.

(*s*) *Jones v. Poultes* (1834), 3 My. & K. 581; *Yeung v. Young* (1867), L. R. 3 Eq. 801.

(*t*) The plea of purchase for value without notice required an allegation of possession by the person who conveyed to the defendant, but not of his actual title; it was enough that he pretended to be entitled (*Mitford on Pleadings*, p. 275, where the essentials of the plea are given; *Ashb.*, p. 74; *Pilcher v. Rawlins* (1872), 7 Ch. App. 259, 266).

(*u*) *Lowther v. Carlton* (1741), 2 Atk. 242; *A.-G. v. Biphosphated Guano Co.* (1878), 11 Ch. D. 327, 334, C. A.; *Kettlewell v. Watson* (1882), 21 Ch. D. 685, 707; *Re Handman and Wilcox's Contract*, [1902] 1 Ch. 599, 609, C. A.

(*a*) *Barrow's Case* (1880), 14 Ch. D. 432, 445, C. A.

(*b*) *Pilcher v. Rawlins*, *supra*, at p. 269.

(*c*) *Pilcher v. Rawlins*, *supra*, overruling *Carter v. Carter* (1857), 3 K. & J. 617.

(*d*) *Newman v. Newman* (1886), 28 Ch. D. 674.

interest of which he had no notice at the time of his purchase (e). It is immaterial that he has notice when he gets in the legal estate (f). Indeed, his having then received notice is usually the reason for his desiring to get in that estate (g). He may get it in, although proceedings have been commenced to establish the priorities, at any time before an order for that purpose is made (h). The most usual case of the legal estate being got in is when a third mortgagee, who has advanced his money without notice of a second mortgage, takes a transfer of the first mortgage with a conveyance of the legal estate. He can then squeeze out the second mortgagee, and hold the property until the first and third mortgages are both satisfied (i); at any rate if the first mortgagee has, at the date of the transfer, no notice of the second mortgage, and apparently, too, though he has notice (k). This doctrine is known as the *tabula in naufragio* (l).

SECT. 10.
The Legal
Estate gives
Priority.

93. If the holder of the legal estate is a trustee for a person having a prior equitable interest, a subsequent purchaser cannot avail himself of the legal estate if he gets it in after notice of the trust, although he paid his money before notice. By taking a conveyance with notice of the trust he himself becomes the trustee, and must not, to get a plank to save himself, be guilty of a breach of trust (m). A satisfied mortgagee is a trustee for this purpose;

Legal owner
a trustee.

(e) *Marsh v. Lee* (1670), 2 Vent. 337; *Brace v. Marlborough (Duchess)* (1728), 2 P. Wms. 491; *Bailey v. Barnes*, [1894] 1 Ch. 25, C. A.

(f) *Blackwood v. London Chartered Bank of Australia* (1874), L. R. 5 P. C. 92, 111.

(g) *Wortley v. Birkhead* (1754), 2 Ves. Sen. 571, 574; *Willoughby v. Willoughby* (1756), 2 Ves. Sen. 684.

(h) *Brace v. Marlborough (Duchess)*, *supra*; *Wortley v. Birkhead*, *supra*; *Bailey v. Barnes*, *supra*, at p. 37.

(i) *Brace v. Marlborough (Duchess)*, *supra*.

(k) *Peacock v. Burt* (1834), 4 L. J. (CH.) 33. If notice to the first mortgagee is immaterial, then the first mortgagee is able to prefer which of the second and third mortgagees he pleases. In *Bates v. Johnson* (1859), John. 304, 314, this was stated by WOOD, V.-C., to be the rule, but he observed that the result was contrary to the ordinary doctrine of the court. It was treated as law, though again disapproved of, in *West London Commercial Bank v. Reliance Permanent Building Society* (1885), 29 Ch. D. 934, C. A. In *Peacock v. Burt*, *supra*, the third mortgagee had no notice of the second mortgage when he advanced his money and took a transfer of the first mortgage, but the first mortgagee had notice. The third mortgagee was allowed priority over the second; see the remarks on this in *West London Commercial Bank v. Reliance Permanent Building Society*, *supra*, per LINDLEY, L.J., at p. 963.

(l) *Brace v. Marlborough (Duchess)*, *supra*; *Wortley v. Birkhead*, *supra*; *Phillips v. Phillips* (1861), 4 De G. F. & J. 208; see the statement of the doctrine by Lord SELBORNE, L.C., in *Blackwood v. London Chartered Bank of Australia*, *supra*. The court was formerly not very particular as to the means by which the legal estate was got in (see *Fagg's (Sir John) Case* (1570), cited in *Huntingdon (Earl) v. Greenville* (1682), 1 Vern. 49, at p. 52; *Harcourt and Knowels' Case* (undated), cited in *Hitchcock v. Sedgwick* (1690), 2 Vern. 156, at p. 159; *Carter v. Carter* (1857), 3 K. & J. 617, 636); and see title MORTGAGE.

(m) *Saunders v. Dehew* (1692), 2 Vern. 271; *Allen v. Knight* (1846), 5 Hare, 272; *Mumford v. Stohwasser* (1874), L. R. 18 Eq. 556, 563; *Harpam v. Shacklock* (1881), 19 Ch. D. 207, 214, C. A.; *Taylor v. Russell*, [1891] 1 Ch. 8, 29, C. A.; *Perham v. Kempster*, [1907] 1 Ch. 373. According to the judgment of WOOD, V.-C., in *Carter v. Carter*, *supra*, at p. 639, and to a dictum of JESSEL, M.R., in *Mumford v. Stohwasser*, *supra*, the purchaser loses the protection if the trustee has notice, but he himself has not. But there is nothing in such a case

SECT. 10.
The Legal
Estate gives
Priority.

he holds the legal estate in trust for the first equitable owner, and cannot confer priority on a subsequent purchaser by conveying to him (n). But a trust or equity, to affect the conscience of him who has got in the legal estate, must be a trust or equity not in favour of some third person, but in favour of the person against whom the legal estate is set up (o).

Where there is a mortgage to secure present and future advances, the mortgagee cannot, by virtue of his legal estate, claim priority for advances made after he has had notice of a second mortgage (p).

SECT. 11.—Notice.

Actual notice
to principal
or agent.

94. Notice of a prior dealing with, or other circumstance affecting, property which will defeat a plea of purchase for value without notice may be either actual or constructive. Actual notice to the party himself exists where knowledge of the dealing or circumstance is brought directly home to him (q). And under this head is included actual notice to an agent—usually a solicitor—employed in the transaction. Such notice is imputed to the principal, and it affects him whether communicated to him or not (r). But an exception is admitted where there has been fraud on the part of the agent in the matter. Although actual communication to the principal is not required, yet fraud excludes in practice

Exception
in case of
fraud.

to affect the conscience of the purchaser, and he should not lose his legal advantage. This extension of the doctrine is referred to doubtfully in *Bailey v. Barnes*, [1894] 1 Ch. 25, C. A.

(n) Originally a subsequent incumbrancer was allowed to protect himself by getting in a satisfied term (*Willoughby v. Willoughby* (1756), 2 Ves. Sen. 684); but later this could only be done where the term was unsatisfied (*Maundrell v. Maundrell* (1805), 10 Ves. 246, 270; *Ex parte Knott* (1806), 11 Ves. 609, 613; *Carter v. Carter* (1837), 3 K. & J. 617, 639, 640; *Prosser v. Rice* (1859), 28 Beav. 68, 74; *Pitcher v. Rawlins* (1872), 7 Ch. App. 268; *Mumford v. Stohwasser* (1874), L. R. 18 Eq. 556, 562; *Taylor v. Russell*, [1891] 1 Ch. 8, 29, C. A. Satisfied terms can no longer exist, but the same principle applies to satisfied legal mortgages (*Carter v. Carter*, *supra*; *Taylor v. Russell*, *supra*).

(o) *Taylor v. Russell*, [1891] 1 Ch. 8, C. A.; [1892] A. C. 244, 253, H. L., and see further title MORTGAGE.

(p) *Hopkinson v. Rolt* (1861), 9 H. L. Cas. 514; as to the effect of appropriation of payments under the rule in *Devaynes v. Noble*, *Clayton's Case* (1816), 1 Mer. 529, 572, on the first mortgagee's security, see *Deeley v. Lloyds Bank*, [1910] 1 Ch. 648, C. A.

(q) For actual notice to be binding it must be given by a person interested in the property and in the course of the negotiation (*Barnhart v. Greenshields* (1853), 9 Moo. P. C. C. 18, 36); and where it is to a corporation, it must be given to an official as such, see *Simpson v. Molsons' Bank*, [1895] A. C. 270, P. C.

(r) *Espin v. Pemberton* (1859), 3 De G. & J. 547, *per* Lord CHELMSFORD, L.C., at p. 554, who pointed out that notice imputed in this way, though sometimes called constructive notice, is more conveniently classed as actual notice; compare *Cave v. Cave* (1880), 15 Ch. D. 639, 643; *Berwick & Co. v. Price*, [1905] 1 Ch. 632, 639. Notice to an agent is notice to the principal, since otherwise notice might be avoided in every case by employing agents (*Sheldon v. Cox* (1764), 2 Eden, 224; *Boursot v. Savage* (1866), L. R. 2 Eq. 134, 142; *Rolland v. Hart* (1871), 6 Ch. App. 678, 681). The doctrine is not confined to notice to solicitors (*Merry v. Abney* (1663), 1 Cas. in Ch. 38). If the agent is acting within the scope of his authority, the most positive proof that he did not communicate notice to his principal does not exempt the latter (*Bawden v. London, Edinburgh and Glasgow Assurance Co.*, [1892] 2 Q. B. 534, C. A.). See also title AGENCY, Vol. I., p. 215; and *Re Payne & Co., Ltd.*, *Young v. Payne & Co.*, [1904] 2 Ch. 608.

all probability of communication, and hence the knowledge of the fraudulent agent is not imputed to the principal (s).

Notice to the agent will not be imputed to the principal unless it is of a matter which was material to the particular transaction, and which it was the agent's duty to communicate to his principal (t); nor will it be imputed unless it comes to the knowledge of the agent as such in the same transaction with respect to which the question of notice to his principal arises (u).

Where a transaction takes place between two companies which have a common officer, and the common officer is concerned in the transaction, knowledge acquired by him as officer of one company will not be imputed to the other company unless it was his duty, as officer of the first company, to communicate that knowledge to the other company, and his duty, as officer of the second company, to receive notice (a); and as regards matters of internal regulation,

SECT. 11.

Notice.

Notice to agent must be in same transaction.

Knowledge of common officer of two companies.

(a) *Kennedy v. Green* (1834), 3 My. & K. 699, 720; *Espin v. Pemberton* (1859), 3 De G. & J. 547, 555; *Thompson v. Cartwright* (1863), 33 Beav. 178, 185; *Waddy v. Gray* (1875), L. R. 20 Eq. 238, 251; see *Re Southampton's (Lord) Estate*, *Allen v. Southampton (Lord)*, *Banfather's Claim* (1880), 16 Ch. D. 178; *Re Cousins* (1886), 31 Ch. D. 671; and compare *Marjoribanks v. Hovenden* (1843), 6 I. Eq. R. 238. But there must be fraud independently of the mere non-disclosure of the prior title (*Atterbury v. Wallis* (1856), 8 De G. M. & G. 454, 466, C. A.). "It must be made out that distinct fraud was intended in the very transaction, so as to make it necessary for the solicitor to conceal the facts from his client in order to defraud him" (*Rolland v. Hart* (1871), 6 Ch. App. 678, per Lord HATHERLEY, L.C., at p. 683); see *Cave v. Cure* (1880), 15 Ch. D. 639, 644; *Berwick & Co. v. Price*, [1905] 1 Ch. 632, 640.

(t) Thus it is not material to a transaction of transfer of mortgage that the transferee's solicitor knows of a matter which would, if known to the transferee, prevent a further advance (*Wyllie v. Pollen* (1863), 3 De G. J. & Sm. 596, 601); see *Espin v. Pemberton*, *supra*, at p. 554; *Rolland v. Hart*, *supra*, at p. 682.

(u) Conveyancing Act, 1882 (45 & 46 Vict. c. 39), s. 3 (1) (ii.); see *Thorne v. Heard and Marsh*, [1895] A. C. 495, 501. The statute restored the rule laid down by Lord HARDWICKE, L.C., in *Warrick v. Warrick* (1715), 3 Atk. 291, for the reason that "otherwise it would make purchasers' and mortgagees' titles depend altogether on the memory of their counsellors and agents, and oblige them to apply to persons of less eminence as counsel, as not being so likely to have notice of former transactions"; see *Worsley v. Scarborough (Earl)* (1746), 3 Atk. 392. The restriction to the same transaction had, previously to the statute, been disregarded, and the client was affected by notice to his solicitor where the one transaction was closely followed by and connected with the other, or where it was clear that the previous transaction was present to the mind of the solicitor when engaged in the later transaction (*Hargreaves v. Rothwell* (1836), 1 Keen, 154, 159; see *Fuller v. Bennett* (1843), 2 Hare, 391, 403; *Spencer v. Topham* (1856), 2 Jur. (n. s.) 865).

The statute put an end to this application of the doctrine (*Re Cousins* (1886), 31 Ch. D. 671, 677); it also put an end to the doctrine that where the same solicitor was acting for both parties to a sale or mortgage, the knowledge of the vendor or mortgagor was imputed to him and through him to his other client (*Re Cousins*, *supra*). *Boursot v. Savage* (1866), L. R. 2 Eq. 134, so far as it rested on this doctrine, is not now an authority (*Taylor v. London and County Banking Co.*, *London and County Banking Co. v. Nixon*, [1901] 2 Ch. 231, 258, C. A.). The mere fact that only one solicitor is employed in a matter does not make him the agent of both parties (*Perry v. Holl* (1860), 2 De G. F. & J. 38). But where a client has placed himself entirely in the hands of his solicitor, and constituted him his general agent in a series of transactions, the knowledge of the solicitor is imputed to him (*Dixon v. Finch*, [1900] 1 Ch. 736, C. A.).

(a) *Re Hampshire Land Co.*, [1896] 2 Ch. 743; *Re Fenwick, Stobart & Co., Ltd.*, *Deep Sea Fishery Co.'s Claim*, [1902] 1 Ch. 507.

SECT. 11. the second company is entitled to assume that the first company
Notice. has acted regularly (b).

Constructive
notice.

95. Although a purchaser has no actual knowledge, by himself or by his agent, of a matter prejudicially affecting his vendor's title, yet in certain circumstances he is treated as though he had notice, and he is then said to have constructive notice of the matter (c). Before the Conveyancing Act, 1882 (d), the cases in which such notice might be established fell under three heads: first, where the purchaser omitted to make usual and proper inquiries into the vendor's title; secondly, where he omitted to follow up an inquiry suggested by some matter of which he had actual notice; and thirdly, where he designedly abstained from inquiry for the purpose of avoiding notice (e). In any of these cases the purchaser was held to be affected with notice of what he would have discovered if he had made the inquiries which a prudent purchaser would have made in the circumstances. Constructive notice has been defined as the knowledge which the courts impute to a person upon a presumption of the existence of the knowledge so strong that it cannot be allowed to be rebutted, either from his knowing something which ought to have put him upon further inquiry, or from his wilfully abstaining from inquiry to avoid notice (f).

(b) *Royal British Bank v. Turquand* (1856), 6 E. & B. 327, Ex. Ch.; *Re Hampshire Land Co.*, [1896] 2 Ch. 743.

(c) See *The Birnam Wood*, [1907] P. 1, C. A., per FARWELL, L. J., at p. 14: "The courts have of late years been unwilling to apply the principle of constructive notice so as to fix companies or persons with knowledge of facts of which they had no knowledge whatever."

(d) 45 & 46 Vict. c. 39.

(e) See the classification by WIGRAM, V.-C., in *Jones v. Smith* (1841), 1 Hare, 43, 55, which, however, does not expressly state the first case. This requires to be included; see *Dart, Vendors and Purchasers*, 7th ed., Vol. II., pp. 896—908; *Wilson v. Hart* (1866), 1 Ch. App. 463, 467; and it covers to a large extent, if not entirely, the third class. Constructive notice has been based on the purchaser's gross negligence (*Ware v. Egmont (Lord)* (1854), 4 De G. M. & G. 460, per Lord CRANWORTH, L.C.); and this may be evidence of fraud (*West v. Reid* (1843), 2 Hare, 249, per WIGRAM, V.-C., at p. 257, explaining his judgment in *Jones v. Smith*, *supra*). But the doctrine does not depend on fraudulent intention (*Jones v. Williams* (1857), 24 Beav. 47, 59). Notice that a draft deed (which is subsequently executed) has been prepared is not, in general, constructive notice of its execution (*Cothay v. Sydenham* (1788), 2 Bro. C. C. 391). As to notice of a settlement, see *Williams v. Williams* (1881), 17 Ch. D. 437.

(f) *Espin v. Pemberton* (1859), 3 De G. & J. 547, per Lord CHELMSFORD, L.O., at p. 554. It was frequently said that the doctrine of constructive notice was not to be extended; see *Ware v. Egmont (Lord)*, *supra*. Where notice is relied on to prevent priority by registration under the Deeds Registration Acts, this must be not merely constructive, but such direct notice as to make it fraudulent in the purchaser to disregard it (*Le Neve v. Le Neve* (1747), Amb. 436; 2 White & Tud. L. C., 7th ed., 175; *Jolland v. Stainbridge* (1797), 3 Ves. 478; *Wyatt v. Barwell* (1816), 19 Ves. 435; *Robinson v. Woodward* (1851), 4 De G. & Sm. 562; *Bradley v. Riches* (1878), 9 Ch. D. 189; see *Crowly v. Bergtheil*, [1899] A. C. 374, 382, P. C.).

Under the Yorkshire Registries Act, 1884 (47 & 48 Vict. c. 54), s. 14, a subsequent purchaser or incumbrancer who registers first does not lose the priority thus gained by actual or constructive notice, but only by fraud; see *Battison v. Hobson*, [1896] 2 Ch. 403; compare *Robinson v. Woodward*, *supra*. An interest not created by a document registrable under a Registry Act does

SECT. 11.

Notice

Constructive notice under the Conveyancing Act, 1882.

Under the Conveyancing Act, 1882 (g), a purchaser is not, apart from actual knowledge in himself or his agent, to be prejudicially affected by notice of any instrument, fact, or thing unless it would have come to his knowledge, or to the knowledge of his solicitor or other agent, if such inquiries and inspections had been made as ought reasonably to have been made by him or by the solicitor or other agent (h). The word "ought" in this connection does not import a duty or obligation, for a purchaser is under no duty to the possible holder of a latent title or security to make any inquiry. The expression "ought reasonably" means as a matter of prudence, having regard to what is usually done by men of business in similar cases (i). The statute, in effect, only states the previous law, though its negative form shows that a restriction, rather than an extension, of the doctrine of notice was intended (k).

not lose priority by the mere registration of a subsequent registrable incumbrance (*Re Culcott and Elvin's Contract*, [1898] 2 Ch. 460 (on the Middlesex Registry Act, 1708 (7 Ann. c. 20)); see *White v. Neaylon* (1886), 11 App. Cas. 171, P. C.); but the Yorkshire Registries Act, 1884 (47 & 48 Vict. c. 51), applies to a charge by deposit of deeds unaccompanied by any memorandum (*Ballison v. Hobson*, [1896] 2 Ch. 403). Registration under the Patents and Designs Act, 1907 (7 Edw. 7, c. 29), s. 71, is subject to equities of which the assignee had notice (*New Lion Tyre and Cycle Co. v. Spilsbury*, [1898] 2 Ch. 484, C. A.); but a mortgagee of a ship or share in a ship, who registers his mortgage, is not affected by notice of prior unregistered equities (*Black v. Williams*, [1895] 1 Ch. 408); and see title SHIPPING AND NAVIGATION.

(g) 45 & 46 Vict. c. 39. "Purchaser" includes a mortgagee and lessee (*ibid.*, s. 1 (4) (ii.)); see *Hunt v. Luck*, [1902] 1 Ch. 428, 433, C. A.; and compare *Wilson v. Hart* (1866), 1 Ch. App. 463, 467.

(h) Conveyancing Act, 1882 (45 & 46 Vict. c. 39), s. 3 (1) (i.), (ii.); and see title SALE OF LAND.

(i) *Bailey v. Barnes*, [1894] 1 Ch. 25, C. A.; compare *Agra Bank, Ltd. v. Hurry* (1874), L. R. 7 H. L. 135, 157; *Gainsborough (Earl) v. Watcombe Terra Cotta Clay Co.* (1885), 54 L. J. (CH.) 991.

(k) *Bailey v. Barnes*, *supra*. A purchaser is bound, at the risk of being affected with constructive notice, to make the usual full investigation of title, notwithstanding that he is debarred by agreement from doing so (*Peto v. Hammond* (1861), 30 Beav. 495, 507; *Re Cox and Neve's Contract*, [1891] 2 Ch. 109, 117); or is prevented by statute (which he is at liberty to exclude by agreement) (*Patman v. Harland* (1881), 17 Ch. D. 353; *Mogridge v. Clupp*, [1892] 3 Ch. 382, C. A.); that is, if in the circumstances he acts unreasonably in not excluding the statute (*Imray v. Oakshette*, [1897] 2 Q. B. 218, C. A.). And he is bound to follow up any inquiries suggested by matters of which he has actual notice. "In all cases where the purchaser cannot make out a title but by a deed which leads him to another fact, the purchaser shall not be a purchaser without notice of that fact, but shall be presumed cognisant thereof; for it is *crassa negligentia* that he sought not after it" (*Moore v. Bennett* (1678), 2 Cas. in Ch. 246; see *Bisco v. Banbury (Earl)* (1676), 1 Cas. in Ch. 287, 291; *Coppin v. Fernyhough* (1788), 2 Bro. O. O. 291; *Malpas v. Ackland* (1827), 3 Russ. 273).

This rule still holds good, and notice of a deed within the period for which the title should be investigated, which affects the land, is notice both of its contents, and of the facts which would be disclosed if its production was insisted on (see *Peto v. Hammond*, *supra*); but where a deed may or may not affect the land, and the purchaser inquires whether it does, and receives an answer in the negative, he is not bound to inquire further (*Jones v. Smith* (1841), 1 Hare, 43; (1843), 1 Ph. 244; see *English and Scottish Mercantile Investment Co. v. Brunton*, [1892] 2 Q. B. 700, C. A.). Notice that the land is in the possession of a tenant puts the purchaser on inquiry as to the terms of the holding, and he has constructive notice of the tenant's rights (*Taylor v. Stibbert* (1794),

SECT. 11.
Notice.

Where the effect of constructive notice would be to invalidate a transaction, such as a sale under the Settled Land Acts, the court will not readily apply the doctrine (*l*).

Part III.—Equitable Interests in Property.

SECT. 1.—Nature of Equitable Estates.

SUB-SECT. 1.—Trust Estates.

Equitable
estates under
trusts.

96. Equitable estates in real property arise either under trusts or mortgages. An equitable estate arises under a trust when by virtue of a deed, will, or other instrument the legal owner—the trustee—is bound to hold the property for the benefit of another, the *cestui*

2 Ves. 437; *Allen v. Anthony* (1816), 1 Mer. 282, *Maux v. Matthy* (1818), 2 Swan. 277, 281, including an agreement for sale to him (*Daniels v. Davison* (1809), 16 Ves. 249, 251; (1811), 17 Ves. 433; *Hunt v. Luck*, [1902] 1 Ch. 428, C. A.). But this only refers to equities between the purchaser and tenant when the legal estate has passed; not to questions between vendor and purchaser before completion (*Caballero v. Henty* (1874), 9 Ch. App. 447; see *Phillips v. Miller* (1875), L. R. 10 C. P. 420, Ex. Ch.). And the purchaser is not affected with notice of the title of a person, other than the vendor, under whom the tenant claims. A person neglecting to inquire to whom the tenant pays rent is not affected with notice of the interest of the tenant's lessor; though if he has actual notice that an adverse claimant is in receipt of rent, he is affected with notice of any interest such claimant may have (*Barnhart v. Greenshields* (1853), 9 Moo. P. C. C. 18, 34; *Knight v. Bowyer* (1858), 2 De G. & J. 421, C. A.; *Hunt v. Luck*, *supra*); *Mumford v. Stohwasser* (1874), L. R. 18 Eq. 556, on this point is overruled.

A purchaser is bound to inquire for the title deeds and to call for their production (*Birch v. Ellames* (1794), 2 Anst. 427; *Worthington v. Morgan* (1849), 16 Sin. 547; *Berwick & Co. v. Price*, [1905] 1 Ch. 632, 638; *Re Greer, Greer v. Greer*, [1907] 1 I. R. 57); but he may accept a satisfactory reason for their non-production, and is not then affected with notice of the title of a third person who in fact holds them (*Plumb v. Fluit* (1791), 2 Anst. 432; *Hewitt v. Loosemore* (1851), 9 Haro. 449, 457; *Espin v. Pemberton* (1859), 3 De G. & J. 547, 556; see *Spencer v. Clarke* (1878), 9 Ch. D. 137). The statement that they are at a bankers for safe custody is not sufficient (*Maxfield v. Burton* (1873), L. R. 17 Eq. 15). Actual notice, however, that the deeds are in the custody of a third person is notice of such person's interest (*Hiern v. Mill* (1801), 13 Ves. 114; *Dryden v. Frost* (1838), 3 My. & Cr. 670, 673; and see *Oliver v. Hinton*, [1899] 2 Ch. 264, C. A.; *Walker v. Linom*, [1907] 2 Ch. 104, 114).

Constructive notice is not implied where negotiable securities are taken in the ordinary course of business and without ground of suspicion, merely because inquiry would have led to knowledge of a defect of title (*London Joint Stock Bank v. Simmons*, [1892] A. C. 201; *Thomson v. Clydesdale Bank, Ltd.*, [1893] A. C. 282). Notice that debentures have been issued is not necessarily notice of their contents (*English and Scottish Mercantile Investment Co. v. Bruntton*, [1892] 2 Q. B. 700, C. A.; *Re Valletort Sanitary Steam Laundry Co., Ltd.*, *Ward v. Valletort Sanitary Steam Laundry Co., Ltd.*, [1903] 2 Ch. 654; see *Wilson v. Kelland*, [1910] 2 Ch. 306). And, generally, the rules as to constructive notice do not apply to commercial transactions (*Manchester Trust v. Furness*, [1895] 2 Q. B. 539, 545, C. A.). But they apply to a mortgage of a policy of insurance (*Spencer v. Clarke*, *supra*; *Re Weniger's Policy*, [1910] 2 Ch. 291), and to a trustee paying a share of the trust fund to an assignee of the *cestui que trust* (*Davis v. Hutchings*, [1907] 1 Ch. 356). As to notice to a lessee of the lessor's title, see title **LANDLORD AND TENANT**.

(*l*) *Mogridge v. Clapp*, [1892] 3 Ch. 382, 396, C. A.; see *Hurrell v. Littlejohn*, [1904] 1 Ch. 689.

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que trust (m); or when, without a written instrument, the circumstances are such that a court of equity will impose this obligation upon the legal owner (n). The essence of the relation of trustee and *cestui que trust* is that the trustee is at law the owner of the land, though the *cestui que trust* takes the profits, and can require the trustee to convey at his direction (o).

97. Originally the *cestui que trust* was not considered to have any right in the land itself (p). His right was merely a personal right to enforce the trust against the trustee and such subsequent legal owners as, in the view of a court of equity, ought to be required to give effect to the trust (q). Such subsequent owners included persons deriving title under the trustee without consideration, whether with or without notice of the trust, and persons taking from the trustee for valuable consideration with notice of the trust (r). But later the right of the *cestui que trust*, since it extended to the beneficial enjoyment of the land itself, came to be regarded as giving him an estate in the land; and this equitable estate now ranks as a right attaching to the land (s), though such right may be

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trust's estate.

(m) See *Hardoon v. Belilos*, [1901] A. C. 118, 123, P. C.; and as to the term "*cestui que trust*," see *Jaw Quarterly Review*, Vol. XXVI., p. 196.

(n) For the various classes of trusts—express, constructive, and resulting—see p. 154, *post*; and title TRUSTS AND TRUSTEES.

(o) See Butler's note to Co. Litt. 290 b, adapting to trusts the definition of a use in *Chudleigh's Case* (1595), 1 Co. Rep. 120 a, 121 b; and see *ibid.*, n. (n).

(p) At common law the trust was a thing in action, to be enforced only by subpoena in Chancery, and hence it was not assignable at common law (*Finch's (Sir Moyle) Case* (1600), 4 Co. Inst. 85).

(q) Before the Statute of Uses (27 Hen. 8, c. 10), where land was conveyed to one and his heirs to the use of another, the use was treated at law as repugnant to the previous limitation and void, but it was recognised and enforced in Chancery. Hence it was said that he who had a use had *jus neque in re neque ad rem*, but only a confidence and trust, for which he had no remedy at the common law, but only by subpoena in Chancery (*Chudleigh's Case*, *supra*, n. (p); *Brent's Case* (1577), 2 Leon. 14, 16; Gilbert, *Law of Uses and Trusts*, p. 2). The use, however, had a flexibility in Chancery which was denied to common law limitations. The Statute of Uses turned the use into the legal estate, and in conveyances operating under the statute the common law courts allowed it to retain this flexibility; so that, for instance, an estate of freehold to arise *in futuro* could be created by way of springing use (*Chudleigh's Case*, *supra*, at 124 a, n. (m 1)); but declined to allow that there could be a use upon a use (*Tyrrel's Case* (1537), Dyer, 155 a; Tudor, *L. C. Real Prop.*, 4th ed., p. 289). Hence a new opening was made for equitable jurisdiction, and the whole system of trusts was in effect built up in defiance of the statute (*Hopkins v. Hopkins* (1738), 1 Atk. 581). To this system of trusts the principle that the obligation rested only on the conscience of the trustee was as much applicable as to the earlier uses (see Co. Litt. 290 b, n. (1)).

(r) This seems to have been settled at an early date, although at first the trust bound only the original feoffee to uses (see *Chudleigh's Case*, *supra*, at p. 121 b, n. (s), referring to Keil. 42, pl. 7 (1502)). Whether a lord taking the legal estate by escheat was bound by the trust was a matter of doubt (*Fawcett v. Louther* (1751), 2 Ves. Sen. 300, 304; and see p. 95, *post*); but a disseisor was not bound (*Finch's (Sir Moyle) Case* (1600), 4 Co. Inst. 85; *Chudleigh's Case*, *supra*, at 139 b; Gilbert, *Law of Uses and Trusts*, by Sugden, p. 429, n. (6); Lewin, *Law of Trusts*, 11th ed., pp. 270, 274; T. Cyprrian Williams in 51 Sol. Jo., p. 143).

(s) *Re Nisbet and Potts' Contract*, [1905] 1 Ch. 391; affirmed [1906] 1 Ch. 386, O. A. This was a decision that a disseisee is bound by the equity arising out of

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waste.

defeated if the legal estate passes to an owner who takes for value without notice (t).

98. For some purposes a tenant for life is treated as a trustee for those entitled in remainder. Thus, although he may be expressly made unimpeachable for waste, so as not in general to be liable for acts of destruction done to the inheritance, yet, on the ground of his fiduciary position, equity interposes to prevent wanton destruction of a dwelling-house, or of trees planted for ornament or shelter, and such waste is known as equitable waste (a). Equitable waste, therefore, is treated as a breach of trust, and after the death of the tenant for life his assets are liable to make it good (b).

Equity to set
aside a deed.

99. The legal owner of an estate in land who has conveyed it in such circumstances that, while the conveyance on the face of it is good, he is entitled in equity to have it set aside, has an equitable interest in the land which is analogous to the beneficial ownership. Consequently it can be devised (c), and can be assigned, whether for value or by voluntary deed (d). If money has been paid for the legal conveyance, the equitable right is similar to an equity of redemption (e), and the money must be repaid on the conveyance being set aside (f). Similarly, a purchaser who has completed his contract may be entitled to impeach a title founded on fraud committed on his vendor; though, since the right to complain of a fraud is not a marketable commodity, a purchase of the estate for the purpose of acquiring a right to set aside a deed for fraud will not be assisted by a judgment for specific performance (g).

SUB-SECT. 2.—Equity of Redemption.

Equity of
redemption.

100. An equitable estate arises under a legal mortgage when the day fixed for redemption has passed without payment of the mortgage money. Until that day the mortgagor retains his legal

a restrictive covenant; but the principle applies equally to a trust, and the case was in substance an overruling of the old law.

(t) See p. 81, *ante*.

(a) *Anon.* (1704), *Freem. (Ch.)* 278; *Vane v. Barnard (Lord)* (1716), 2 Vern. 738; *Lawley v. Lawley* (1717), Jac. 71, n.; *Rolt v. Somerville (Lord)* (1737), 2 Eq. Cas. Abr. 759; *Coffin v. Coffin* (1821), Jac. 70. As to the origin of the jurisdiction, see *Aston v. Aston* (1749), 1 Ves. Sen. 264, *per* Lord HARDWICKE, L.C., at p. 265; and see titles REAL PROPERTY AND CHATELS REAL; SETTLEMENTS.

(b) *Ormonde (Marquis) v. Kynnersley* (1820), 5 Madd. 369.

(c) *Stump v. Gaby* (1852), 2 De G. M. & G. 623; *Gresley v. Mousley* (1859), 4 De G. & J. 78, 93.

(d) *Dickinson v. Burrell, Dickinson (Ann) v. Burrell, Stourton v. Burrell* (1866), L. R. 1 Eq. 337; but to enable the assignee to sue, the assignment must be of the assignor's entire interest in the property, and not of the mere right to sue (*ibid.*, *per* Lord ROMILLY, M.R., at p. 342); compare *Prosser v. Edmonds* (1835), 1 Y. & C. (ex.) 481, 491.

(e) *Blake v. Johnson* (1700), Prec. Ch. 142.

(f) *Stump v. Gaby*, *supra*, *per* Lord ST. LEONARDS, L.C., at p. 630: "In the view of this court he remains the owner, subject to the repayment of the money which has been advanced"; compare *Aldborough (Lord) v. Trye* (1840), 7 Cl. & Fin. 436, 463, H. L.

(g) *De Hoghton v. Money* (1866), 2 Ch. App. 164; see also title SPECIFIC PERFORMANCE.

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right under the terms of the mortgage to a reconveyance on payment. After that day this right is forfeited at law, but the mortgagor is entitled to be relieved against the forfeiture in equity (*h*), and the interest which he thus retains in the land is called an equity of redemption (*i*). It is not a mere right, but is an estate in the land; the person entitled to the equity of redemption is considered as the owner of the land, while the interest of the mortgagee is treated as part of his personal assets (*k*). Hence, when this position is changed by foreclosure, the mortgagee, in acquiring for the first time the ownership of, and the beneficial title to, the land, takes it under an entirely new title (*l*). A mortgage by way of trust for sale is a mortgage only (*n*).

101. The Court of Chancery was so jealous of preserving the equity of redemption that it did not allow it to be clogged or fettered by any agreement entered into by the mortgagor and mortgagee at the time of the mortgage (*u*), and this is an inflexible rule at the present time (*o*). It does not prevent the mortgagee from stipulating for a collateral advantage if this is limited to the duration of the security, and is not unfair to the mortgagor (*p*). Nor does it prevent the mortgage being for a fixed term, provided that the term is reasonable, *e.g.*, five or seven years (*q*). But on redemption the mortgagor is entitled to have his property back as free and unfettered as if it had never been made the subject of the security (*r*). The rule applies not only to land, but to other

Clog on
equity of
redemption
not allowed.

(*h*) The court, it was said with some exaggeration, would relieve a mortgagee to the tenth generation (*Bacon v. Bacon* (1640), Toth. 133); see, generally, title MORTGAGE.

(*i*) See p. 10, *ante*.

(*k*) *Casborne v. Scarfe* (1737), 1 Atk. 603; 2 White & Tud. L. C., 7th ed., p. 6; *Thornborough v. Baker* (1675), 3 Swan. 628, 630.

(*l*) *Heath v. Pugh* (1881), 6 Q. B. D. 345, C. A., *per* Lord SELBORNE, L.C., at p. 360. The right of foreclosure results from the original interference of equity in favour of the mortgagor; see *Sampson v. Pattison* (1842), 1 Hare, 533, 536.

(*m*) *Re Alison, Johnson v. Mounsey* (1879), 11 Ch. D. 284, 294, C. A.; *Locking v. Parker* (1872), 8 Ch. App. 30.

(*n*) *Howard v. Harris* (1683), 1 Vern. 190; *Jennings v. Ward* (1705), 2 Vern. 520; *Toomes v. Conset* (1745), 3 Atk. 261; *Re Edwards' Estate* (1861), 11 I. Ch. R. 367. In *Orby v. Trigg* (1722), 9 Mod. Rep. 2, it was considered that a covenant in a mortgage giving the mortgagee a right of pre-emption was enforceable, if not oppressively used; but this is doubtful.

(*o*) *Salt v. Northampton (Marquis)*, [1892] A. C. 1.

(*p*) Such as a covenant in a mortgage of a public-house to obtain liquor from the mortgagee during the continuance of the mortgage (*Biggs v. Hoddinott*, [1898] 2 Ch. 307, C. A.; overruling to this extent the *dictum* in *Jennings v. Ward*, *supra*, that a man shall not have interest for his money and a collateral advantage besides for the loan of it). A covenant not so restricted in duration will be void (*Noakes & Co., Ltd. v. Rice*, [1902] A. C. 24; *Brown v. Ryan*, [1901] 2 I. R. 653, C. A.); *Santley v. Wilde*, [1899] 2 Ch. 474, *contra*, is overruled.

(*q*) *Teevan v. Smith* (1882), 20 Ch. D. 724, 729, C. A.; *Morgan v. Jeffreys*, [1910] 1 Ch. 620. And apparently the provision for the mortgage remaining must be binding on both parties (*Morgan v. Jeffreys*, *supra*).

(*r*) *Noakes & Co., Ltd. v. Rice*, *supra*, *per* Lord MACNAGHTEN, at p. 30. It has been held that a mortgagee may charge a bonus or commission and deduct it from the money advanced (*Potter v. Edwards* (1857), 26 L. J. (OIL.) 468; *Mainland v. Upjohn* (1889), 41 Ch. D. 126); but that he cannot claim to add commission or

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forms of property, such as shares or stock(s), or a policy of insurance (i); it forbids an indirect as much as a direct fetter on the property (a); and it applies to mortgages made by commercial and other companies (b). But an agreement fettering the equity made subsequently to the mortgage is valid (c).

SUB-SECT. 3.—Equitable Securities.

Equitable
securities.

102. In addition to legal mortgages, which give the legal estate to the mortgagee and leave an equity of redemption in the mortgagor, there are various forms of security under which the creditor or other person entitled has only an equitable interest (d). This is so where the legal estate is outstanding in a prior mortgagee, and a subsequent incumbrancer takes a conveyance of the equity of redemption in the form of a legal mortgage; and where, while the legal estate remains in the mortgagor, an equitable charge is created by deposit of title deeds or otherwise (e), with or without a memorandum in writing (f). In addition, charges on land are created by will or settlement, and liens—such as a vendor's lien (g)—arise by operation of law. As regards such equitable mortgages or charges, and equitable liens, the chief distinction relates to the remedy of the incumbrancer. An ordinary second mortgage in the form of a legal mortgage carries with it all the ordinary remedies of a mortgagee. The mortgagee is entitled to foreclose the mortgagor; and, on the other hand, he is entitled to redeem the

remuneration to principal and interest when the mortgage is paid off (*James v. Kerr* (1889), 40 Ch. D. 449; *Field v. Hopkins* (1890), 41 Ch. D. 521, C. A.). It is doubtful, however, whether these latter cases would be followed since *Biggs v. Hoddinott*, [1898] 2 Ch. 307, C. A.

(s) *Bradley v. Carritt*, [1903] A. C. 253; *Samuel v. Jarrah Timber and Wood Paving Corporation*, [1904] A. C. 323.

(t) *Salt v. Northampton (Marquis)*, [1892] A. C. 1.

(a) *Bradley v. Carritt*, *supra*.

(b) *Samuel v. Jarrah Timber and Wood Paving Corporation*, *supra*; *British South Africa Co. v. De Beers Consolidated Mines, Ltd.*, [1910] 1 Ch. 354; C. A. (1919), 54 Sol. Jo. 679. Irredeemable debenture stock is authorised by the Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 103; see title COMPANIES, Vol. V., p. 362.

(c) *Reeve v. Lisle*, [1902] A. C. 461.

(d) See generally, title MORTGAGE.

(e) See *Re Pidcock*, *Penny v. Pidcock* (1907), 51 Sol. Jo. 514.

(f) The creation of a charge on land without writing is opposed to the Statute of Frauds, but such securities have been supported on the ground that the delivery of the title deeds is an act of part performance (*Russel v. Russel* (1783), 1 Bro. C. C. 269); this has been disapproved of, but followed (*Ex parte Haigh* (1805), 11 Ves. 403; *Ex parte Finden* (1805), 11 Ves. 404, n.; see *Norris v. Wilkinson* (1806), 12 Ves. 192, 197; *Ex parte Mountfort* (1808), 14 Ves. 606; *Ex parte Coombe* (1810), 17 Ves. 369; see *Re McMahon*, *McMahon v. McMahon* (1886), 55 L. T. 763; compare p. 71, *ante*). And evidence of the agreement being thus let in, the deposit may cover subsequent advances, if the agreement is clearly shown to be to that effect (*Ex parte Langston* (1810), 17 Ves. 227; see n. (1) (5th ed. by Bolt) to *Russel v. Russel*, *supra*); though a legal mortgage cannot be extended by parol agreement to cover a further advance (*Re Hewett*, *Ex parte Hooper* (1816), 1 Mer. 7). The actual delivery of the title deeds by way of security is necessary. It is not sufficient that, after a parol agreement to give security, they come into the hands of the creditor for another purpose (*Re Beetham*, *Ex parte Broderick* (1886), 18 Q. B. D. 380, 385).

(g) See *Mackreth v. Symmons* (1808), 15 Ves. 329; 2 White & Tud. L. C., 7th ed., p. 926; *Kettlewell v. Watson* (1884), 26 Ch. D. 501 C. A.; see title LIEN.

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prior mortgage. A charge accompanied by an agreement to execute a legal mortgage, and also a charge created by deposit of title deeds, carries with it the same remedy of foreclosure. The court treats the deposit as an agreement to execute a legal mortgage, and, therefore, as giving all the remedies incident to such a mortgage (*h*). But a charge created by settlement or by will does not carry with it a right of foreclosure, but only a right of sale, to be exercised with the help of the court (*i*); and in the case of an equitable lien the creditor must have recourse to the court to declare the lien, and enforce it by sale (*j*).

A charge may be created by covenant, as where a settlor covenants to charge an annuity on his real estate or on a specified part of it (*k*); and a covenant to charge under a power, where the covenantor becomes insane before he can exercise it, may be assisted in equity as a defective execution of the power (*l*). But there is no charge if the lands to be subject to it are not ascertained (*m*), or if the settlor has an option of settling money instead of the annuity (*n*). An agreement to execute a mortgage on request does not give an immediate charge (*o*).

SUB-SECT. 4.—Incidents of Equitable Estates.

103. Equitable estates, whether arising under trusts or under mortgages, are dealt with upon the principle that equity follows the law (*p*), and are in general subject to the same rules as legal estates (*q*). Thus they can be divided into various concurrent or successive interests (*r*), and the words of limitation by which this

Equitable estates follow analogy of legal estates.

(*h*) *Carter v. Wake* (1877), 4 Ch. D. 605, per JESSEL, M.R., at p. 606; *Harrold v. Plenty*, [1901] 2 Ch. 314.

(*i*) In the case of a judgment becoming a charge on land, the creditor has been allowed a right of foreclosure (see *Rolleston v. Morton* (1842), 1 Dr. & War. 171, 195; *Jones v. Bailey* (1853), 17 Beav. 582; *Fisher on Mortgages*, 5th ed., p. 481); and this analogy has been followed with regard to a charge created by debentures (*Sadler v. Worley*, [1894] 2 Ch. 170; *Re Continental Oxygen Co.*, *Elias v. Continental Oxygen Co.*, [1897] 1 Ch. 511). But the ordinary mode of enforcing a charge is by sale (see *Footner v. Sturgis* (1852), 5 De G. & Sm. 736); and this is the only way when the charge is created by will or settlement (*Re Owen*, [1894] 3 Ch. 220; *Re Lloyd, Lloyd v. Lloyd*, [1903] 1 Ch. 385, 401, C. A.).

(*j*) See titles LIEN; MORTGAGE; PAWNBROKERS AND PLEDGES.

(*k*) *Legard v. Hodges* (1792), 1 Ves. 477; *Ravenshaw v. Hollier* (1834), 7 Sim. 3; *Montagu v. Sandwich (Earl)* (1886), 32 Ch. D. 525, C. A.

(*l*) *Affleck v. Affleck* (1857), 3 Sm. & G. 394; see title POWERS.

(*m*) *Fremoult v. Dedere* (1718), 1 P. Wms. 429; *Williams v. Lucas* (1789), 2 Cox, 160; *Mornington v. Keane* (1858), 2 De G. & J. 292; see *Averall v. Wade* (1835), L. & G. temp. Sugd. 252, 261; and compare *Kennedy v. Daly* (1804), 1 Sch. & Lef. 355, 371, where an agreement on marriage made in 1764 by a Papist in Ireland to convey all his real estate in strict settlement in case he should at any time be qualified by law to do so, was held not to constitute a charge on his estate until 1778, when the Papist disabilities were removed by 17 & 18 Geo. 3, c. 49 (Irish).

(*n*) *Ravenshaw v. Hollier*, *supra*.

(*o*) *Shaw v. Foster* (1872), L. R. 5 H. L. 321, 334.

(*p*) *Coope v. Arnold* (1855), 4 De G. M. & G. 574, 585; and see p. 68, *ante*.

(*q*) As to a trust estate, see *Hopkins v. Hopkins* (1738), 1 Atk., 581, 591; *Burgess v. Wheate, A.-G. v. Wheate* (1759), 1 Eden, 177, 223, 226; as to an equity of redemption, see *Casborne v. Scarfe* (1737), 1 Atk. 603; 2 White & Tud. L. O., 7th ed., p. 6.

(*r*) In the case of limitations of a trust estate, the fact that the legal estate was

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division is effected usually receive the same construction as in the case of legal limitations (s): they are subject to the same rules of descent (t); they can be devised (u) and alienated (a); and they can be made available for payment of debts (b). If, however, there is

vested in the trustees was a sufficient protection to contingent remainders (*Hopkins v. Hopkins* (1734), *Cas. temp. Talb.* 44; *Fearne's Contingent Remainders*, p. 304; *Re Finch, Abbiss v. Burney* (1881), 17 Ch. D. 211, 229, C. A.; *Marshall v. Gingell* (1882), 21 Ch. D. 790); and so a legal estate outstanding in a mortgagee preserved contingent remainders (*Astley v. Micklethwait* (1880), 15 Ch. D. 59, 65).

(s) See *Norfolk's (Duke) Case* (1685), 3 Cas. in Ch. 28; Co. Litt. 290 b., Butler's note; 1 *Sunderson, Uses and Trusts*, 4th ed., p. 269; *Shep. Touch.* by Preston, p. 507, note (8); 2 *Preston's Estates*, p. 64. Hence in a deed an equitable limitation by way of executed trust in favour of a person without words of inheritance gives only a life estate (*Holliday v. Overton* (1852), 15 Beav. 480, affirmed on appeal, 16 Jur. 751; *Lucas v. Brandreth* (No. 2) (1860), 28 Beav. 274; *Tatham v. Vernon* (1861), 29 Beav. 604; *Middleton v. Barker* (1873), 29 L. T. 613; *Meyler v. Meyler* (1883), 11 L. R. Ir. 522; *Re Whiston's Settlement, Lovatt v. Williamson*, [1894] 1 Ch. 661). Executory trusts are construed with more freedom (*Egerton v. Brownlow (Earl)* (1853), 4 H. L. Cas. 1, 210; *Sackville West v. Holmesdale (Viscount)* (1870), L. R. 4 H. L. 543). The rule in *Shelley's Case* applies to equitable limitations (*Austen v. Taylor* (1759), 1 Eddon, 361; *Re Buckton, Buckton v. Buckton*, [1907] 2 Ch. 406); provided all the limitations are of this nature (*Fearne's Contingent Remainders*, p. 52, v. 9; p. 58). So, too, does the rule against double possibilities, which forbids a limitation in favour of a child of an unborn person (*Re Nush, Cook v. Frederick*, [1910] 1 Ch. 1, C. A.).

(t) See Co. Litt. 290 b, Butler's note. This applies also to copyholds, so that in trusts executed the beneficial estate descends in accordance with the special custom of the manor, e.g., to the youngest son (*Trash v. Wood* (1839), 4 My. & Cr. 324; *Re Hudson, Cassels v. Hudson*, [1908] 1 Ch. 655); and so as to an equity of redemption (*Fawcett v. Lowther* (1751), 2 Ves. Sen. 300, 303).

(u) Devises of equitable estates were recognised at common law (*Pawlett v. A.-G.* (1667), *Hard.* 465, 469; and see *Anon.* (1679), 2 Cas. in Ch. 8; *Blake v. Foster* (1813), 2 Ball & B. 387).

(a) The resemblance between legal and equitable estates was carried so far that trust estates tail were barred by fine and recovery, although they were in their nature incapable of those processes (*Goodrick v. Brown* (1664), *Freem. (Cir.)* 180; *North v. Way* (1681), 1 Vern. 13; Co. Litt. 290 b, Butler's note (xiv.); *Hopkins v. Hopkins* (1738), 1 Atk. 581, 591); and similarly as to equities of redemption (*Casborne v. Scarfe* (1737), 1 Atk. 603; 2 *White & Tud. L. O.*, 7th ed., p. 5). But there was a necessary exception as to forms of conveyance, since an equitable estate was incapable of livery of seisin, or of being conveyed under the Statute of Uses, and hence a trust estate could be transferred by assignment or declaration of trust in writing, or, before the Statute of Frauds by parol. Under the modern system of conveyancing voluntary assignments of equitable estates are in practice always made by deed, but a transfer for value is equally effectual if made under hand only; see title DEEDS AND OTHER INSTRUMENTS, Vol. X., p. 375, note (d). Before the institution of the separate use a wife's trust term was subject to alienation by her husband unless it had been assigned in trust for her with his consent (*Turner's Case* (1681), 1 Vern. 7; *Pitt v. Hunt* (1681), 1 Vern. 18; *Jewson v. Moulson* (1742), 2 Atk. 417, 421); and after her death the husband surviving takes her chattels real vested in possession during the coverture without taking out administration to her, and therefore, also, her equitable term (*Re Bellamy, Elder v. Pearson* (1883), 25 Ch. D. 620, 623).

(b) That is, by equitable execution (see title EXECUTION), or by sale; in this respect equity followed the law, and allowed the equitable remedy against only one half of the debtor's real estate, as under a writ of *elegit* before the Judgments Act, 1838 (1 & 2 Vict. c. 110) (*Stileman v. Ashdown* (1743), 2 Atk. 608; see *Rowe v. Bant* (1751), 1 Dick. 150). And as to the remedy against devisees of the debtor under stat. (1691) 3 Will. & Mar. c. 14, see *Gawler v. Wade* (1707), 1 P. Wms. 99.

on the deed a clear intention apparent that the grantee of an equitable estate shall take the entire equitable fee simple, this may pass without express limitation of such an estate (c).

104. But the analogy between legal and equitable estates does not in strictness apply as regards rights in favour of third parties—such as escheat (d) and dower (e)—which are incident to the

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Nature of
Equitable
Estates.

Rights
against
legal estate
not usually
incident to
equitable
estate.

(c) "In limitation of a trust either of real or personal estate to be determined [in a court of equity], the construction ought to be made according to the construction of limitations of a legal estate; with this distinction, unless the intent of the testator or author of the trust plainly appears to the contrary" (*Garth v. Baldwin* (1755), 2 Ves. Sen. 646, per Lord HARDWICKE, L.C., at p. 655; see Hayes, Introduction to Conveyancing, 5th ed., Vol. I., p. 92; Williams on Settlements, p. 60); and effect has been given to this reservation in *Pugh v. Drew* (1869), 17 W. R. 988; *Re Tringham's Trusts*, *Tringham v. Greenhill*, [1901] 2 Ch. 487; *Re Oliver's Settlement*, *Evered v. Leigh*, [1905] 1 Ch. 191; *Re Houston, Rodgers v. Houston*, [1909] 1 I. R. 319; *Re Thursby's Settlement*, *Grant v. Littledale*, [1910] 2 Ch. 181, 189; see *Re Ford and Ferguson's Contract*, [1906] 1 I. R. 607; but see *Re Irwin*, *Irwin v. Parkes*, [1901] 2 Ch. 752, as to the cases to which the reservation is to be confined. In *Bagshaw v. Spencer* (1748), 2 Atk. 577; 1 Ves. Sen. 142, Lord HARDWICKE treated all trusts as executory for the purpose of the construction of equitable limitations, but in *Garth v. Baldwin*, *supra*, he did not carry this freedom of construction so far; see *Jones v. Morgan* (1783), 1 Bro. C. C. 206, 222.

(d) Thus, escheat for lack of a tenant is an incident of the legal estate, but it was not in equity made an incident of the equitable estate. In the case of a trust, it is probable that, on escheat of the legal estate, the lord took it free from the trust, and, if this was so, there was no reason for allowing him an escheat of the equitable estate as well. But the point was not settled, and, in fact, escheat of the legal estate was an unlikely event. On the other hand, upon the death of the *cestui que trust* intestate and without heirs, the lord could not call for a conveyance from the trustee, who therefore kept the land for his own benefit; (*A.-G. v. Sands* (1669), Hard. 488; *Burgess v. Wheate* (1759), 1 Eden, 177, per HENLEY, Lord Keeper, and CLARKE, M.R.). Lord MANSFIELD, C.J., who delivered a dissentient judgment in *Burgess v. Wheate*, *supra*, considered that the lord's legal estate by escheat would be subject to the trust, and that on the other hand the lord would take beneficially by escheat of the equitable estate.

In the case of an equity of redemption also, the legal estate and not the equity escheated (*Burgess v. Wheate*, *supra*, at p. 256; *Lawcet v. Lowther* (1751), 2 Ves. Sen. 300); but the lord, on the escheat of the legal estate, took it subject to the equity of redemption; the mortgagee, on the other hand, in the event of the death of the mortgagor intestate and without heirs, was entitled to hold the estate free from the equity of redemption unless it was required for creditors of the mortgagor, or unless the mortgagee, by suing the personal representatives for the mortgage debt, made himself liable to reconvey to them (*Burgess v. Wheate*, *supra*, at pp. 210, 256; *Gordon v. Gordon* (1821), 3 Swan. 400). Similarly, under the modern system of conveying freehold hereditaments in possession by grant, the mortgagee under a legal mortgage becomes seised at law of the hereditaments, so as, in the case of customary freeholds, to be subject to the legal incidents of tenure; while the mortgagor, on the other hand, although remaining in possession, is not so subject. Consequently a heriot is not due on the death of the mortgagor (*Copstake v. Hoyer*, [1908] 2 Ch. 10, C. A.; see articles by T. Cyprian Williams in 51 Sol. Jo. 478, 496; 52 *ibid.*, 510); and title COPYHOLDS, Vol. VIII., p. 39.

(e) The refusal of equity to allow a wife dower out of an equitable estate appears to have been originally based on the same principle as the refusal to allow escheat. Dower was an incident of the legal estate, and was not made incident also to the equitable estate. But where the legal estate was in a trustee the dowress could only take subject to the trust, and hence she was, in effect, excluded both from the legal and the equitable estate. However correct theoretically, this was felt to be wrong practically, since dower was a right of property which might fairly be claimed against an equitable as much as against

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Equitable
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legal estate. These remain incident to the legal estate; they are not transferred to the equitable estate, nor are they doubled by corresponding rights being given also against the equitable estate. Exceptions to this rule, however, have been introduced by statute (*f*).

SUB-SECT. 5.—*Equitable Interests in Personal Property and under Contracts.*

Equitable
interests in
personal
property.

105. Equitable interests may subsist also in personal property by reason of the creation of trusts (*g*); and, upon a mortgage of such property, an equity of redemption will arise in favour of the mortgagor, which will last until the property has been lawfully sold by the mortgagee, or until he has obtained a judgment for foreclosure (*h*). And to the legal and equitable interests thus co-existing the same principles apply as in the case of real property. The burdens incident to the legal estate must be borne by the legal owner, and cannot be enforced against the *cestui que trust* (*i*),

a legal estate, and it was allowed out of an equity of redemption by Jekyll, M.L., in *Banks v. Sutton* (1732), 2 P. Wms. 700. But too many titles had been accepted on the faith of the existence of a trust being a protection against dower to allow of the rule being set aside, and dower was not admitted in the case either of a trust estate or of an equity of redemption existing at the date of the marriage (*Chaplin v. Chaplin* (1733), 3 P. Wms. 229; *A.-G. v. Scott* (1735), Cas. temp. Talb. 138; *Godwin v. Winsmore* (1742), 2 Atk. 525; *D'Arcy v. Blake* (1805), 2 Sch. & Lef. 387). And similarly as to freebench (*Forder v. Wade* (1794), 4 Bro. C. C. 521; *Smith v. Adams* (1854), 5 De G. M. & G. 712, C. A.; compare *Godwin v. Winsmore*, *supra*). But the theory that rights peculiar to the legal estate are not to be extended to the equitable estate was never applied to a tenancy by the curtesy. This was treated as subject to the general principle that the rules of property ought to be the same in all courts, and it was allowed both in the case of trust estates (*Watts v. Ball* (1708), 1 P. Wms. 108) and of equities of redemption (*Cashorne v. Scarfe* (1737), 1 Atk. 603; 2 White & Tud. L. C., 7th ed., p. 6)—in the latter case on the ground that the mortgagor was to be regarded as in equitable seisin of the estate, which of course should have been equally effectual to give a right of dower. But the inconsistency was allowed to stand; see *D'Arcy v. Blake*, *supra*, per Lord REDESDALE, L.C., at p. 389.

(*f*) Thus, under the Intestates Estates Act, 1884 (47 & 48 Vict. c. 71), s. 4, equitable estates may escheat to the Crown; and under the Dower Act, 1833 (3 & 4 Will. 4, c. 105), dower is allowed out of equitable estates.

(*g*) A trust is the usual mode of creating successive interests in personal property (see Fearn, *Contingent Remainders*, p. 407, v.), and is essential for this purpose in assignments *inter vivos*; though under wills a future interest could be created at law in chattels real by way of executory gift, and a future interest in chattels could be similarly created in equity (see *Vachel v. Vachel* (1669), 1 Cas. in Ch. 129). Originally, in order to secure this effect, the preceding bequest for life must have been of the use of the chattels, not of the chattels themselves; but this distinction was abandoned (Fearn, *Contingent Remainders*, p. 406); and the former practice of requiring the legatee for life to give security was also abandoned, and he was required instead to sign and deposit with the master an inventory of the goods (*Foley v. Burnell* (1783), 1 Bro. C. C. 274, 279; *Conduitt v. Soane* (1844), 1 Coll. 285). But the legatee for life is still entitled absolutely to things *que usu consumuntur* (*Randall v. Russell* (1817), 3 Mer. 190; *Andrew v. Andrew* (1845), 1 Coll. 686, 691). As to equitable security on a policy of life insurance, see *Crosley v. City of Glasgow Life Assurance Co.* (1876), 4 Ch. D. 421.

(*h*) Foreclosure or sale is the appropriate remedy in the case of personal property not passing by delivery (*London and Midland Bank v. Mitchell*, [1899] 2 Ch. 161; *Harrold v. Plenty*, [1901] 2 Ch. 314); but where the property passes by delivery, the mortgage operates by way of pledge, and foreclosure does not lie (*Carter v. Wake* (1877), 4 Ch. D. 605).

(*i*) Thus a trustee of shares is liable for calls (*Re Electric Telegraph Co. of*

who, on the other hand, is bound to indemnify the trustee against such burdens, and is entitled to the beneficial enjoyment of the property (k).

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Equitable
Estates.

Equitable
interest in
contract.

106. The doctrine of trusts applies also to contracts, and where two persons enter into a contract which is intended to be for the benefit of a third person, such person is a *cestui que trust* under the contract, and may enforce it in a court of equity (l); thus, under articles of partnership a trust may be created in favour of the widow of one of the partners (m). And in a settlement by way of covenant, if the covenant is already perfect, equity will interfere in favour of a volunteer, even though the deed has been kept by the settlor till his death, and not communicated to the trustees or the *cestui que trust* (n); and volunteers who are defeated by the covenantor conveying away trust property may, after his death, claim against his assets (o).

SUB-SECT. 6.—Imperfect Gifts not Assisted.

107. Equitable interests in property may be created in favour of volunteers, but a court of equity does not interfere to perfect

Imperfect
gifts not
assisted.

Ireland, Bunn's Case (1860), 2 Do G. F. & J. 275, C. A.; *Re Moseley Green Coal and Coke Co., Ltd., Barrett's Case* (1864), 4 Do G. J. & Sm. 416; *Re East of England Banking Co., Ex parte Bugg* (1865), 2 Drew. & Sm. 452; and this liability is not limited to the amount of the trust estate (*Leifchild's Case* (1865), L. R. 1 Eq. 231; *Muir v. City of Glasgow Bank* (1879), 4 App. Cas. 337); and he holds "in his own right" so as to be qualified (where this is a requirement) for directorship (*Pulbrook v. Richmond Consolidated Mining Co.* (1878), 9 Ch. D. 610; *Bainbridge v. Smith* (1889), 41 Ch. D. 462, C. A.; *Cooper v. Griffin*, [1892] 1 Q. B. 740, C. A.; *Sutton v. English and Colonial Produce Co.* (1902), 50 W. R. 571). A mortgagee who takes a transfer of the mortgaged shares is in the same position (*Royal Bank of India's Case* (1869), 4 Ch. App. 252; *Weikersheim's Case* (1873), 8 Ch. App. 831). So a trustee (*Tretton v. Diggle* (1813), 4 Taunt. 766) and a mortgagee by assignment (*Haig v. Roman* (1839), 4 Bli. (n. s.) 380, H. L.; *Stone v. Evans* (1796), Peake, Add. Cas. 94) of leasehold property are liable at law upon the covenants in the lease; but cannot be compelled in equity to perform them (*Sparkes v. Smith* (1692), 2 Vern. 275); and an equitable interest in leaseholds, though accompanied by possession, imposes no direct liability. As to a mortgagee by deposit, see *Moore v. Choat* (1839), 8 Sim. 508; *Robinson v. Rosher* (1841), 1 Y. & C. Ch. Cas. 7; *Moore v. Greg* (1848), 2 Ph. 717; as to a *cestui que trust*, see *Nokes v. Fish* (1857), 3 Drew. 735; and as to an equitable assignee under an agreement to take an assignment, see *Cox v. Bishop* (1857), 8 Do G. M. & G. 815, C. A.; *Priary, Holroyd, and Healey's Breweries, Ltd. v. Singleton*, [1899] 1 Ch. 86.

(k) As to shares, see *Hughes-Hallett v. Indian Munmoth Gold Mines Co.* (1892), 22 Ch. D. 561; *Hardoon v. Belilos*, [1901] A. C. 118, 123, P. C.; as to leases, see *Close v. Wilberforce* (1838), 1 Beav. 112; *Willson v. Leonard* (1840), 3 Beav. 373; *Nokes v. Fish*, *supra*; but the company or lessor may be able to make use of the trustee's right of indemnity so as, in effect, to secure payment by the *cestui que trust* (*Cruse v. Paine* (1868), L. R. 6 Eq. 641; see *Re European Society Arbitration Acts, Ex parte British Nation Life Assurance Association (Liquidators)* (1878), 8 Ch. D. 679, 708, C. A.).

(l) *Gandy v. Gandy* (1885), 30 Ch. D. 57, C. A.

(m) *Re Flavell, Murray v. Flavell* (1883), 25 Ch. D. 89, C. A.; and see title **PARTNERSHIP**.

(n) *Fletcher v. Fletcher* (1844), 4 Hare, 67; see *Bridge v. Bridge* (1852), 16 Beav. 315, 321. But where the settlement by way of covenant is not complete (e.g., in the case of a covenant to surrender copyholds) equity will not interfere (*Jefferys v. Jefferys* (1841), Cr. & Ph. 138; *Dening v. Ware* (1856), 22 Beav. 184).

(o) *Williamson v. Codrington* (1750), 1 Ves. Sen. 511.

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Nature of
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Estates.

an imperfect gift (*p*). In order to render a voluntary settlement valid and effectual, the settlor must either (1) have done everything which, according to the nature of the property comprised in the settlement, was necessary to be done to transfer the property, and to render the settlement binding on him—this is effected when he actually transfers his own interest in the property to the donee or to trustees for the donee; or (2) while retaining the property in himself, the donor must have declared himself to be a trustee of it for the donee. But the court does not treat an imperfect gift by way of transfer as a declaration of trust (*q*). If the donor has only an equitable interest vested in him, the gift is effectually made by an assignment of this interest (*r*), and notice to the trustees is not essential (*s*); similarly a chose in action may be given by an equitable assignment, without notice to the debtor (*t*). And if there is an intention to give property or release a debt, and the legal estate in the property becomes vested in the donee, or the debt becomes extinguished at law, though not in equity, this completes the gift or release (*u*).

SECT. 2.—Equitable Interests under Contracts of Sale (*a*).

Equitable
interest of
purchaser.

108. Upon the signing of a contract for sale of land a change takes place in the equitable, but not in the legal, interest in the land. At law the purchaser has no right to the land, nor the vendor to the money, until the conveyance is executed (*b*). But in equity, if

(*p*) See the early cases collected in note to *Ward v. Audland* (1845), 8 Beav. 201, 213.

(*q*) *Milroy v. Lord* (1862), 4 De G. F. & J. 261, O. A., per TURNER, L.J., at p. 274. "There is no case in which a party has been compelled to perfect a gift which in the mode of making it he has left imperfect," per GRANT, M.R., in *Antrobus v. Smith* (1805), 12 Ves. 39, 46; see *Jones v. Lock* (1865), 1 Ch. App. 25 (delivery of a cheque to a child with words of gift, the cheque being at once taken back and retained by the donor); *Antrobus v. Smith*, *supra*; *Dillon v. Coppin* (1839), 4 My. & Cr. 647; *Warriner v. Rogers* (1873), L. R. 16 Eq. 340; *Heartley v. Nicholson* (1875), L. R. 19 Eq. 233 (all cases of attempted gift of shares in partnership or company, but no actual transfer, or declaration of trust); *Richards v. Delbridge* (1874), L. R. 18 Eq. 11 (property not effectually given by indorsement of a memorandum of gift on a title deed); *Re Breton's Estate*, *Breton v. Woolven* (1881), 17 Ch. D. 416 (imperfect gift of furniture); *Re Richardson, Shillito v. Hobson* (1885), 30 Ch. D. 396, O. A. (an equitable mortgage by deposit of deed not effectually transferred by parol gift with delivery of the deed); see title GIFTS.

(*r*) *Kekewich v. Manning* (1851), 1 De G. M. & G. 176, C. A.

(*s*) *Donaldson v. Donaldson* (1854), Kay, 711.

(*t*) *Harding v. Harding* (1886), 17 Q. B. D. 442; *Re Patrick, Bills v. Tatham*, [1891] 1 Ch. 82, O. A.; compare *Fortescue v. Barnett* (1834), 3 My. & K. 36 (assignment of life policy by deed). A bond must be transferred to a volunteer by instrument under seal (*Edwards v. Jones* (1836), 1 My. & Cr. 226); but an ordinary chose in action can be transferred by any means which operate as an equitable assignment, such as the indorsement and delivery of a banker's deposit receipt (*Re Griffin, Griffin v. Griffin*, [1899] 1 Ch. 408).

(*u*) This happens when the donor or creditor appoints the donee or debtor to be his executor; see, as to debts, *Strong v. Bird* (1874), L. R. 18 Eq. 315; *Re Applebee, Leveson v. Beales*, [1891] 3 Ch. 422; as to gifts, *Re Griffin, Griffin v. Griffin*, *supra*; *Re Stewart, Stewart v. McLaughlin*, [1908] 2 Ch. 251; and see *Re Innes, Innes v. Innes*, [1910] 1 Ch. 188.

(*a*) See title SALE OF LAND.

(*b*) *Fludyer v. Cocker* (1805), 12 Ves. 25, 27; *Laird v. Pim* (1841), 7 M. & W. 474; *East London Union (Guardians) v. Metropolitan Rail. Co.* (1869), L. R. 4 Exch. 309

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Equitable
Interests
under
Contracts
of Sale.

the contract is one of which specific performance would be ordered (c), the beneficial interest passes to the purchaser immediately on the signing of the contract, and thereupon the vendor, in regard to his legal ownership and possession of the land, becomes constructively a trustee for the purchaser (d). As such trustee he is bound to take reasonable care of the property, since the purchaser is entitled to have it handed over to him on completion in the same condition as when he entered into the contract (e). On the other hand, the property is, from the date of the contract, at the risk of the purchaser, and he has no claim against the vendor for depreciation which is not due to the vendor's neglect (f); but he is entitled to accessions to the value (g). Before the purchaser can be required to complete the vendor must make out his title; but pending completion he retains an interest in the property, since it forms the security for the purchase-money. Thus the vendor is not a mere dormant trustee; he is a trustee having a personal and substantial interest in the property, a right to protect that interest, and an active right to assert that interest if anything should be done in derogation of it (h).

(c) *Cornwall v. Henson*, [1899] 2 Ch. 710; see title SPECIFIC PERFORMANCE.

(d) *Hadley v. London Bank of Scotland* (1865), 3 De G. J. & Sm. 63, 70, C. A.; *Shaw v. Foster* (1872), L. R. 5 H. L. 321, per Lord CAIRNS, at p. 338, per Lord HATHERLEY, L.C., at p. 356; *Lysaght v. Edwards* (1876), 2 Ch. D. 499; see *Rose v. Watson* (1864), 10 H. L. Cas. 672; *Re Thomas, Thomas v. Howell* (1886), 34 Ch. D. 166. But the vendor is not at once a mere trustee. "He is in progress towards it, and finally becomes such when the money is paid, and when he is bound to convey" (*Wall v. Bright* (1820), 1 Jac. & W. 494, per PLUMER, M.R., at p. 503). "He is certainly a trustee for the purchaser; a trustee, no doubt, with peculiar duties and liabilities, for it is a fallacy to suppose that every trustee has the same duties and liabilities; but he is a trustee" (*Egmont (Earl) v. Smith, Smith v. Egmont (Earl)* (1877), 6 Ch. D. 469, per JESSEL, M.R., at p. 475).

(e) *Foster v. Deacon* (1818), 3 Madd. 394; and see note (h), *infra*.

(f) *Robertson v. Skelton* (1849), 12 Beav. 260; and loss by fire falls on the purchaser (*Counter v. Macpherson* (1845), 5 Moo. P. C. C. 83, 105); see *Rayner v. Preston* (1881), 18 Ch. D. 1, C. A.; the older cases were in favour of the property being at the vendor's risk till the time for completion; see Ashb., p. 504, n. (o).

(g) *Vesey v. Elwood* (1842), 3 Dr. & War. 74, 79.

(h) *Shaw v. Foster*, *supra*, at p. 338; *Raffety v. Schofield*, [1897] 1 Ch. 937, 943. It has been much discussed whether the vendor's lien upon the property places him, while he remains in possession, on the footing of a mortgagee, so as to render him accountable, without special circumstances, for wilful default. According to *Sherwin v. Shakspeare* (1854), 5 De G. M. & G. 517, C. A., he is a trustee rather than a mortgagee, and chargeable for wilful default only on special circumstances being shown. But in *Phillips v. Sylvester* (1872), 8 Ch. App. 173, 176, Lord SELBORNE, L.C., put him on the footing of a mortgagee in possession; and this case, though it has been adversely criticised (Dart, *Vendors and Purchasers*, 7th ed., p. 674), has been treated as stating the existing law (*Royal Bristol Permanent Building Society v. Bomash* (1887), 35 Ch. D. 390, 398). At any rate, the vendor is liable to the purchaser if he allows yearly property, which can be readily let, to remain unlet, or if he neglects to keep agricultural land in a proper state of cultivation (*Egmont (Earl) v. Smith, Smith v. Egmont (Earl)*, *supra*, at p. 474). Practically the test appears to be whether the vendor has taken reasonable care of the property (*Royal Bristol Permanent Building Society v. Bomash*, *supra*; *Clarke v. Ramuz*, [1891] 2 Q. B. 456, C. A.). But the purchaser is not entitled to an allowance for deterioration happening after he took possession, or after a title has been shown under which he could safely take possession (*Binks v. Rokeby (Lord)* (1818), 2 Swan. 222, 226; *Minchin v. Nance* (1841), 4 Beav. 332).

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under
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109. The date for completion specified in the contract does not affect the equitable relation of vendor and purchaser. Before this date the purchaser is already equitable owner subject to completion. It marks, however, the time when the purchaser becomes entitled to the rents and profits, and the vendor to interest on the unpaid purchase-money (*i*). If no date is fixed by the contract, then the date for completion is the time when the vendor has made out his title, and when, therefore, the purchaser could safely take possession (*k*).

Where the vendor has entered into a subsequent contract for sale, the first purchaser, provided his contract is specifically enforceable (*l*), has the better title, and can assert it in an action for specific performance against the vendor and the second purchaser, unless the latter has obtained the legal estate without notice (*m*).

SECT. 3.—Restrictive Covenants (*n*).

Covenants
running with
the land in
equity.

110. As between lessor and lessee both the burden and the benefit of a covenant which touches or concerns the land, and is not merely collateral, run with the reversion and the term at law (*o*); though when the covenant relates to a thing not *in esse* at the time of the demise, the assigns of the lessee must be named to make it binding on them (*p*). As between persons interested in land otherwise than as lessor and lessee, the benefit of a covenant may run with the land at law, but not the burden (*q*). The burden, however, may run with the land in equity if the covenant is negative (*r*).

Interest
created by
restrictive
covenants.

111. A restrictive covenant creates an equitable interest in the land of the nature of a negative easement, and, in accordance with the maxim *qui prior est tempore, potior est jure* (*s*), it binds subsequent equitable owners, whether they take with notice of it or not; and it binds also a subsequent legal owner unless he obtained the legal estate for value and without notice (*a*).

(*i*) But where the contract only fixes the date of completion, and does not stipulate as to interest, this rule is subject to exceptions (*Esdaile v. Stephenson* (1822), 1 Sim. & St. 122).

(*k*) *Currodus v. Sharp* (1855), 20 Beav. 55; *Barshlt v. Tagg*, [1900] 1 Ch. 231, 235.

(*l*) *Goodwin v. Fiddling* (1853), 4 De G. M. & G. 90; *De Hoghton v. Money* (1866), 2 Ch. App. 164.

(*m*) *Potter v. Saunders* (1846), 6 Hare, 1; *Trinidad Asphalt Co. v. Coryat*, [1896] A. C. 587, P. C.

(*n*) See titles LANDLORD AND TENANT; REAL PROPERTY AND CHATTELS REAL; SALE OF LAND.

(*o*) The proposition stated in the text is based upon the doctrines laid down in *Spencer's Case* (1583), 5 Co. Rep. 16 a; 1 Smith, L. C., 11th ed. 55, and upon statutory extensions of those doctrines introduced by stat. (1540) 32 Hen. 8, c. 34, and the Conveyancing Act, 1881 (44 & 45 Vict. c. 41), ss. 10, 11; see also title CONTRACT, Vol. VII., p. 504.

(*p*) See *Dewar v. Goodman*, [1907] 1 K. B. 612; [1908] 1 K. B. 91; [1909] A. C. 72.

(*q*) *Austerberry v. Oldham Corporation* (1885), 29 Ch. D. 750, C. A.

(*r*) The equitable doctrine does not apply to covenants which require an act to be done by the covenantor, such as the expenditure of money in repairs (*Haywood v. Bramwick Building Society* (1881), 8 Q. B. D. 403, C. A.; see *Andrew v. Aitken* (1882), 22 Ch. D. 218). As to the meaning of a covenant not to erect more than one house on a particular site, see *Ilford Park Estates, Ltd. v. Jacobs*, [1903], 2 Ch. 522.

(*s*) See p. 79, ante.

(*a*) This doctrine was first established by *Tulk v. Moxhay* (1848), 2 Ph. 774,

SECT. 8. Restrictive Covenants.

Building
scheme.

Frequently such covenants are created on the sale of plots of land under a common building scheme; and then, although there is no express contract that the various purchasers shall have the benefit of the covenants entered into by the other purchasers with the common vendor, yet such a contract will be implied; and, accordingly, each purchaser and his assigns can obtain an injunction against other purchasers (*b*) or (as to unsold plots) against the vendor (*c*) to restrain a breach of the covenants. But the vendor may expressly reserve to himself the right of dispensing with the observance of the covenants (*d*).

and, as there laid down, it depended on the subsequent owner taking with notice of the covenant. "It is said that the covenant being one which does not run with the land, this court cannot enforce it; but the question is, not whether the covenant runs with the land, but whether a party shall be permitted to use the land in a manner inconsistent with the contract entered into by his vendor, and with notice of which he purchased": *per* Lord COTTENHAM, L.C., at p. 777; see *Wilson v. Hart* (1866), 1 Ch. App. 463. The principle applies to other forms of property, such as ships (*De Mattos v. Gibson* (1859), 4 De G. & J. 276, 282, C. A.); and it applies even though there is no antecedent relation, such as that of vendor and purchaser, or lessor and lessee (*Luker v. Dennis* (1877), 7 Ch. D. 227, *per* Fry, J., at p. 236). But the view that the covenant runs in equity by reason of notice has been set aside in favour of the principle that it creates an equitable interest in the land of the nature of a negative easement (but see *Noakes & Co., Ltd. v. Rice*, [1902] A. C. 24, 32, 35); and, like a legal easement, it gives a present interest in the land and is not obnoxious to the rule against perpetuities (*London and South Western Rail. Co. v. Gomm* (1882), 20 Ch. D. 562, C. A., *per* JESSEL, M.R., at p. 583; *Formby v. Barker*, [1903] 2 Ch. 539, 552, C. A.). It follows that it binds a subsequent equitable owner, though without notice, and a subsequent legal owner unless he is protected as a purchaser for value without notice (*ibid.*; *Rogers v. Hosgood*, [1900] 2 Ch. 388, 405, C. A.; *Osborne v. Bradley*, [1903] 2 Ch. 446, 451; *Re Nisbet and Potts' Contract*, [1906] 1 Ch. 386, C. A., affirming *FARWELL, J.*, [1905] 1 Ch. 391; compare *Averall v. Wade* (1835), L. & G. temp. Sugd. 252, 260; and as to notice, see *Rowell v. Satchell*, [1903] 2 Ch. 212). As to negative covenants, see title EASEMENTS, Vol. XI., pp. 240, 247.

A purchaser will be bound by the covenants if he receives notice before the completion of his contract, and hence he can refuse to complete on the ground of there being covenants affecting the property which were not disclosed before the contract (*Reeve v. Berridge* (1888), 20 Q. B. D. 523, C. A.; *Re White and Smith's Contract*, [1896] 1 Ch. 637; *Molyneux v. Hawtrey*, [1903] 2 K. B. 487, C. A.).

(*b*) *Reynolds v. Cowlshaw* (1878), 9 Ch. D. 125, *per* HALL, V.-C., at p. 129; affirmed (1879), 11 Ch. D. 866, C. A.; *Nottingham Patent Brick and Tile Co. v. Butler* (1885), 15 Q. B. D. 261; affirmed (1886), 16 Q. B. D. 778, C. A.; *Collins v. Castle* (1887), 36 Ch. D. 243; *Spicer v. Martin* (1888), 14 App. Cas. 12; *Elliston v. Reacher*, [1908] 2 Ch. 374; and whether the plots are sold at the same or at successive sales, provided the stipulations were a condition at each sale (*Rowell v. Satchell*, *supra*). Restrictive covenants may be registered against land registered under the Land Transfer Acts, 1875 and 1897 (38 & 39 Vict. c. 87; 60 & 61 Vict. c. 65); but the registration does not make the covenants enforceable between purchasers of the land *inter se*, where they are not otherwise enforceable by virtue of a building scheme (*Willé v. St. John*, [1910] 1 Ch. 325, C. A.). A purchaser who is shown the building plan is not necessarily entitled to the benefit of the covenants (*Tucker v. Vowles*, [1893] 1 Ch. 195). Where a vendor sells adjoining lots at different times to different purchasers under similar restrictions, this in itself does not entitle the purchaser of one plot to enforce the covenants as against the other (*Master v. Mansard* (1876), 4 Ch. D. 718, C. A.). And as to what constitutes a building scheme, see *Osborne v. Bradley*, [1903] 2 Ch. 446; *A.-G. v. Richmond Corporation* (1903), 89 L. T. 700; *Reid v. Bickerstaff*, [1909] 2 Ch. 305, C. A.; *Tubbs v. Esser* (1910), 26 T. L. R. 145; and as to non-liability of an owner for breaches of covenant by a predecessor, see *Powell v. Helmsley*, [1909] 2 Ch. 252.

(*c*) *Re Birmingham and District Land Co. and Alday*, [1893] 1 Ch. 342.

(*d*) *Everett v. Remington*, [1892] 3 Ch. 148.

**SECT. 8.
Restrictive
Covenants.**

Where no
building
scheme.

In the absence of a building scheme, a purchaser of a neighbouring plot of land will not take the benefit of the covenant unless upon his purchase he contracts to have it (e); nor unless the covenant, on being entered into by the first purchaser, is so attached to the land retained by the vendor as to pass with different parts of that land to subsequent purchasers by mere conveyance of the land, e.g., where it is entered into for the benefit of the vendors, their heirs and assigns, "and others claiming under them any of their adjoining lands" (f). A covenant in form positive may be in substance negative, and therefore enforceable as a restrictive covenant (g).

Release of
restrictive
covenant.

A restrictive covenant will cease to be enforceable if the character of the neighbourhood has been so altered as to render the enforcement useless (h), or if the persons entitled to the benefit of it have acquiesced in the changed user of the property (i). It will be presumed to have been released if there has been for many years an open enjoyment of the land inconsistent with it (j). It will be extinguished upon purchase of the land under the Lands Clauses Consolidation Act, 1845 (k), and compensation can be claimed for its value (l).

Part IV.—Equitable Doctrines Affecting Property.

SECT. 1.—Equitable Assignments.

Assignments
permitted in
equity.

112. It was the policy of the common law that no mere possibility, or contingent right or title, or thing in action should be assigned, since this might lead to litigation (m); but the validity of the reason was not recognised in equity, and assignments were permitted both of contingent interests in real and leasehold estate and of choses in action (n). This was based partly upon the doctrine that an assignment operates by way of contract, and on

(e) *Renals v. Cowlishaw* (1878), 9 Ch. D. 125.

(f) *Rogers v. Hosegood*, [1900] 2 Ch. 388, 405, C. A.; see *Reid v. Bickerstaff*, [1909] 2 Ch. 305, C. A.

(g) *Catt v. Tourle* (1869), 4 Ch. App. 654; *Clegg v. Hands* (1890), 41 Ch. D. 503, 519, C. A.

(h) *Bedford (Duke) v. British Museum (Trustees)* (1822), 2 My. & K. 552; see *Knight v. Simmonds*, [1896] 2 Ch. 294, C. A.; *Osborne v. Bradley*, [1903] 2 Ch. 446, 452; see *Elliston v. Reacher*, [1908] 2 Ch. 374, 393.

(i) *Roper v. Williams* (1822), Turn. & R. 18; *Sayers v. Collyer* (1884), 28 Ch. D. 103, C. A.

(j) *Gibson v. Doeg* (1857), 2 H. & N. 615; *Hepworth v. Pickles*, [1900] 1 Ch. 108.

(k) *Baily v. De Crespigny* (1869), L. R. 4 Q. B. 180; see title COMPULSORY PURCHASE OF LAND AND COMPENSATION, Vol. VI., pp. 367 *et seq.*

(l) *Kirby v. Harrogate School Board*, [1896] 1 Ch. 437, C. A.; compare *Tendring Union Guardians v. Dowton*, [1891] 3 Ch. 26, C. A.

(m) *Lampet's Case* (1612), 10 Co. Rep. 46 b, 48 a.

(n) *Wright v. Wright* (1750), 1 Ves. Sen. 409; see, generally, title CHOSSES IN ACTION, Vol. IV., pp. 374 *et seq.*

SECT. 1.
Equitable
Assign-
ments.

this footing it was necessary that there should be a valuable consideration to make the contract enforceable (o). But in another view the effect of the assignment was to make the assignor a trustee for the assignee (p), and this did not require any consideration. At the present time the distinction is not primarily between the presence or absence of consideration, but whether the disposition amounts to an absolute assignment, so as to put the assignee in the place of the assignor, in which case it is good, though voluntary (q); or whether it merely gives a charge on property, in which case it operates by way of contract, and requires a valuable consideration to support it (r).

113. To constitute an equitable assignment of a chose in action no particular form of words is required; an engagement or direction by a debtor to pay out of a specified debt or fund constitutes an equitable assignment, though it does not operate as an assignment of the whole fund or debt. A mere charge on a fund or debt operates as a partial equitable assignment (s). Notice to the person owing the debt, or to the holder of the fund, is not necessary to complete the title of the assignee (t); but if he omits to give such notice, a subsequent assignee, who took without notice of the first charge, may, by giving notice, obtain priority over him (a). In the case of a legal chose in action the assignee can now obtain a legal title by the assignment—i.e., the right to sue in his own name—if the assignment is absolute (b) and is of the entire debt (c),

Title under
equitable
assignment.

114. Sometimes the instrument creating a chose in action makes it assignable by the creditor free from equities between himself and the debtor, and then the debtor is bound to pay the assignee, although he has a claim against the assignor which might be used by way of defence or set-off in an action brought by the

Chose in
action assign-
able subject
to equities.

(o) "An assignment always operates by way of agreement or contract; amounting in the consideration of this court to this, that one agrees with another to transfer" (*Wright v. Wright* (1750), 1 Ves. Sen. 409, per Lord HARDWICKE, L.C., at p. 412).

(p) See p. 10, *ante*; compare *Fullam v. McCarthy* (1848), 1 H. L. Cas. 703.

(q) See p. 98, *ante*, and *Squib v. Wyu* (1717), 1 P. Wms. 378; *Nunney v. Morgan* (1887), 37 Ch. D. 346, 352, C. A.

(r) *Re Lucan (Earl)*, *Hardinge v. Cobden* (1890), 45 Ch. D. 470.

(s) *Durham Brothers v. Robertson*, [1898] 1 Q. B. 765, C. A., per CHITTY, L.J., at p. 769; *Rodick v. Gandell* (1852), 1 De G. M. & G. 763, per Lord TRURO, L.C., at p. 777; *Brown, Shipley & Co. v. Kough* (1885), 29 Ch. D. 848, 851, C. A.; *Gorringe v. Irwell India Rubber and Gutta Percha Works* (1886), 34 Ch. D. 128, C. A., per COTTON, L.J., at p. 134; *Brandt's (William) Sons & Co. v. Dunlop Rubber Co.*, [1905] A. C. 454.

(t) *Ward v. Duncombe*, [1893] A. C. 369, per Lord MACNAGHTEN, at p. 392.

(a) *Dearle v. Hall* (1828), 3 Russ. 1; *Re Dallas*, [1904] 2 Ch. 385, C. A. Similarly a stop order on a fund in court will give priority to a second incumbrancer, provided he did not take with notice (*Re Holmes (A. D.)* (1885), 29 Ch. D. 786, C. A.; see *Re Eytton*, *Bartlett v. Charles* (1890), 45 Ch. D. 458).

(b) Judicature Act, 1873 (36 & 37 Vict. c. 66), s. 25 (6) (including assignments by way of mortgage; *Durham Brothers v. Robertson*, *supra*; see *Hughes v. Pump House Hotel Co.*, [1902] 2 K. B. 190, C. A.).

(c) *Forster v. Baker* (1910), 102 L. T. 522, C. A., affirming decision of BRAY, J., *ibid.*, p. 29, and not following *Skipper and Tucker v. Holloway* (1909), 79 L. J. (K. B.) 91, reversed on another ground, *ibid.*, p. 496; compare *Jones v. Humphreys*, [1902] 1 K. B. 10.

SECT. 1.
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Assign-
ments.

assignor (*d*). But otherwise an equitable assignment is subject to the rule that the assignee takes subject to all rights of set-off and defences existing between the debtor and the assignor; except that, after notice of an assignment of a chose in action, the debtor cannot by payment or otherwise do anything to take away or diminish the rights of the assignee as they stood at the time of the notice (*e*).

Assignment
of after-
acquired
property.

115. An assignment for valuable consideration of property to be afterwards acquired by the assignor operates as a covenant to assign it when acquired, and the beneficial interest passes so soon as the property is acquired by the assignor (*f*).

SECT. 2.—Conversion.

Theoretical
conversion of
land into
money and
money into
land.

116. The rule that equity considers that as done which ought to be done has given rise to the doctrine of conversion (*g*) by means of which land may be impressed with the legal qualities of personal estate, and money may be impressed with the legal qualities of real estate, although no actual sale or purchase, as the case may be, has taken place. This change of one kind of property into the other may follow from a direction contained in a will or settlement, from a contract, or from an order of the court (*h*). The general principle is that land directed or agreed to be sold and turned into money, or money directed or agreed to be laid out in the purchase of land is to be considered as that species of property into which it is directed or agreed to be converted: thus the owner of the property or the contracting parties may make land money, or money land (*i*). It follows that no change is effected where land is directed to be sold and the proceeds reinvested in the purchase of land (*j*).

(*d*) *Re Goy & Co., Ltd., Farmer v. Goy & Co., Ltd.*, [1900] 2 Ch. 149.

(*e*) *Roxburghe v. Cox* (1881), 17 Ch. D. 520, C. A., *per* JAMES, L.J., at p. 526; *Re Brown and Gregory, Ltd., Shephard v. Brown and Gregory, Ltd., Andrews v. Brown and Gregory, Ltd.*, [1904] 1 Ch. 627; see *Newfoundland Government v. Newfoundland Rail. Co.* (1888), 13 App. Cas. 199, P. C.; *Re Taunton, Delmard, Lane & Co., Christie v. Taunton, Delmard, Lane & Co.*, [1893] 2 Ch. 175. Where a fund in court in an action is carried to a separate account, the person entitled to it under the account can confer a title on an assignee for value free from equities of other parties to the action (*Edgar v. Plumley*, [1900] A. C. 431, P. C.).

(*f*) *Collyer v. Isaacs* (1881), 19 Ch. D. 342, C. A.; *Re Clarke, Coombe v. Carter* (1887), 36 Ch. D. 348, C. A.; *Tailby v. Official Receiver* (1888), 13 App. Cas. 523; see p. 74, *ante*; and title DEEDS AND OTHER INSTRUMENTS, Vol. X., p. 497. And where a person has conveyed for value a defective title, and he afterwards acquires a good title, the good title is available in equity to make the conveyance effectual (*Noel v. Bewley* (1829), 3 Sim. 103; *Re Bridgewater's Settlement, Partridge v. Ward*, [1910] W. N. 188), provided the conveyance purports to be of an absolute title in the first instance (*Smith v. Osborne* (1857), 6 H. L. Cas. 375, 398).

(*g*) See *Lechmere v. Carlisle (Earl)* (1733), 3 P. Wms. 211, 215; *Guidot v. Guidot* (1745), 3 Atk. 254, 256; *Re Walker, Macintosh-Walker v. Walker*, [1908] 2 Ch. 705, 712.

(*h*) See p. 111, *post*.

(*i*) *Fletcher v. Ashburner* (1779), 1 Bro. C. C. 497, see *per* Sir T. SEWELL, M.R., at p. 499; 1 White & Tud. L. O., 7th ed. p. 327; *Wheldale v. Partridge* (1800), 5 Ves. 388, 397; see the early cases collected in note to *Cruss v. Barley* (1727), 3 P. Wms. 19, at p. 22. Where the trust for sale is void under the rule against perpetuities, but the beneficial interests are not void, the trust for sale is disregarded and the land is taken as realty (*Re Appleby, Walker v. Lever, Walker v. Nisbet*, [1903] 1 Ch. 565, C. A.).

(*j*) *Sperling v. Toll* (1747), 1 Ves. Sen. 70; *Pearson v. Lane* (1809), 17 Ves. 101.

SECT. 2.

Conversion.

Direction in will or settlement must be imperative.

117. Equitable conversion takes place, in the case of a will, when land is devised upon trust for sale, or money is bequeathed to be laid out in land; in the case of a settlement, when land is conveyed or agreed to be conveyed upon trust for sale, or when money is paid or agreed to be paid, and is to be held upon trust for the purchase of land. But in each case the direction to change the nature of the property must be imperative. There is no conversion where there is a mere power to sell land, or to invest money in real estate, or where it is left optional whether an investment of money shall take the form of real or personal estate (*k*). And conversion is not effected by a mere declaration that personalty shall devolve as realty, or *vice versâ*. There must be an imperative trust or direction which in equity can be treated as effecting the desired change in the nature of the property (*l*); and to deprive the heir of his rights under an intestacy the property must be disposed of in favour of the next of kin, and *vice versâ* (*m*). Moreover, the direction to convert must be effectual; if for any reason it is void, there is no conversion (*n*).

118. But it is not essential that there should be an express direction to convert the property. It is sufficient if an imperative trust for conversion can be collected from the instrument (*o*): thus though there may be an apparent option to invest money in land or in personalty, yet if the limitations applicable to the investment are only suitable for real estate, the money will be treated as converted into realty (*p*). And though there is a discretionary

Direction to convert need not be express

(*k*) *Curling v. May* (1734), cited 3 Atk. 235; *Walker v. Denne* (1793), 2 Ves. 170, 184; *Whealdale v. Partridge* (1800), 5 Ves. 388; *Walter v. Maunde* (1815), 19 Ves. 424; *De Beauvoir v. De Beauvoir* (1852), 3 H. L. Cas. 524; *Smithwick v. Smithwick* (1861), 12 I. Ch. R. 181, 201; *Re Whitty's Trust* (1875), 9 I. R. Eq. 41; *Re Ibbittson's Estate* (1869), L. R. 7 Eq. 226; *Atwell v. Atwell* (1871), L. R. 13 Eq. 23; *Hyett v. Meekin* (1884), 25 Ch. D. 735; *Re Hotchkys*, *Freke v. Calmady* (1886), 32 Ch. D. 408, C. A.; *Re Bird*, *Pitman v. Pitman*, [1892] 1 Ch. 279; *Re Walker, Macintosh-Walker v. Walker*, [1908] 2 Ch. 705. If the conversion is directed in a certain event which is ascertained to be existing at the date of the testator's death, the conversion takes effect from the death (*Ward v. Arch* (1846), 15 Sim. 389; and see *Wall v. Colshead* (1858), 2 De G. & J. 683, C. A.). But a power to sell for the purpose of distribution does not effect a conversion till there is an actual sale (*Lucas v. Brandreth* (No. 1) (1860), 28 Beav. 273); see *Brown v. Bigg* (1802), 7 Ves. 279; *Polley v. Seymour* (1837), 2 Y. & C. (Ex.) 708, 722; and generally a mere power does not effect a conversion (*De Beauvoir v. De Beauvoir*, *supra*).

(*l*) *Re Walker, Macintosh-Walker v. Walker*, *supra*; compare *Edwards v. Tuck* (1856), 23 Beav. 268; *Hyett v. Meekin*, *supra*.

(*m*) It is not sufficient that the testator directs that the proceeds shall be considered to all intents and purposes as personal estate; this is on the assumption that he dies testate, and implies no gift in favour of the next of kin (*Robinson v. London Hospital (Governors)* (1853), 10 Haro, 19; *Taylor v. Taylor* (1853), 3 De G. M. & G. 190).

(*n*) *Re Appleby*, *Walker v. Lever*, *Walker v. Nisbet*, [1903] 1 Ch. 565, C. A.

(*o*) See *Burrell v. Baskerfield* (1849), 11 Beav. 525.

(*p*) *Cowley v. Hartstonge* (1813), 1 Dow, 361; *Johnson v. Arnold* (1748), 1 Ves. Sen. 169; *Earlom v. Saunders* (1754), Amb. 241; *Cookson v. Reay* (1842), 5 Beav. 22, affirmed *sub nom.* *Cookson v. Cookson* (1845), 12 Cl. & Fin. 121, H. L.; *Simpson v. Ashworth* (1843), 6 Beav. 412; *De Beauvoir v. De Beauvoir*, *supra*; see *Evans v. Ball* (1882), 47 L. T. 165, H. L. But a limitation to "heirs" is not sufficient to convert money into realty (*Atwell v. Atwell*, *supra*).

SECT. 2.
Conversion.

power to sell the whole or part of land, yet, if there are trusts which require the exercise of the power, there is a conversion (*q*). And a trust for conversion will be implied where real and personal property are given for division in such a manner as can only be effectuated by sale (*r*).

Conversion at request.

119. Where there is a trust for conversion at the request of a specified person, the request is generally treated, not as a condition of conversion, but as intended to secure the performance of the trust, and the trust is imperative and operates at once to effect a conversion (*s*); and similarly where a specified consent or approbation is required (*t*). But it is otherwise if the direction is to convert on the joint request of two persons, as of husband and wife (*a*); or if the language otherwise shows that the consent is essential (*b*); or if the effect is to give a discretion as to the form which the property is to take (*c*).

Effect of conversion.

120. When conversion has once been effected in equity, whether of land into money or of money into land, the property is treated in equity as having all the legal incidents of its new form (*d*); and this whether the conversion is under a will or a settlement or otherwise. Consequently, land which has been theoretically converted into money will pass as personalty under the will (*e*) or upon the intestacy (*f*) of the *cestui que trust*; and money which has been theoretically converted into land will pass as real estate under the *cestui que trust's* will (*g*), or upon his

(*q*) *Ralph v. Carrick* (1877), 5 Ch. D. 984, 996, 997; this point was not discussed on appeal ((1879), 11 Ch. D. 873, O. A.); see *Grierson v. Kirsopp* (1838), 2 Keen, 653.

(*r*) *Mower v. Orr* (1849), 7 Hare, 473; see *Cornick v. Pearce* (1848), 7 Hare, 477; *Greenway v. Greenway* (1860), 2 De G. F. & J. 128.

(*s*) *Thornton v. Hawley* (1804), 10 Ves. 129; *Burrell v. Baskerfield* (1849), 11 Beav. 525.

(*t*) *Lechmere v. Carlisle (Earl)* (1733), 3 P. Wms. 211, 220; *Wrightson v. Macaulay* (1845), 4 Hare, 487, 497; compare the opposite opinion in *Stead v. Newdigate* (1817), 2 Mer. 521, 530.

(*a*) *Re Taylor's Settlement* (1852), 9 Hare, 596.

(*b*) *Davies v. Goodhew* (1834), 6 Sim. 585, where the sale was to take place with a specified consent, "and not without"; compare *Huskinson v. Lefevre* (1858), 26 Beav. 157; *Sykes v. Sheard* (1863), 33 Beav. 114, on appeal, 2 De G. & Sm. 6, O. A.

(*c*) *Re Taylor's Settlement*, *supra*, at p. 602.

(*d*) As to the effect of conversion in relation to death duties, see title ESTATE AND OTHER DEATH DUTIES, *post*.

(*e*) Thus it will pass under a residuary bequest of personalty (*Stead v. Newdigate*, *supra*; *Gover v. Davis* (1860), 29 Beav. 222); and not under a devise of land (*Elliott v. Fisher* (1842), 12 Sim. 505); and, where the will disposes of this property only, probate of the will as a will of personalty can be granted (*In the Goods of Gunn* (1884), 9 P. D. 242, 244); though not where the conversion of land into money is only effected by the will to be proved (*In the Goods of Barden* (1867), L. R. 1 P. & D. 325). Under the Land Transfer Act, 1897 (60 & 61 Vict. c. 65), s. 1 (3), probate can be granted in respect of real estate only, so that the last two cases are apparently obsolete.

(*f*) *Ashby v. Palmer* (1816), 1 Mer. 296; *Biggs v. Andrews* (1832), 5 Sim. 424, where part of the land had not been sold; *Griffith v. Ricketts*, *Griffith v. Lunell* (1849), 7 Hare, 299.

(*g*) Thus it will pass under a general devise of land or of real estate (*Lingen v. Souray* (1711), 1 P. Wms. 172; *Greenhill v. Greenhill* (1711), 2 Vern. 679;

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intestacy (*h*). But the *cestui que trust*, by a suitable description in his will, may show an intention to include proceeds of sale of land in a devise, or money to be invested in land in a bequest, and effect will be given to such intention accordingly (*i*). Money theoretically converted into land will be subject to tenancy by the curtesy (*k*), and probably to dower (*l*).

121. In the case of conversion directed by will, the conversion takes place from the death of the testator (*m*); where it is directed by deed, from the delivery of the deed (*n*); and this is so, although

*Date of
conversion.

Quidot v. Guidot (1745), 3 Atk. 254; *Rashleigh v. Master* (1790), 1 Ves. 201; *Biddulph v. Biddulph* (1806), 12 Ves. 161; *Green v. Stephens* (1810), 17 Ves. 64, 77; *Chandler v. Pocock* (1880), 15 Ch. D. 491, 499, affirmed (1881), 16 Ch. D. 648, C. A.; *Re Greaves' Settlement Trusts* (1883), 23 Ch. D. 313; and will not pass under a bequest of personal estate (*Gillies v. Longlands* (1851), 4 De G. & Sm. 372); and see *Wrightson v. Macaulay* (1845), 4 Hare, 487. Where the trust is for investment in land generally, the money will not pass under a devise of land in a particular county (*Re Cleveland's (Duke) Settled Estates*, [1893] 3 Ch. 244, C. A.). A direction to resettle "hereditaments" which are already subject to a settlement extends to money held upon trust under the settlement for investment in land (*Basset v. St. Levan* (1894), 43 W. R. 165; *Re Gosselin, Gosselin v. Gosselin*, [1906] 1 Ch. 120).

(*h*) *Lingen v. Sowray* (1711), 1 P. Wms. 172; *Disher v. Disher* (1712), 1 P. Wms. 204; *Chaplin v. Horner* (1718), 1 P. Wms. 483; *Scudamore v. Scudamore* (1720), Prec. Ch. 543; *Edwards v. Warwick (Countess)* (1723), 2 P. Wms. 171; see *Knights v. Atkins* (1687), 2 Vern. 20. Where the money is to be paid by the ancestor, and before his death the trusts which require investment in land are exhausted, a different principle comes in; the money is "at home" in the lifetime of the ancestor, and the equity of the heir to take it as land does not arise; see p. 116, *post*.

(*i*) Thus, if in his will a testator describes a fund as so much money agreed to be laid out in land, it will pass as personal estate (*Cross v. Addenbroke* (1719), cited in note to *Lechmere v. Carlisle (Earl)* (1733), 3 P. Wms. 211, 222). But it has been held that a devise by B. of a share in a specific estate taken by him under the will of A. will not pass the share if, under the will of A., it was converted (*Elliott v. Fisher* (1842), 12 Sim. 505), *sed quære*; and see *Re Padder's Settlement* (1851), 5 De G. M. & G. 890, C. A.

(*k*) *Sweetapple v. Bindon* (1705), 2 Vern. 536; *Cunningham v. Moody* (1748), 1 Ves. Sen. 174, 176; *Dodson v. Hay* (1791), 3 Bro. C. C. 405; *Follett v. Tyrer* (1844), 14 Sim. 125.

(*l*) Formerly this was not so, probably because a widow was not dowable out of an equitable estate (*Cunningham v. Moody, supra*; *Crabtree v. Bramble* (1747), 3 Atk. 680, 687); and see p. 95, *ante*. But now that women are dowable out of equitable estates (Dower Act, 1833 (3 & 4 Will. 4, c. 105)), the rule may be taken to have been changed. The effect of the conversion of money into land, and *vice versa*, was formerly important in regard to the liability of the property to debts of the deceased *cestui que trust* (*Whitwick v. Jermin* (undated), cited in *Baden v. Pembroke (Earl)* (1688), 2 Vern. 52, 58; and see cases cited in 1 White & Tud. L. C., 7th ed., at p. 334); but now that land is liable for both specialty and simple contract debts the result of conversion is not important. The Intestates Estates Act, 1884 (47 & 48 Vict. c. 71), s. 4, appears to have similarly abolished the old rule that the court would not treat money as land where the Crown would take by escheat (*Walker v. Denne* (1793), 2 Ves. 170, 185; *Henchman v. A.-G.* (1834), 3 My. & K. 485, 494; see *Taylor v. Haygarth* (1844), 14 Sim. 8). On the other hand, money which would, as such, have been forfeitable, prior to the Forfeiture Act, 1870 (33 & 34 Vict. c. 23), to the Crown on conviction of felony was saved by a theoretical conversion into land (*Re Harrop's Estate* (1857), 3 Drew. 720).

(*m*) *Beauclerk v. Mead* (1741), 2 Atk. 167; *Hutcheon v. Mannington* (1791), 1 Ves. 366. Hence actual conversion gives no fresh title to the proceeds of land as personality (*Re Bacon, Toovey v. Turner*, [1907] 1 Ch. 475, 481).

(*n*) *Griffith v. Ricketts, Griffith v. Lunell* (1849), 7 Hare, 299, 311; *Clarke v.*

SECT. 2. a period is expressly fixed within which the sale is to be made (o); or
Conversion. although the trustees are directed to sell when it shall appear advantageous (p), or when the sale shall be for the benefit of the *cestui que trust* (q); or although the sale is not to take place till the happening of a future event (r), such as the death of a tenant for life (s). If, however, the future event is contingent, the conversion does not take place until the contingency is ascertained (t). In the event of a postponement of the actual sale of land after the time when it is to be deemed to take place, the intermediate rents and profits go to the person entitled to the income of the proceeds of sale (u).

Total or
partial failure
of purpose of
conversion.

122. The purposes for which a conversion is directed by will may fail either wholly or partially, and then, upon the assumption that the conversion was directed for these purposes only (a), equity will treat the property, so far as the purposes fail, as reconverted; and if it was originally land, will give it to the heir-at-law (b); and if it was originally money, will give it to the next of kin (c). And this is so whether conversion has actually taken place or not (d), and although the real and personal estate have been blended so as to

Franklin (1858), 4 K. & J. 257, 263; unless the deed shows an intention that the property shall remain in its existing state until a future event (*Wheldale v. Partridge* (1803), 8 Ves. 227, 236).

(c) *Pearce v. Gardner* (1852), 10 Hare, 287.

(p) *Robinson v. Robinson* (1854), 19 Beav. 494.

(q) *Doughty v. Bull* (1725), 2 P. Wms. 320; *Re Raw, Morris v. Griffiths* (1881), 26 Ch. D. 601.

(r) *Tily v. Smith* (1841), 1 Coll. 434.

(s) *Clarke v. Franklin* (1858), 4 K. & J. 257; *Stead v. Newdigate* (1817), 2 Mer. 521.

(t) *Ward v. Arch* (1846), 15 Sim. 389.

(u) *Casamajor v. Strode* (1809), 19 Ves. 390, n.; *Fitzgerald v. Jervoise* (1820), 5 Mudd. 25; *Re Searle, Searle v. Baker*, [1900] 2 Ch. 829. As to intermediate income generally where conversion is postponed, see *Howe v. Dartmouth* (Earl), *Howe v. Aylesbury* (Countess) (1802), 7 Ves. 137; 1 White & Tud. L. C., 7th ed., p. 68; and titles EXECUTORS AND ADMINISTRATORS; TRUSTS AND TRUSTEES.

(a) *Hill v. Cock* (1813), 1 Ves. & B. 173, per Lord Eldon, L.C., at p. 175.

(b) *Ackroyd v. Smithson* (1780), 1 Bro. C. C. 503; 1 White & Tud. L.C., 7th ed., p. 372; *Robinson v. Taylor* (1789), 2 Bro. C. C. 589; *Chitty v. Parker* (1793), 2 Ves. 271; *Berry v. Usher* (1805), 11 Ves. 87; *Roberts v. Walker* (1830), 1 Russ. & M. 752; and the principle applies also to money which is in equity theoretically land, and which is subject to a devise on trust for sale (*Re Taylor's Settlement* (1852), 9 Hare, 596, 604). The failure of the trusts may be by reason of the death of a legatee or devisee in the lifetime of the testator (*Ackroyd v. Smithson*, *supra*); or of a legatee or devisee failing to obtain a vested interest (*Jessopp v. Watson* (1833), 1 My. & K. 665); or of a disposition being illegal, as where it infringes the Mortmain Act (*Jones v. Mitchell* (1823), 1 Sim. & St. 290; *Hopkinson v. Ellis* (1846), 10 Beav. 169, 174, 175); or the Accumulations Act, 1800 (39 & 40 Geo. 3, c. 98) (*Eyre v. Marsden* (1838), 2 Keen, 564; *Simmons v. Pitt* (1873), 8 Ch. App. 978; *Re Perkins, Brown v. Perkins* (1909), 101 L. T. 345); or where the surplus of the proceeds of sale is undisposed of (*Naismith v. Boyes*, [1899] A. C. 495).

(c) *Cogan v. Stephens* (1835), 5 L. J. (CH.) 17. Before this case, while it was admitted that personality directed to be laid out in land resulted to the next of kin on a total failure of the purposes of conversion, it was doubted whether the next of kin would take on a partial failure (see judgment of Lord COTTENHAM, M.R.).

(d) In *Ackroyd v. Smithson*, *supra*, the land had been sold; compare *Bective v. Hodgson* (1864), 10 H. L. Cas. 656, per Lord WESTBURY, L.C., at p. 667.

form a mixed fund (e). The testator, foreseeing this result, may avoid it, if he so chooses, by directing that the conversion shall be not only for the primary purposes of his will, but shall be absolute, and shall prevail as between the heir and the next of kin (f): but to effect this, it is not sufficient, in the case of land directed to be converted, merely to exclude the heir—there must be an actual gift of the proceeds in favour of the next of kin; and, similarly, in the case of money directed to be laid out in land, there must, to exclude the next of kin, be a gift of the land in favour of the heir (g). Where the income only of the proceeds of sale is disposed of, there is a resulting trust of the capital in favour of the heir (h); and similarly the heir takes income which is undisposed of (i).

SECT. 2.
Conversion.

123. When, upon the failure of the purposes for which a conversion is directed by will, the heir or the next of kin, as the case may be, takes the property, it may become necessary to ascertain whether it is taken by the one or the other as real or personal estate. Here, again, the result does not depend upon whether there has been an actual conversion or not, but on whether there has been a total or only a partial failure of the purposes for which conversion was directed. If, before the death of the testator, these purposes have wholly failed, the need for conversion has gone, and if there is an actual conversion it is improper and should not affect the rights of the heir or the next of kin (j). Hence, in the case of land directed to be turned into money, the heir-at-law takes the property, whatever its form, as real estate, and, unless otherwise disposed of, it will descend to his heir-at-law; and, similarly, in the case of money directed to be laid out in land, the next of kin will take it, whatever its form, as personal estate (k). If, however, there has been at the death of the testator only a partial failure of the purposes for which conversion was directed, the result is different. The trust for conversion becomes operative, and though, so far as the purposes fail, land directed to be sold goes to the heir-at-law, yet he takes it as personal estate (l), whether it has been actually sold or not (m); and, similarly, money directed

Character in which property results on failure of purposes of conversion under will.

Total failure.

Partial failure.

(e) *Ackroyd v. Smithson* (1780), 1 Bro. C. C. 503; 1 White & Tud. L. C., 7th ed., p. 372; *Jessopp v. Watson* (1833), 1 My. & K. 665. Where debts and legacies are payable out of the mixed fund, the converted land must bear its rateable proportion before the reconversion takes effect (*Tench v. Cheese* (1855), 6 De G. M. & G. 453, 467, C. A.; *Allan v. Gott* (1872), 7 Ch. App. 439, 445).

(f) 1 Jarman on Wills, 5th ed., 530; see cases collected in note to *Cruse v. Burley* (1727), 3 P. Wms. 19, 22.

(g) *Fitch v. Weber* (1848), 6 Hare, 145; see *Berry v. Usher* (1805), 11 Ves. 87.

(h) *Wilson v. Major* (1805), 11 Ves. 205; *Watson v. Hayes* (1839), 5 My. & Cr. 125.

(i) *Eyre v. Marsden* (1838), 2 Koen, 564; *Re Perkins, Brown v. Perkins* (1909), 101 L. T. 345.

(j) *Davenport v. Colman* (1842), 12 Sim. 588, 610.

(k) *Smith v. Claxton* (1820), 4 Madd. 484, per LEACH, V.-C., at p. 493; *Bagster v. Fackerell* (1859), 26 Beav. 469; *Buchanan v. Harrison* (1861), 1 John. & H. 662.

(l) *Smith v. Claxton*, *supra*; *Jessopp v. Watson*, *supra*; *A.-G. v. Lomas* (1873), L. R. 9 Exch. 29.

(m) *Re Richerson, Scales v. Heyhoe*, [1892] 1 Ch. 379.

SECT. 2.

Conversion.

Where
conversion
directed by
deed.

to be laid out in land goes to the next of kin as real estate, whether land has been actually purchased or not (*n*).

Where there is a total or partial failure of the purposes of a conversion directed by deed the principle is the same, but it has to be applied with reference to the time from which the deed operates. A will speaks from the death of the testator; a deed from the time of delivery. Hence the property not required for the stated objects results to the settlor himself, and not to his heir-at-law or next of kin (*o*); and if there is a total failure of the purposes, it results to him, in the case of land to be turned into money, as realty, which, if he has died without disposing of it, passes to his heir-at-law (*p*); if there is a partial failure, it results to him as personalty (*q*). Similarly, money directed to be laid out in land results to the settlor, on a total failure of the purposes of conversion, as personalty, and on a partial failure, as realty (*r*).

Conversion
by contract
of sale.

Under Lands
Clauses
Consolidation
Act.

124. The doctrine of conversion applies where land is agreed to be sold, and from the date when the contract becomes binding the land is treated for purposes of testamentary disposition and of devolution as personalty. In ordinary cases the signing of the contract marks the date of this conversion (*s*). Special considerations arise where land is taken under the Lands Clauses Consolidation Act, 1845 (*t*), or where it is purchased under an option of purchase conferred by agreement. Where land is taken under that Act the notice to treat does not create a contract (*a*); but as soon as the purchase price has been ascertained, whether by agreement, by arbitration, or by a jury, a contract arises by virtue of the statute (*b*); and if this is done in the landowner's lifetime, the proceeds of sale pass as personalty, but the rents accruing between his death and completion belong to the devisee or heir (*c*).

(*n*) *Curteis v. Wormald* (1878), 10 Ch. D. 172, C. A., overruling *Head v. Godlee*, *Reynolds v. Godlee* (1859), John. 536, 583; see also *Cogan v. Stephens* (1835), 5 L. J. (CN.) 17.

(*o*) *Griffith v. Ricketts*, *Griffith v. Lunell* (1849), 7 Hare, 299, 311.

(*p*) *Ripley v. Waterworth* (1802), 7 Ves. 425, 435.

(*q*) *Hewitt v. Wright* (1780), 1 Bro. C. C. 86; *Clarke v. Franklin* (1858), 4 K. & J. 267; see *Van v. Barnett* (1812), 19 Ves. 102; *Biggs v. Andrews* (1832), 5 Sim. 424.

(*r*) See *Wheldale v. Partridge* (1803), 8 Ves. 227, 236; *Clarke v. Franklin*, *supra*, at pp. 264, 265.

(*s*) See p. 98, *ante*. If the heir adopts and carries out a parol contract of his ancestor, this avoids any objection based on the Statute of Frauds; the conversion is complete, and the purchase-money belongs to the next of kin (*Frayne v. Taylor* (1863), 10 Jur. (N. S.) 119); but otherwise an unenforceable contract does not effect a conversion (*Re Thomas*, *Thomas v. Howell* (1886), 34 Ch. D. 166). On the other hand, if it is enforceable, but goes off after the death of the vendor through the default of the purchaser, there is conversion (*Curre v. Bowyer* (1818), 5 Beav. 6, n.; see *Broom v. Monk* (1805) 10 Ves. 597).

(*t*) 8 & 9 Vict. c. 18; see title COMPULSORY PURCHASE OF LAND AND COMPENSATION, Vol. VI., p. 66.

(*a*) *Haynes v. Haynes* (1861), 1 Drew. & Sm. 426, 450.

(*b*) *Harding v. Metropolitan Rail. Co.* (1872), 7 Ch. App. 154, 158; see *Regent's Canal Co. v. Ware* (1857), 23 Beav. 575; and compare *Morgan v. Milman* (1853), 3 De G. M. & G. 24, C. A.

(*c*) *Ex parte Hawkins* (1849), 13 Sim. 569; *Re Manchester and Southport Rail. Co.* (1854), 19 Beav. 365; *Watts v. Watts* (1873), L. R. 17 Eq. 217. But a compulsory sale of settled land does not effect a conversion (*Re Taylor's Settlement*

SECT. 2.

Conversion.

Under option of purchase.

Where an agreement confers an option of purchase, the exercise of the option converts the agreement into an agreement for sale, and the land itself is treated as converted from the date of the agreement, though the title to the intermediate rents and profits is not changed. Thus, if the vendor has died in the interval, the proceeds of sale do not belong to his devisee or heir, but pass as personal estate—in other words, the exercise of the option deprives the devisee or heir of the land without compensation (*d*); but he is not required to account for rents and profits received before the time for completion (*e*). The vendor may, however, either in the agreement (*f*) or in his will, indicate his intention that the owner at the date of the exercise of the option shall take the proceeds of sale; and where, after the land has been made subject to the option, he specifically devises it, the devise is construed as passing the proceeds of sale if the option is exercised (*g*).

125. Although there is no imperative trust for conversion, yet there may be a disposition of the property under a power conferred by a settlor or testator, or otherwise existing. In such cases, if the disposition involves a change in the nature of the property, a conversion is effected upon the power being exercised (*h*); and the conversion is final, and the property belongs to the beneficial owner at the time of conversion in its altered form. Hence, though some of the purposes of the conversion fail, so that there is a surplus, this devolves upon the representatives of the owner in the altered form; and if it is the proceeds of sale of land, there is no equity in the heir to take the property as though it were land. This is equally the case whether the conversion is by a trustee under a power, or is in pursuance of an order of the court (*i*), including a sale in a

Conversion under a power or by the court.

(1852), 9 Hare, 596; nor, apparently, of land of a lunatic (*Re Tugwell* (1884), 27 Ch. D. 309; *contra*, *Re East Lincolnshire Railway Act, Ex parte Flamank* (1851), 1 Sim. (N. S.) 260); or of an infant (*Kelland v. Fulford* (1877), 6 Ch. D. 491); unless the purchase-money is paid to trustees who are not bound to reinvest it in land (*Re Morgan, Smith v. May*, [1900] 2 Ch. 474).

(*d*) *Laures v. Bennett* (1785), 1 Cox, Eq. Cas. 167, 171. The rule applies whether the vendor dies testate or intestate, and although the option is exercisable only after his death (*Re Isaacs, Isaacs v. Reginall*, [1894] 3 Ch. 506); see *Re Crofton* (1839), 1 I. Eq. R. 204; *Re Cousins, Alexander v. Cross* (1885), 30 Ch. D. 203, C. A.

(*e*) *Townley v. Bedwell* (1808), 14 Ves. 591; *Collingwood v. Row* (1857), 3 Jur. (N. S.) 785.

(*f*) *Re Graves Minors, Graves v. Graves* (1864), 15 I. Ch. R. 357.

(*g*) *Drant v. Vause* (1842), 1 Y. & C. Ch. Cas. 580; *Emuss v. Smith* (1848), 2 De G. & Sm. 722. Where the agreement follows the will containing the specific devise, the devise is not saved (*Farrar v. Winterton (Earl)* (1842), 5 Beav. 1; *Weeding v. Weeding* (1861), 1 John. & H. 424); but where the will was confirmed by a codicil made on the same day as the agreement, the devise was held to carry the proceeds of sale (*Re Pyle, Pyle v. Pyle*, [1895] 1 Ch. 724).

(*h*) *Re Dyson, Chalkinor v. Sykes*, [1910] 1 Ch. 750. The power must, of course, be still in existence (*Re Jump, Galloway v. Hope*, [1903] 1 Ch. 129).

(*i*) *Steed v. Preece* (1874), L. R. 18 Eq. 192, *per* JESSEL, M.R., at p. 197: "If a conversion is rightfully made, whether by the court or a trustee, all the consequences of a conversion must follow; and there is no equity in favour of the heir or anyone else to take the property in any other form than that in which it is found"; *Hyett v. Meekin* (1884), 25 Ch. D. 735. This dictum is opposed to *Jermyn v. Preston* (1842), 13 Sim. 356; and *Cooke v. Dealey* (1855), 22 Beav. 196; but was approved in *Burgess v. Booth*, [1903] 2 Ch. 648, C. A.

SECT. 2. partition action (*k*). Consequently, where the court sells the estate of an adult (*l*), or of an infant (*m*), or of a lunatic (*n*), the property is converted out and out—the conversion taking effect from the date of the order (*o*)—and there is no reconversion of any proceeds of sale not required for the purpose of the order; except in the case of a person under disability, where the sale is made under the Partition Acts, 1868 and 1876 (*p*), and the money is not paid out of court to trustees (*q*). And it is the same where a mortgagee sells under his power of sale, during the lifetime of the mortgagor. Upon the death of the mortgagor without having received the surplus, there is no equity in the heir to have the surplus reconverted, notwithstanding that the mortgage contains a trust for payment of the surplus to the mortgagor, his heirs and assigns (*r*). But if the land is sold after the mortgagor's death, the surplus belongs to the heir or devisee (*s*), notwithstanding that the trust is for payment to the mortgagor, his executors and administrators (*t*).

Election to reconvert.

126. When property which is subject to a trust for conversion is vested, as regards the beneficial interest, in an absolute owner, he is entitled to take the property in its actual state, free from the trust for conversion; but he must indicate his election (*u*) to take the property in this manner. Such election operates to put an end to the theoretical conversion of the property; or, in other words, it effects a reconversion (*a*). But it is enough if the party shows an

(*k*) *Re Dodson, Yates v. Morton*, [1908] 2 Ch. 638.

(*l*) *Arnold v. Dixon* (1874), L. R. 19 Eq. 113.

(*m*) *Burgess v. Booth*, [1908] 2 Ch. 648, C. A., disapproving of *Scott v. Scott* (1882), 9 L. R. Ir. 367; see *Dyer v. Dyer* (1865), 34 Beav. 504. But the proceeds of timber on settled land may retain the character of real estate (*Field v. Brown, Smith v. Brown* (1859), 27 Beav. 90).

(*n*) *Ex parte Bromfield* (1792), 1 Ves. 453; *Oxenden v. Compton* (Lord) (1793), 2 Ves. 69; *Ex parte Phillips* (1812), 19 Ves. 118; *Hartley v. Pendarves*, [1901] 2 Ch. 498.

(*o*) *Burgess v. Booth*, *supra*; *Arnold v. Dixon*, *supra*.

(*p*) 31 & 32 Vict. c. 40; 39 & 40 Vict. c. 17. This is under s. 8 of the Act of 1868; *Foster v. Foster* (1875), 1 Ch. D. 588; and *Mildmay v. Quicke* (1877), 6 Ch. D. 553; see *Mordaunt v. Benwell* (1881), 19 Ch. D. 302.

(*q*) *Re Morgan, Smith v. May*, [1900] 2 Ch. 474; on the ground that the trustees are "absolutely entitled"; see *Re Hobson's Trusts* (1878), 7 Ch. D. 708, C. A. But if the beneficiary dies before payment, the money goes to his heir-at-law as money (*Mordaunt v. Benwell*, *supra*).

(*r*) *Re Grange, Chadwick v. Grange*, [1907] 2 Ch. 20, C. A.; and *a fortiori* if the direction is for payment to the executors (*Re Underwood* (1857), 3 K. & J. 745).

(*s*) *Bourne v. Bourne* (1842), 2 Hare, 35; see *Re Cooper's Trusts, Ex parte Sparks* (1853), 4 De G. M. & G. 757, C. A.

(*t*) *Wright v. Ross* (1825), 2 Sim. & St. 323.

(*u*) The election here referred to is an incident of the doctrine of conversion. It must be distinguished from the election between two properties or benefits, which is treated subsequently; see p. 116, *post*.

(*a*) *Cookson v. Cookson* (1845), 12 Cl. & Fin. 121, H. L., *per* Lord COTTENHAM, at p. 146; see *Pearson v. Lane* (1809), 17 Ves. 101, *per* GRANT, M.R., at p. 104; *Ashby v. Palmer* (1816), 1 Mer. 296. When a mortgagee in possession dies while the statute is running in his favour, the mortgage debt and land devolves as personalty. But so soon as the statute has run, the land vests as realty in the persons beneficially entitled to the mortgage debt, and no case for election arises (*Re Loveridge, Pearce v. Marsh*, [1904] 1 Ch. 518).

intention to take the property in its actual state, and it is immaterial whether he knows or does not know that, but for some election by him, the trust property, if money, would be turned into land, or if land would become money (b).

SECT. 2.
Conversion.

Where the beneficial title to land subject to a trust for conversion is vested in several persons, there can be no reconversion unless all concur (c). Each is entitled to share in the enhanced price which the sale of the entirety of the estate might produce. But the same reason does not apply where several persons are entitled to money to be laid out in land, and anyone can elect to take his share of the money unconverted (d).

Several owners.

A remainderman can elect to take property unconverted, and his election will be operative if the property is still in fact unconverted when his interest falls into possession; this is so, whether he is entitled to a vested (e), or to a contingent remainder (f). But there can be no final reconversion except by direction of the persons absolutely entitled (g).

Remainderman.

Under the old law a tenant in tail could bar his own issue by a fine levied either in vacation time or in term, and, if there were no remainders in the way, money in court liable to be invested in land was paid out to him without actual fine levied (h); but if there were remainders, it was necessary that they should be barred by recovery before he could elect as against them to take the money in specie (i). Under the Fines and Recoveries Act (j), 1833, the purpose of a recovery is effected by a disentailing deed, by which the tenant in tail can elect both as to land to be converted into money and money to be

Tenant in tail.

(b) *Harcourt v. Scymour* (1851), 2 Sim. (N. S.) 12, 46.

(c) *Holloway v. Radcliffe* (1857), 23 Beav. 163; *Biggs v. Peacock* (1882), 22 Ch. D. 284, C. A.; *Re Tweedie and Miles* (1884), 27 Ch. D. 315; *Re Douglas and Powell's Contract*, [1902] 2 Ch. 296, 312; and consequently a trust for sale continues until there has been an election to reconvert by all the absolute owners; compare *Re Jenkins and H. E. Randall & Co.'s Contract*, [1903] 2 Ch. 362. As to the duration of a power of sale, compare *Trower v. Knightley* (1821), Madd. & G. 134; *Peters v. Lewes and East Grinstead Rail. Co.* (1881), 18 Ch. D. 429, C. A.; *Re Cotton's Trustees and London School Board* (1882), 19 Ch. D. 624; *Re Sudeley (Lord) and Baines & Co.*, [1894] 1 Ch. 334; *Re Jump, Galloway v. Hope*, [1903] 1 Ch. 129; *Talbot v. Scarisbrick*, [1908] 1 Ch. 812. A power to postpone the sale is not put an end to by the vesting of a share in possession, so as to entitle the owner of the share to call either for an immediate sale or for a conveyance of an undivided share in the land (*Re Horsnail, Womersley v. Horsnail*, [1909] 1 Ch. 631).

(d) Since, if invested in land, he might the next moment turn it into money, "and equity, like nature, will do nothing in vain" (*Seeley v. Jago* (1717), 1 P. Wms. 389; *Walker v. Denne* (1793), 2 Ves. 170, 182). And this appears to be so where the only persons interested, other than the absolute owner, are portioners; but if the only person so interested is a jointress, she is entitled to have the money laid out in land as security for the jointure rentcharge, and while this right lasts there is no reconversion (*Walrond v. Rosslyn, Walrond v. Fulford* (1879), 11 Ch. D. 640).

(e) See *Crabtree v. Bramble* (1747), 3 Atk. 680.

(f) *Meek v. Devenish* (1877), 6 Ch. D. 566.

(g) *Sisson v. Giles* (1863), 3 De G. J. & Sm. 614.

(h) *Benson v. Benson* (1710), 1 P. Wms. 130; *Short v. Wood* (1718), 1 P. Wms. 470.

(i) *Cunningham v. Moody* (1748), 1 Ves. Sen. 174; or it was sufficient to obtain the consent of the remaindermen (*Trafford v. Boehm* (1746), 3 Atk. 440).

(j) 3 & 4 Will. 4, c. 74.

§ 2.

Conversion.

laid out in land (*k*). Accordingly money in court under the Lands Clauses Consolidation Act, 1845 (*l*), will not be paid out to a tenant in tail as a person absolutely entitled until he has executed a disentailing deed (*m*).

Persons under disability.

Infant.

Lunatic.

127. The person electing must be *sui juris*, and hence an infant cannot elect either to take money which is subject to conversion into land (*n*), or land which is subject to conversion into money (*o*); but the court, upon finding that it is for his benefit, will elect on his behalf (*p*). Similarly a lunatic cannot elect (*q*), but the court can elect on his behalf (*r*).

Married woman

128. A married woman can elect as to money or land subject to conversion, where her interest in the converted property is her separate estate(s). If she is entitled to the proceeds of sale of land as non-separate property, this confers on her an "estate" in the land within the Fines and Recoveries Act, 1833 (*t*), and she can elect to take the land unconverted by deed acknowledged in which her husband concurs (*a*); if she is entitled to money subject to be laid out in land, she can elect in the same way, the section expressly applying to money subject to be invested in land (*b*). Where money is in court in a partition action (*c*), or under the Lands Clauses Consolidation Act, 1845 (*d*), and a married woman is absolutely entitled, it is *prima facie* subject to reinvestment in land; but it will be paid out to her either on a deed acknowledged or on her separate examination in court (*e*), unless it is her separate property, when it will be paid out to her on her mere receipt.

(*k*) Fines and Recoveries Act, 1833 (3 & 4 Will. 4, c. 74), s. 71.

(*l*) 8 & 9 Vict. c. 18.

(*m*) *Re Broadwood's Settled Estates* (1875), 1 Ch. D. 438; *Re Reynolds* (1876), 3 Ch. D. 61, C. A.

(*n*) *Seeley v. Jago* (1717), 1 P. Wms. 389; *Earlom v. Saunders* (1754), Amb. 241; *Carr v. Ellison* (1786), 2 Bro. C. C. 56; *Re Harrop's Estate* (1857), 3 Drew. 726.

(*o*) *Van v. Barnett* (1812), 19 Ves. 102, 109.

(*p*) *Robinson v. Robinson* (1854), 19 Beav. 494.

(*q*) *Ashby v. Palmer* (1816), 1 Mer. 296; *Re Wharton* (1854), 5 De G. M. & G. 33, C. A.; *Re Jump, Galloway v. Hope*, [1903] 1 Ch. 129.

(*r*) See *Re Douglas and Powell's Contract*, [1902] 2 Ch. 296; and compare *A.-G. v. Ailesbury (Marquis)* (1887), 12 App. Cas. 672.

(*s*) *Sharp v. St. Sauveur* (1871), 7 Ch. App. 343; *Re Davidson, Martin v. Trimmer, Davidson v. Trimmer* (1879), 11 Ch. D. 341, C. A.

(*t*) 3 & 4 Will. 4, c. 74, s. 77.

(*a*) See *ibid.*, s. 1; *Briggs v. Chamberlain* (1853), 11 Hare, 69; *Tuer v. Turner* (1855), 20 Beav. 560; see *Miller v. Collins*, [1896] 1 Ch. 573, C. A.; see, generally, title HUSBAND AND WIFE.

(*b*) Formerly she could elect on examination in court; or sometimes a sham purchase was made, and she then disposed of the land by fine (*Oldham v. Hughes* (1742), 2 Atk. 452, 453, 454).

(*c*) *Standerling v. Hall* (1879), 11 Ch. D. 652; *Wallace v. Greenwood* (1880), 16 Ch. D. 362.

(*d*) 8 & 9 Vict. c. 18.

(*e*) *Re Tyler's Estate* (1860), 8 W. R. 540; *Re Hayes* (1861), 9 W. R. 769; *Re Robins' Estate* (1879), 27 W. R. 705; *Standerling v. Hall*, *supra*; *Tennent v. Welch* (1888), 37 Ch. D. 622. As to payment out of small sums without these formalities, see *Knapping v. Tomlinson, Knapping v. Bannister* (1870), 18 W. R. 684; *Gugst v. I'cames*, [1884] W. N. 227.

SECT. 2.

Conversion.

Implied
election to
retain land.

129. An election to take property in its unconverted state may be express, and it is then effectual though by parol (*f*); or it may be presumed from circumstances (*g*), and slight circumstances are sufficient to show an intention to elect (*h*). In the case of land this intention will be presumed where the person entitled is in possession and retains the land for a considerable time (*i*); especially if he lays out money on the land (*k*), or pays off a charge on it (*l*), or takes possession of the title deeds (*m*), or otherwise deals with it as owner, as by granting a lease (*n*), or entering into an agreement for partition (*o*). But it has been held that two years is too short a time to raise the presumption (*p*). Where a trustee for sale is also the remainderman, and the object of the trust—*e.g.*, the payment of debts—has been answered without recourse to the land, an intention to reconvert may be inferred from his keeping the land unsold for a long time (*q*). But a person entitled under the same will to the proceeds of lands in possession, and of lands in remainder, does not, by showing an intention to reconvert the former, necessarily show also an intention to reconvert the latter (*r*). A devise of the property, describing it specifically as land at a particular place, will effect a reconversion (*s*).

130. Where personalty is subject to be invested in land, the mere receipt of the income from the personalty investments, though for a considerable time, does not raise a presumption of election to take the property unconverted (*t*). But if the beneficiary absolutely entitled receives payment of the capital money, it is in his hands to do as he likes with, and it is discharged from any trust for conversion. In such circumstances it is said to be

Implied
election to
retain
personalty.

(*f*) *Edwards v. Warwick (Countess)* (1723), 2 P. Wms. 171; *Ohaloner v. Butcher* (1736), cited 3 Atk. 685; *Pulteney v. Darlington (Earl)* (1783), 1 Bro. C. C. 223, 236; *Wheldale v. Partridge* (1803), 8 Ves. 227, 236; *contra*, *Bradish v. Gee* (1754), Amb. 229.

(*g*) *Harcourt v. Seymour* (1851), 2 Sim. (N. S.) 12, 45.

(*h*) *Pulteney v. Darlington (Earl)*, *supra*; *Van v. Barnett* (1812), 19 Ves. 102, 109.

(*i*) *Ashby v. Palmer* (1816), 1 Mer. 296, 301; *Dixon v. Gayfere* (No. 2), *Flucker v. Gordon* (1853), 17 Beav. 433; *Re Gordon, Roberts v. Gordon* (1877), 6 Ch. D. 531; *Re Davidson, Martin v. Trimmer, Davidson v. Trimmer* (1879), 11 Ch. D. 341, C. A.

(*k*) *Griesbach v. Fremantle* (1853), 17 Beav. 314; *Mutlow v. Bigg* (1875), 1 Ch. D. 385, C. A.

(*l*) *Re Davidson, Martin v. Trimmer, Davidson v. Trimmer*, *supra*.

(*m*) *Davies v. Ashford* (1845), 15 Sim. 42; *Potter v. Dudeney* (1887), 56 L. T. 395.

(*n*) *Mutlow v. Bigg*, *supra*; *Re Gordon, Roberts v. Gordon*, *supra*; *contra*, if the lease contains an option to purchase (*Re Lewis, Fozzwell v. Lewis* (1885), 30 Ch. D. 654).

(*o*) *Sharp v. St. Sauveur* (1871), 7 Ch. App. 343.

(*p*) *Kirkman v. Miles* (1807), 13 Ves. 338; compare *Brown v. Brown* (1864), 33 Beav. 399.

(*q*) *Smith v. Gumbleton* (1909), 54 Sol. Jo. 181.

(*r*) *Meredith v. Vick* (1857), 23 Beav. 559.

(*s*) *Sharp v. St. Sauveur*, *supra*; *Meek v. Devenish* (1877), 6 Ch. D. 566, 573.

(*t*) *Gillies v. Longlands* (1851), 4 De G. & Sm. 372; *Re Peilder's Settlement* (1854), 5 De G. M. & G. 890, C. A.

SECT. 2. "at home," and passes in its actual state if the recipient dies without disposing of it; the former trust for conversion being no longer operative, there is no equity in favour of the heir as against the personal representative (a).

Conversion. Similarly, where a settlor has covenanted to pay money to be laid out in the purchase of land, and the land, if purchased, would, in his lifetime and in the events that happen, belong to him in fee simple, the money due under the covenant is at home, the covenant is discharged, and, on his death, the heir cannot call upon the personal representative to find the money and pay it to him as land (b). Without actual receipt of money subject to a trust for conversion, the beneficiary may refer to or deal with it in such a way as to show that he regards it as personalty, and he will then be deemed to have elected to take it as such, as where he includes it in a statement of his personal property (c), or describes it as money which he is entitled to receive (d).

Where money "at home." **131.** An election as to the form in which property is to be taken may be shown by the nature of the limitations which the beneficiary imposes. Thus money to be invested in land, with an ultimate limitation to the heirs of the beneficiary, will be taken to be personalty if he invests it in trust for himself, his executors and administrators (e); and in the same way, a grant of a lease, with a reservation of rent to the grantor and his heirs, has been held to indicate an intention to take the property as land, notwithstanding that the reservation could hardly have been in any other form (f).

Election implied from form of limitations. **SECT. 3.—Election.**

The doctrine of election. **132.** Where a testator by his will purports to give property to A. which in fact belongs to B., and at the same time out of his own property confers benefits on B., the literal construction and application of the will would allow B. to keep his own property to the disappointment of A., and also to take the benefits given to him by the will. Equity, however, in such circumstances, introduces the principle that a man shall not accept and reject the same instrument, and B. is not allowed to take the full benefit given him by the will unless he is prepared to carry into effect the whole of the testator's dispositions (g). He is accordingly

(a) *Pulteney v. Darlington (Earl)* (1783), 1 Bro. C. C. 223; (1796), 7 Bro. Parl. Cas. 530; *Wheldale v. Partridge* (1803), 8 Ves. 227, 235; see *Bowes v. Shrewsbury (Earl)* (1758), 5 Bro. Parl. Cas. 144. In *Rich v. Whitfield* (1866), L. R. 2 Eq. 583, personalty, which was directed to be invested in land, vested absolutely, subject to a prior life interest, in a child who died on the day of her birth, and remained uninvested in land for over fifty years till the death of the tenant for life. It was held to have been reconverted.

(b) *Chichester v. Bickerstaff* (1693), 2 Vern. 295.

(c) *Harcourt v. Seymour* (1851), 2 Sim. (N. S.) 12.

(d) *Cookson v. Cookson* (1845), 12 Cl. & Fin. 121, H. L., affirming S. C. *sub nom. Cookson v. Reay* (1842), 5 Beav. 22.

(e) *Lingen v. Souray* (1711), 1 P. Wms. 172.

(f) *Crabtree v. Bramble* (1747), 3 Atk. 680, 689.

(g) As to the doctrine of election, see note to *Dillon v. Parker* (1818), 1 Swan. 359, at p. 394.

SECT. 3.
Election.

put to his election to take either under the instrument or against it (*h*). If he elects to take under the will he is bound, and may be ordered (*i*), to convey his own property to A.; if he elects to take against the will and to keep his own property, and so disappoints A., then he cannot take any benefits under the will without compensating A. out of such benefits to the extent of the value of the property of which A. is disappointed (*k*). It follows that if B.'s property is such that it cannot be assigned—as where it consists of heirlooms—he is not put to his election (*l*).

The doctrine of election requires that there shall be a claim under the will and a claim dehors the will and adverse to it. It is not applied as between two clauses in the same will (*m*). It applies although part of the benefits in the testator's own property conferred by the will may fail (*n*). Where two wills of the same testator, disposing of different properties, form one complete scheme of testamentary disposition, a beneficiary electing against one will can only claim under the other on terms of paying compensation (*o*).

(*h*) *Birmingham v. Kirwan* (1805), 2 Sch. & Lef. 441, *per* Lord REDESDALE, L.C., at p. 449; *Codrington v. Lindsay* (1873), 8 Ch. App. 578, *per* Lord SELBORNE, L.C., at p. 587; *Cooper v. Cooper* (1874), L. R. 7 H. L. 53, *per* Lord CAIRNS, L.C., at p. 63, *per* Lord HATHERLEY, at p. 70; *Codrington v. Codrington* (1875), L. R. 7 H. L. 854, 861, varying S. C. *sub nom. Codrington v. Lindsay*, *supra*; see *Noys v. Mordaunt* (1706), 2 Vern. 581 and *Streetfield v. Streetfield* (1735), Cas. temp. Talb. 176, both in 1 White & Tud. L. C., 7th ed., pp. 414, 416, *Bor v. Bor* (1756), 3 Bro. Parl. Cas. 167; *Whistler v. Webster* (1794), 2 Ves. 367, 370; *Ker v. Wauchope* (1819), 1 Bli. 1, 21, H. L.; and see *Re Fardon's Trusts* (1884), 28 Ch. D. 124 (reversed) (1885) 31 Ch. D. 275, C. A.), where the cases are collected; *Re Brooksbank, Beaucherk v. James* (1886), 31 Ch. D. 160, 163. The doctrine applies where a settlor with a limited power of revocation revokes in excess of the power, and while purporting to dispose of the interests which were not revocable gives benefits to the persons entitled to them under the settlement (*Coutts v. Acworth* (1870), L. R. 9 Eq. 519).

(*i*) *Blake v. Bunbury* (1792), 1 Ves. 514, 527; *Gretton v. Haward* (1819), 1 Swan. 409, 420.

(*k*) *Blake v. Bunbury*, *supra*, and, as reported, 4 Bro. C. C. 21; *Raneliffe (Lord) v. Parkyns (Lady)* (1818), 6 Dow. 149, 179, H. L.; *Gretton v. Haward*, *supra*; *Pickersgill v. Rodger* (1876), 5 Ch. D. 163. If the gift to A. fails through A. being unable to take, the effect will be to throw the subject of the gift into the residue, so that the residuary legatee profits by the election, and takes either B.'s property or compensation (*Re Brooksbank, Beaucherk v. James*, *supra*).

(*l*) *Re Chesham (Lord)*, *Cavendish v. Darre* (1886), 31 Ch. D. 466.

(*m*) *Wollaston v. King* (1869), L. R. 8 Eq. 165, *per* JAMES, V.-C., at p. 174. And the failure of a gift in a codicil owing to the legatee being an attesting witness, whereby the property passes to the legatee and others under the residuary gift in the will, does not raise a case of election (*Burton v. Newbery* (1875), 1 Ch. D. 234, 242; compare *Sheldon v. Goodrich* (1803), 8 Ves. 481, 497; *Bizzey v. Flight* (1876), 3 Ch. D. 269, 274). But where a legatee takes under the same will a beneficial legacy and an onerous legacy, and the two are intended to form one aggregate gift, he must accept or reject both (*Talbot v. Rudnor (Earl)* (1834), 3 My. & K. 252; *Re Hotchkys, Freke v. Calmady* (1886), 32 Ch. D. 408, C. A.; *Frewen v. Law Life Assurance Society*, [1896] 2 Ch. 511; *Re Kensington (Baron), Longford (Earl) v. Kensington (Baron)*, [1902] 1 Ch. 203, 207; but otherwise if the gifts can be construed as distinct (*Warren v. Rudall, Ex parte Godfrey* (1860), 1 John. & H. 1, 13; *Syer v. Gladstone* (1885), 30 Ch. D. 614).

(*n*) *Newman v. Newman* (1783), 1 Bro. C. C. 186.

(*o*) *Douglas-Menzies v. Umphelby*, [1908] A. C. 224, P. C.

SECT. 3.

Election.

Election not
dependent on
testator's
knowledge.

133. The application of the doctrine of election does not depend on whether or not the testator knows that he has no title to the property which he purports to dispose of. If he knows that it is another's, and gives that other benefits under the will, he may be supposed to intend to put that other to his election (*p*). But it is not necessary that the testator should have had in his mind the equitable principle of election (*q*). The principle equally applies where he is in error as to his power of disposition, and thinks that the property of which he purports to dispose is his own (*r*). The court does not speculate as to whether the testator would have made a different disposition had he known of his error, but takes the will as it is, and requires the beneficiaries to give effect to it (*s*).

Election
under deeds.

134. The doctrine of election is most frequently applied to dispositions by will, but it applies equally to deeds and other instruments *inter vivos* (*t*). Thus, where a settlement purports to settle certain property, but is not effectual to do so, a person who claims that property adversely to the settlement cannot at the same time take advantage of other provisions of the settlement in his favour (*a*). Two ante-nuptial settlements of even date, one of realty and the other of personalty, have been held to be one settlement for the purpose of putting to his election a person whose property was affected by one, and who claimed a benefit under the other (*b*). It is doubtful whether the doctrine of election applies to a grant from the Crown (*c*).

(*p*) See *Wilkinson v. Dent* (1871), 6 Ch. App. 339, 341. In *Forrester v. Cotton* (1760), 1 Eden, 531, 535, it was said that the testator must know that he had no right to dispose of the lands, and that, knowing it, he takes upon himself to dispose of them. But this does not represent the accepted rule.

(*q*) *Cooper v. Cooper* (1874), L. R. 7 H. L. 53, 67; and the doctrine is not excluded by the fact that, as to other property, the testator has expressly required legatees to take their legacies in satisfaction of sums due to them (*Wilkinson v. Dent*, *supra*); though if it appears that the testator meant to confine election to a particular property, it will not extend to other property (*East v. Cook* (1750), 2 Ves. Sen. 30; see the explanation of this case in *Wilkinson v. Dent*, *supra*).

(*r*) *Walpole v. Conway* (Lord) (1740), Barn. (Ch.) 153, 159; *Kirkham v. Smith* (1749), 1 Ves. Sen. 258; *Swan v. Holmes* (1854), 19 Beav. 471, 477; *Wollaston v. King* (1869), L. R. 8 Eq. 165, 173; see *Welby v. Welby* (1813), 2 Ves. & B. 187, *per* GRANT, M.R., at p. 199.

(*s*) *Whistler v. Webster* (1794), 2 Ves. 367, 370; *Thellusson v. Woodford* (1806), 13 Ves. 209, 221.

(*t*) See *Codrington v. Lindsay* (1873), 8 Ch. App. 578, 587, where the cases on instruments of different kinds are collected; and see *Llewellyn v. Mackworth* (1740), Barn. (Ch.) 445; *Digland v. Huddleston* (1789), 3 Bro. C. C. 285, n.; *Cumming v. Forrester* (1820), 2 Jac. & W. 334, 345; *Mosley v. Ward* (1861), 29 Beav. 407; *Griffith-Boscawen v. Scott* (1884), 26 Ch. D. 358.

(*a*) *Anderson v. Abbott* (1857), 23 Beav. 467; *Willoughby v. Middleton* (1862), 2 John. & H. 344; *Brown v. Brown* (1866), L. R. 2 Eq. 481. But where a person, who himself takes no interest under the settlement, claims property comprised in, but not bound by, the settlement under a party to the settlement who takes a benefit under it, there is apparently no case of election (*Campbell v. Ingilby* (1856), 21 Beav. 667; affirmed on different grounds (1857), 1 De G. & J. 393, C. A.); see *Brown v. Brown*, *supra*; but compare the reference to *Campbell v. Ingilby*, *supra*, in *Codrington v. Lindsay*, *supra*, at p. 593.

(*b*) *Bacon v. Cosby* (1851), 4 De G. & Sm. 261.

(*c*) *Cumming v. Forrester* (1820), 2 Jac. & W. 334, 345. As to royal grants, see title CONSTITUTIONAL LAW, Vol. VI., pp. 479—483.

135. The doctrine of election applies to an erroneous exercise of a limited power of appointment, whereby property is appointed to a stranger, a benefit being at the same time conferred by the appointor out of his own property on an object of the power. The object of the power cannot claim this benefit and also exclude the stranger and take in default of appointment (*d*). There is no distinction between an invalid gift of property which a testator believed to be his own and an invalid gift of property which the testator knew not to be his own, but over which he erroneously believed he had a power of appointment (*e*). But where there has been a proper appointment to an object of the power, invalid modifications of the appointment are altogether void, and cannot be used to raise a case of election (*f*). And the doctrine of election is not available for curing illegality; hence an appointment to a stranger which is in its nature void for illegality—as where it infringes the rule against perpetuities—does not raise a case of election (*g*).

SECT. 3.
Election.
—
Election
under exercise
of power.

136. The doctrine of election applies as between all kinds of property and interests in property, and as between all classes of persons claiming property. For the purposes of election no distinction can be drawn between personal estate and real estate, between specific and residuary devisees or legatees, or between legatees and next of kin of an intestate (*h*). And where a testator disposes in favour of another of land belonging to his heir-at-law,

Scope of
doctrine of
election.

Heir-at-law.

(*d*) *Whistler v. Webster* (1794), 2 Ves. 367; and so where, under a power to appoint to children of one marriage, an appointment is made in favour of children of a second marriage (*White v. White* (1882), 22 Ch. D. 555); see also title POWERS.

(*e*) *Cooper v. Cooper* (1870), 6 Ch. App. 15, 20; *Re Brooksbank, Beauclerk v. James* (1886), 34 Ch. D. 160.

(*f*) *Curver v. Bowles* (1831), 2 Russ. & M. 301, 308; *Woolridge v. Woolridge* (1859), John. 63; consequently precatory words added to the appointment will not put the appointee to election (*Blacket v. Lamb* (1851), 14 Beav. 482; *Langslow v. Langslow* (1856), 21 Beav. 552; *Churchill v. Churchill* (1867), L. R. 5 Eq. 44; compare *Tomkyns v. Blane* (1860), 28 Beav. 422); unless the benefit conferred by the will is subject to forfeiture on non-compliance (*King v. King* (1864), 15 L. Ch. R. 479).

(*g*) *Re Nash, Cook v. Frederick*, [1910] 1 Ch. 1, 10, O. A., approving *Wollaston v. King* (1869), L. R. 8 Eq. 165; *Re Warren's Trusts* (1884), 26 Ch. D. 208; *Re Handcock's Trusts* (1889), 23 L. R. Ir. 34, O. A.; *Re Oliver's Settlement, Everd v. Leigh*, [1905] 1 Ch. 191; *Re Beales' Settlement, Barrett v. Beales*, [1905] 1 Ch. 256; *Re Wright, Whitworth v. Wright*, [1906] 2 Ch. 238; and overruling *Re Bradshaw, Bradshaw v. Bradshaw*, [1902] 1 Ch. 436.

(*h*) *Cooper v. Cooper*, *supra*, at p. 21; see *Kirkham v. Smith* (1749), 1 Ves. Sen. 258, 260; *Webb v. Shaftesbury (Earl)*, *Shaftesbury (Earl) v. Arrowsmith* (1802), 7 Ves. 480, 488; and compare *McDonald v. McDonald* (1875), L. R. 2 Sc. & Div. 482. The doctrine applies to copyholds (*Highway v. Banner* (1785), 1 Bro. C. O. 584; *Frank v. Standish* (1772), 1 Bro. C. O. 588, n.). It was the rule that creditors in whose favour a devise in trust for payment of their debts had been made could not be put to their election between their remedies under the will and outside the will (*Kidney v. Cousmaker* (1806), 12 Ves. 136, 154); but now that creditors have their remedy against all assets, the doctrine is obsolete. And the doctrine applies where a testator purports to release a debt due to a third party upon whom he confers a benefit (*Synge v. Synge* (1874), 9 Ch. App. 128).

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Election.

and devises land of his own to the heir-at-law, the heir is put to his election (i).

(i) Formerly the heir-at-law took nothing under such a devise, because he took the devised land by his better title as heir-at-law. But though strictly he derived no benefit under the will, yet the mere intention of the testator was held to put him to his election (*Welby v. Welby* (1813), 2 Ves. & B. 187; *Thellusson v. Woodford* (1806), 13 Ves. 209, 224; *Schroder v. Schroder* (1854), Kay, 578). Under the Inheritance Act, 1833 (3 & 4 Will. 4, c. 106), s. 3, the heir in such a case now takes as devisee.

Similar questions arose (1) where a devise of real estate was ineffectual because the will was not properly attested, though effectual to pass personal estate; (2) where, in a devise of a copyhold estate, the estate had not been surrendered to the use of the will; and (3) where the testator purported to dispose of property belonging to him at his death, though not at the date of the will. In the first case the heir, if a legacy was bequeathed to him, was not bound to elect between the legacy and the estate which, through failure of the devise, he took as heir-at-law. This was upon the ground that the will could not be read as to the devise (*Sheddon v. Goodrich* (1803), 8 Ves. 481, 497; *Gardiner v. Fell* (1819), 1 Jac. & W. 22). But if the will contained an express direction that anyone who disputed it should forfeit all benefits under it, the heir was put to his election (*Boughton v. Boughton* (1750), 2 Ves. Sen. 12); see *Wilson v. Wilson* (1847), 1 De G. & Sm. 152. This case can no longer arise, since the same attestation is now required for wills of real and of personal estate (Wills Act, 1837 (7 Will. 4 & 1 Vict. c. 26), s. 9). In the case of a devise of copyhold lands not surrendered to the uses of the will, and of after-acquired lands, there was no technical objection to reading the will, and the heir-at-law was put to his election between these lands, which devolved on him by descent, and any benefit given him by the will; see as to copyholds, *Frank v. Standish* (1772), 1 Bro. C. C. 588, n.; *Peltiward v. Prescott* (1802), 7 Ves. 541, and as to after-acquired lands, *Thellusson v. Woodford*, *supra*, affirmed *sub nom. Rendlesham v. Woodford* (1813), 1 Dow, 249, H. L.; *Schroder v. Schroder*, *supra*; *Hance v. Truwhitt* (1862), 2 John. & H. 216. But a surrender to the use of the will is no longer necessary (stat. (1815) 55 Geo. 3, c. 192, repealed by and in effect re-enacted by Wills Act, 1837 (7 Will. 4 & 1 Vict. c. 26)). Moreover, the will speaks from the death, and hence a devise of lands acquired between the date of the will and the date of the testator's death is effectual (Wills Act, 1837 (7 Will. 4 & 1 Vict. c. 26), s. 24).

Where a devise by an English will of land in Scotland or elsewhere is ineffectual through failure to comply with the local law, and the person inheriting is a beneficiary under the will, he is put to his election (*Brodie v. Barry* (1813), 2 Ves. & B. 127; *Devar v. Maitland* (1866), L. R. 2 Eq. 834, where the cases where the heir is and is not put to his election are contrasted by STUART, V.-C.; *Orrell v. Orrell* (1871), 6 Ch. App. 302; *Harrison v. Harrison* (1873), 8 Ch. App. 342); but the property must be specifically described; a devise in general words will only operate on the land capable of passing under it (*Maxwell v. Maxwell* (1852), 2 De G. M. & G. 705, C. A.).

Before the Wills Act, 1837 (7 Will. 4 & 1 Vict. c. 26), a will of an infant was valid as to personal estate, though not as to real estate; so that the heir-at-law might become entitled by descent owing to the failure of the devise, and to personal estate under the will; but he was not put to his election (*Hearle v. Greenbank* (1749), 3 Atk. 695, 715); so, where a married woman's will is void owing to incapacity, her heir or next of kin is not put to his election (*Re De Burgh Lawson*, *De Burgh Lawson v. De Burgh Lawson* (1885), 34 W. R. 39 (heir-at-law); *Blaklock v. Grindle* (1868), L. R. 7 Eq. 215 (next of kin)); see *Re Anderson*, *Pegler v. Gillatt*, [1905] 2 Ch. 70; and compare *Re Atkinson*, *Walter v. Atkinson*, [1899] 2 Ch. 1, C. A.). Whether it was the same where her will would defeat her husband's marital right so as to put him to election between such right and benefits taken under the will is not clear (*Rich v. Cockell*, *Rich v. Hull* (1804), 9 Ves. 369); but since the Married Women's Property Act, 1882 (45 & 46 Vict. c. 75), it seems that the husband is put to his election (*Re Harris*, *Leacroft v. Harris*, [1909] 2 Ch. 206, where *Rich v. Cockell*, *Rich v. Hull*, *supra*, is discussed).

Where the marriage occurred on or before the 1st of January, 1834, the husband

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Election.

Intention to dispose of the particular property must be clear.

137. To raise a case of election under a will upon the ground that the testator has attempted to dispose of property over which he had no disposing power, it must be clearly shown that the testator intended to dispose of the particular property (*k*); and this intention must appear on the face of the will, either by express words or by necessary conclusion from the circumstances disclosed by the will (*l*). The presumption is that a testator intends to dispose only of his own property (*m*); and general words will not be construed so as to include other property (*n*), nor will parol evidence be admitted to show that the testator believed such other property to be his own so as to allow it to be comprised in general words (*o*). Similarly, where a testator has a limited interest in

was not able directly to deprive his wife of her right to dower out of lands to which that right had once attached; but if he conferred upon her other benefits by his will, she might be put to her election between her dower and such benefits (see *Birmingham v. Kirwan* (1805), 2 Sch. & Lef. 444, 450). This was the case if the will showed that the husband intended to dispose of the property which was subject to dower in a manner inconsistent with the right to dower (*Butcher v. Kemp* (1820), 5 Madd. 61; *Parker v. Sowerby* (1851), 4 De G. M. & G. 321, C. A.; *Nottley v. Palmer* 1854, 2 Drew. 93; see, where she was not put to election, *Holdich v. Holdich* (1842), 2 Y. & C. Ch. Cas. 18; *Ellis v. Lewis* (1844), 3 Hare, 310). A devise to the widow of an interest in part of the lands was not inconsistent with her claim to dower (*Lawrence v. Lawrence* (1699), 2 Vern. 365); but under the Dower Act, 1833 (3 & 4 Will. 4, c. 105), a devise to the widow of any interest in the land out of which she is dowerable defeats her claim to dower in the rest of the land (*Re Thomas, Thomas v. Howell* (1886), 34 Ch. D. 166, 170); and this statute, by putting the right to dower under the husband's control, has rendered the numerous authorities on the subject practically obsolete. The principle as to dower applied to freebench (*Nottley v. Palmer, supra*; *Thompson v. Burra* (1873), L. R. 16 Eq. 592). In other cases where a widow has a legal claim on her husband's property which he cannot defeat, she may still be put to her election, as in the *jus relicte* and *terce* of Scotch law (*Douglas-Menzies v. Umphelby*, [1908] A. C. 224, P. C.); see also title HUSBAND AND WIFE.

(*k*) *Dushwood v. Peyton* (1811), 18 Ves. 27, 41; *Randliffe (Lord) v. Parkyns (Lady)* (1818), 6 Dow, 149, 179, H. L.; *Wintour v. Clifton* (1856), 8 De G. M. & G. 641, 650.

(*l*) *Blake v. Bunbury* (1792), 4 Bro. C. C. 21, 24. The widow of a testator will be put to her election by a devise of all the testator's interest in property which belongs solely to her (*Whitley v. Whitley* (1862), 31 Beav. 173).

(*m*) *Randliffe (Lord) v. Parkyns (Lady)*, *supra*; *Ustick v. Peters* (1858), 4 K. & J. 437; *Cosby v. Ashtown (Lord)* (1859), 10 L. Ch. R. 219; *Thornton* (1861), 11 L. Ch. R. 474, 480; *Pickersgill v. Rodger* (1876), 5 Ch. D. 163, 170; see *Re Harris, Leacock v. Harris*, [1909] 2 Ch. 206.

(*n*) *Forrester v. Cotton* (1760), 1 Eden, 531, 535; *Miller v. Thurgood* (1864), 33 Beav. 496, 500; *Re Bidwell's Settlement* (1862), 11 W. R. 161. But in a settlement general words which are clearly intended to bring in property not in law included in the settlement may be allowed their full effect (*Willoughby v. Middleton* (1862), 2 John. & H. 344). As to the effect of a bequest by a husband of "all his jewels" on jewels which are the paraphernalia of his wife, see *Jervoise v. Jervoise* (1853), 17 Beav. 566.

(*o*) *Stratton v. Best* (1791), 1 Ves. 285. In several cases it was considered that evidence dehors the will might be admitted to show that the testator considered the property his own, and so intended to include it in general words—*e.g.*, evidence of an assignment (though ineffectual) to the testator (*Rutter v. Maclean* (1799), 4 Ves. 531, 537; see *Pole v. Somers (Lord)* (1801), 6 Ves. 309); or of accounts showing that he had dealt with it as his own (*Pulteney v. Darlington (Lord)* (1776), cited 3 Ves. 529; see 2 Ves. 560; *Druce v. Denison* (1801), 6 Ves. 385). But such evidence is inadmissible (*Doe d. Oxenden v. Chichester* (1816), 4 Dow, 65, 89, 90, H. L.; *Dummer v. Pitcher* (1833), 2 My. & K. 262; *Clementson*,

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property, and purports to dispose of the property itself, the presumption is that he intends to dispose only of his limited interest (*p*); and, if it is sought to carry the disposition further, it must be shown that he intended to dispose of more than that interest. But for this purpose positive declaration is not necessary. Regard may be had to the context of the will, and to the inaptitude of the testamentary limitations if applied to the testator's actual interest (*q*); and where a co-owner of property devises the property specifically without restriction to his share, and confers a benefit on another co-owner, this will usually raise a case of election against such co-owner (*r*). But a devise of an estate which is subject to incumbrances does not by itself import an intention to devise it free from incumbrances, so as to put incumbrancers who take under the will to their election (*s*).

It may appear from a recital that a testator has disposed of his own property under an erroneous belief as to the interests in other property of certain beneficiaries under his will, giving less to some on the footing that they would be compensated by their interests in the other property. But such a recital is not equivalent to a disposition of such other property, so as to raise a case of election against the persons who unduly benefit under the will (*t*).

Election
depends on
compensation.

138. In applying the doctrine of election equity proceeds upon the principle not of forfeiture, but of compensation; that is, the beneficiary who elects against the instrument and keeps his own

v. Gundy (1836), 1 Keen, 309; *Dixon v. Samson* (1837), 2 Y. & C. (ex.) 566; *Galvin v. Devereux*, [1903] 1 I. R. 185; see note to *Dillon v. Parker* (1818), 1 Swan. 359, 402; but see the dictum of JESSEL, M.R., in *Pickersgill v. Rodger* (1876), 5 Ch. D. 163, 171, in favour of admitting parol evidence).

(*p*) *Maddison v. Chapman* (1861), 1 John. & H. 470; *Howell v. Jenkins* (1862), 2 John. & H. 706; (1863) 1 De G. J. & Sm. 617, C. A.; *Henry v. Henry* (1872), 6 I. R. Eq. 286; *Dummer v. Pitcher* (1833), 2 My. & K. 262. But if the only interest of the testator is a life interest, and the intention appearing on the will is to dispose of his interest, if any, there is no case of election (*Galvin v. Devereux*, [1903] 1 I. R. 185).

(*q*) *Wintour v. Clifton* (1856), 8 De G. M. & G. 641; *Usticke v. Peters* (1858), 4 K. & J. 437; *Welby v. Welby* (1813), 2 Ves. & B. 187; see *Shuttleworth v. Greaves* (1838), 4 My. & Cr. 35; *Padbury v. Clark* (1850), 2 Mac. & G. 298; *Honywood v. Forster* (1860), 30 Beav. 14.

(*r*) *Fitzsimons v. Fitzsimons* (1860), 28 Beav. 417; *Swan v. Holmes* (1854), 19 Beav. 471; *Miller v. Thurgood* (1864), 33 Beav. 496; *Wilkinson v. Dent* (1871), 6 Ch. App. 339; *Henry v. Henry*, *supra*, at p. 295; see *Padbury v. Clark*, *supra*; and compare *Chave v. Chave* (1830), 2 John. & H. 713 n., *contra*; and *Re Bidwell's Settlement* (1862), 11 W. R. 161. A bequest to a third person of stock standing in the joint names of a testator and his wife, where benefits are conferred on the wife, will put her to her election (*Grosvenor v. Durston* (1858), 25 Beav. 97; *Re Carpenter*, *Carpenter v. Disney* (1884), 51 L. T. 776).

(*s*) *Stephens v. Stephens* (1857), 1 De G. & J. 62; *Henry v. Henry*, *supra*, at p. 297. But a devise inconsistent with the continuance of the incumbrances will put the incumbrancers, if they are beneficiaries under the will, to their election (*Blake v. Bunbury* (1792), 1 Ves. 514, 523); and compare *Sadlier v. Buller* (1867), 1 I. R. Eq. 416, where the incumbrancer was put to his election.

(*t*) *Box v. Barrett* (1866), L. R. 3 Eq. 244. That a recital, without more, cannot amount to a gift, or show an intention to give, see *Dashwood v. Peyton* (1811), 18 Ves. 27, 41; nor is there a case for election where a testator, erroneously reciting that a hotchpot clause will apply, refrains from appointing the unappointed residue of a fund (*Lanqslow v. Lanqslow* (1856), 21 Beav. 552).

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property is not required to abandon all the benefits which are conferred upon him by the instrument. Such benefits are treated in equity as a fund out of which compensation must be made to the disappointed beneficiary; and, after such compensation, the electing beneficiary is entitled to any surplus which may remain (*a*). The duty to make compensation imposes a personal liability on the electing beneficiary which will furnish ground for an action (*b*); or, after his death, for a claim against his estate (*c*). Where the person to elect dies, and the properties go in different directions, the obligation to compensate falls on the persons who succeed to the benefits out of which, according to the above rule, compensation ought to have been made (*d*). The amount of compensation payable is to be ascertained, in the case of a will, as at the date of the testator's death, and not at the time when the election is made (*e*).

139. From the principle that election proceeds on the footing of compensation it follows that no case for election will be raised against a person whose property a testator has purported to dispose of, unless he takes under the will a benefit out of property which the testator can actually dispose of. It is only such benefit which gives the necessary fund for compensation. The doctrine of election cannot be applied, except where, if an election is made contrary to the will, the interest that would pass by the will can be laid hold of to compensate the beneficiary who is disappointed by the election. Therefore, in all cases there must be some free disposable property given by the will to the person whom it is sought to put to his election (*f*).

No election
unless fund
for compensa-
tion.

(*a*) *Welby v. Welby* (1813), 2 Ves. & B. 187, 191; *Rancliffe (Lord) v. Parkyns (Lady)* (1818), 6 Dow, 149, 179, H. L.; *Gretton v. Haward* (1819), 1 Swan. 409. About the date of these decisions the question of forfeiture or compensation was regarded as doubtful (see *per* Lord ELDON, L.C., in *Green v. Green* (1816), 2 Mer. 86, 93; *Tibbits v. Tibbits* (1821), Jac. 317, 319). But an exhaustive review of the authorities was given by the reporter in a note to *Gretton v. Haward*, *supra*, in which their result was summed up as follows:—“(1) In the event of election to take against the instrument, courts of equity assume jurisdiction to sequester the benefit intended for the refractory donee, in order to secure compensation to those whom his election disappoints; (2) The surplus, after compensation, does not devolve as undisposed of, but is restored to the donee, the purpose being satisfied for which alone the court controlled his legal right.” Since this statement the uncertainty referred to by Lord ELDON has disappeared, and the later cases are uniform in affirming the principle of compensation (see, for example, *Ker v. Wauchope* (1819), 1 Bli. 1, 25, H. L.; *Schroder v. Schroder* (1854), Kay 578; *Rogers v. Jones* (1876), 3 Ch. D. 688; *Pickersgill v. Rodger* (1876), 5 Ch. D. 163, 173; *Smith v. Lucas* (1881), 18 Ch. D. 531, 545; *Re Vardon's Trusts* (1884), 28 Ch. D. 124, 131; *Re Chesham (Lord), Cavendish v. Dacre* (1886), 31 Ch. D. 466, 473). The fund available for compensation will be apportioned among the disappointed legatees rateably according to their interests (*Howell v. Jenkins* (1863), 1 De G. J. & Sm. 617, C. A.).

(*b*) *Rogers v. Jones* (1877), 7 Ch. D. 345.

(*c*) *Greenwood v. Penny* (1850), 12 Beav. 403.

(*d*) *Pickersgill v. Rodger* (1876), 5 Ch. D. 163, 174.

(*e*) *Re Hancock, Hancock v. Pawson*, [1905] 1 Ch. 16.

(*f*) *Bristow v. Warde* (1794), 2 Ves. 336; the statement of the principle by Lord LOUGHBOROUGH, L.C., at p. 350, is verbally inaccurate, and is altered in the text to accord with the apparent meaning (*Re Fowler's Trust* (1859), 27 Beav. 362; *Re Apdin's Trust* (1865), 13 W. R. 1062; compare *Wallinger v. Wallinger* (1869), L. R. 9 Eq. 301).

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Hence, where a testator purports to exercise a limited power of appointment by appointing to a stranger, and appoints also to an object of the power, the latter may claim to participate, as in default of appointment, in the share appointed to the stranger, without compensating the stranger out of the properly appointed share (*g*). No part of the fund is at the disposal of the testator. To raise a case of election the testator must both make a direct appointment to a stranger to the power (*h*) and a gift of the testator's free property to an object of the power (*i*).

Person taking
under deriva-
tive title.

140. Where a testator purports to dispose of property which is not his own, no case of election arises against a person who takes such property by a derivative title after the testator's death, and who is also a beneficiary under the will (*j*). At the date when the will comes into operation he must be in a position to claim in his own right an interest in the property (*k*). A beneficiary is not put to his election, because he has a derivative title under another person who was the true owner at the time of the death (*l*). Where such other person was also a beneficiary under the will and elected against it, paying compensation, there is the additional consideration that the payment has freed the property from the obligation of further election (*m*).

Person
electing
entitled to
information.

141. No person can be required to elect without a clear knowledge of both the funds or properties between which he has to elect (*n*). Hence he is entitled to be allowed time to consider as to his election (*o*), and, if necessary, the election will be postponed till accounts of the property concerned have been taken (*p*). If there is an action pending, the necessary accounts and inquiries can be taken and made in the action (*q*); otherwise, the person who wishes to decide as to election can commence an action to ascertain the

(*g*) See note (*f*), p. 123, *ante*.

(*h*) An appointment to an object of the power subject to a request to him to give the property to a stranger will not suffice, the request being merely void (*Blacket v. Lamb* (1851), 14 Beav. 482).

(*i*) *Whistler v. Webster* (1794), 2 Ves. 367.

(*j*) Thus, where a testator disposes of property of a married woman, and confers by his will benefits on her husband, the husband, on becoming entitled to his wife's property as administrator, is not put to his election (*Grissell v. Swinhoe* (1869), L. R. 7 Eq. 291; see *Howells v. Jenkins* (1862), 2 John. & H. 706; *Brown v. Brown* (1866), L. R. 2 Eq. 481, 485).

(*k*) Where the owner of property which the testator has purported to dispose of is dead, it is sufficient if the beneficiary under the testator's will is entitled to an interest in such property as next of kin of the deceased owner, notwithstanding that his interest is subject to payment of the debts of such owner (*Cooper v. Cooper* (1870), 6 Ch. App. 15, 21; (1874) L. R. 7 H. L. 53).

(*l*) *Cooper v. Cooper*, *supra*; compare *Armstrong v. Lynn* (1875), 9 L. R. Eq. 186.

(*m*) *Cavan (Lady) v. Pulteney* (1795), 2 Ves. 544.

(*n*) *Whistler v. Webster*, *supra*, at p. 371; see *Pusey v. Desbouverie* (1734), 3 P. Wms. 315; *Chalmers v. Storil* (1813), 2 Ves. & B. 222.

(*o*) See *Codrington v. Lindsay* (1873), 8 Ch. App. 578, 593; *Re Hancock*, *Hancock v. Pawson*, [1905] 1 Ch. 16, 19.

(*p*) *Hender v. Rose* (1718), 3 P. Wms. 124, n.; *Newman v. Newman* (1783), 1 Bro. O. C. 186; *Boynon v. Boynton* (1785), 1 Bro. O. C. 445.

(*q*) *Douglas v. Douglas*, *Douglas v. Webster* (1871), L. R. 12 Eq. 617.

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value of the properties (*r*). An election made before the party has had an opportunity of ascertaining his rights and the value of them (*s*), or under a mistake as to matters on which those rights depend (*t*), will not be binding; though, if election has once been deliberately made, persons claiming under the electing party are bound thereby without distinct evidence being given that he was aware of his rights (*a*).

142. Where several persons are interested in the property disposed of by the testator, and are also beneficiaries under his will, an election by one does not bind the others; and this is so whether they are entitled simultaneously as co-owners (*b*), or in succession as tenant for life and remaindermen (*c*). All the persons interested have a right to exercise their judgment as to the way in which they will elect (*b*). Nor are next of kin bound by the election of the administrator (*b*). Compensation may be payable by some persons electing against the will to others so electing, and such compensation must then be included by the latter in the benefits taken by them under the will (*d*).

Election
where several
persons
interested.

143. A person required by the court to elect within a specified time will, if he does not elect within that time, be treated as having elected against the instrument (*e*). But otherwise no definite time limit can be assigned for election; and if the party is neither required to elect, nor does any acts from which election can be inferred, his right to elect will remain open until it becomes inequitable to assert it (*f*). And this will be the case if he has allowed the property devised away from himself to be enjoyed for a long time—*e.g.*, ten years (*g*)—by the devisee.

Time for
election.

144. Election is a question of fact and must be ascertained as such (*h*). It may be express, or may be implied from the acts of the person bound to elect. To constitute an implied election there must be clear proof that the person put to his election was aware of the nature and extent of his rights; and that, having that knowledge, he intended to elect (*i*). Where there has been ignorance

Implied
election.

(*r*) *Buttrick v. Broadhurst* (1790), 1 Ves. 171; *Dillon v. Parker* (1818), 1 Swan. 359, 381, n.; but in *Douglas v. Douglas*, *Douglas v. Webster* (1871), L. R. 12 Eq. 617, at p. 637, WICKENS, V.-C., intimated that the rule might require restriction.

(*s*) *Pusry v. Desbouverie* (1734), 3 P. Wms. 315.

(*t*) *Kidney v. Coussmaker* (1806), 12 Ves. 136, 153.

(*a*) *Dewar v. Maitland* (1866), L. R. 2 Eq. 834, 838.

(*b*) *Fytche v. Fytche* (1868), L. R. 7 Eq. 494.

(*c*) *Ward v. Baugh* (1799), 4 Ves. 623; *Hutchison v. Skelton* (1856), 2 Macq. 492, 493, H. L.; compare *Long v. Long* (1800), 5 Ves. 445, where the point was not decided.

(*d*) *Re Booth, Broth v. Robinson*, [1906] 2 Ch. 321.

(*e*) *Streatfield v. Streatfield* (1735), Cas. temp. Talb. 176; see 1 Swan. 417, where the decree which shows this is given.

(*f*) *Buttrick v. Broadhurst*, *supra*.

(*g*) *Tibbits v. Tibbits* (1816), 19 Ves. 656, 662.

(*h*) *Roundel v. Currer* (1786), 2 Bro. C. C. 67, 73.

(*i*) *Worthington v. Winton* (1855), 20 Beav. 67, per ROMILLY, M.R., at p. 74; see *Stratford v. Powell* (1807), 1 Ball & B. 1; *Dillon v. Parker* (1818), 1 Swan. 359, 382; *Edwards v. Morgan*, *Morgan v. Edwards* (1824), 13 Price, 782, affirmed *sub nom. Morgan v. Edwards* (1827), 1 Bl. (N. S.) 401; *Wintour v. Clayton* (1856), 21 Beav. 447, 468; *Spread v. Morgan* (1865), 11 H. L. Cas. 588.

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of the right, an enjoyment of the benefits conferred by the will for a considerable time will not prevent the party from claiming to elect (*k*). But where, with knowledge of his obligation to elect, a person enjoys property given by the will or exercises acts of ownership over it, he will be held to have elected to confirm the will, and will be debarred from keeping his own property as well (*l*). Similar acts in relation to his own property will show an election against the will (*m*). It is necessary, however, to have regard to the history of both the properties between which election was to be made, and possession of or acts of ownership over both will raise no presumption of election (*n*). An implied election is binding on the representatives of the person electing (*o*), though, if the election has not been clearly made, the representatives may, perhaps, elect on offering compensation (*p*).

Married women.

145. The capacity of a married woman to elect depends on her capacity to give up the property belonging to her which the instrument purports to dispose of, and it is essential that both the properties between which she has to elect should be free from restraint on anticipation. As regards the property which does not pass under the instrument, the restraint prevents her from giving it up so as to confirm the instrument; as regards the property which does pass under the instrument, the restraint prevents it from becoming a fund for compensation if she elects against the instrument (*q*); and, indeed, the imposition of the restraint on alienation shows an intention on the part of the author

Restraint on anticipation.

(*k*) *Wake v. Wake* (1791), 3 Bro. C. C. 255 (three years' receipt of an annuity); *Rejnard v. Spence* (1841), 4 Beav. 103 (five years' receipt); *Sopwith v. Maughan* (1861), 30 Beav. 235 (provision in lieu of dower enjoyed by widow for sixteen years, but, as the certificate found, "in ignorance of her right to dower").

(*l*) *Butricke v. Broadhurst* (1790), 3 Bro. C. C. 88; *Worthington v. Wiginton* (1855), 20 Beav. 7; *Whitley v. Whitley* (1862), 31 Beav. 173. The receipt of a legacy shows an intention to take under the will (*Northumberland (Earl) v. Aylesford (Earl)* (1760), Amb. 540; *S. C. sub nom. Northumberland (Duke) v. Egremont (Earl)* (1768), Amb. 657; *Ardesoife v. Bennet* (1772), Dick. 463); and the court does not readily disturb arrangements to which the parties have assented; see *Tomkyns v. Ladbroke* (1755), 2 Ves. Sen. 591, 593, and cases collected in 1 Swan. p. 381, n.

(*m*) Such as a sale of the property (*Rogers v. Jones* (1876), 3 Ch. D. 688).

(*n*) *Dillon v. Parker* (1818), 1 Swan. 359, at p. 380; *Padbury v. Clark* (1850), 2 Mac. & G. 298; *Morgan v. Morgan* (1853), 4 I. Ch. R. 606, 614, *Spread v. Morgan* (1865), 11 H. L. Cas. 588, at p. 613. But where an heir enjoyed lands ineffectually devised to him for a limited interest to which, therefore, he was entitled by descent, and also lands well devised, he was presumed to have elected to take under the will (*Dewar v. Maitland* (1866), 1. R. 2 Eq. 834).

(*o*) *Northumberland (Earl) v. Aylesford (Earl)*, *supra*; *Ardesoife v. Bennet*, *supra*; *Dewar v. Maitland*, *supra*; and, indeed, cases of implied election generally arise where the party has died. Where he is alive he can contradict the implication (*Sopwith v. Maughan*, *supra*, at p. 239).

(*p*) See *Dillon v. Parker*, *supra*, at p. 385.

(*q*) *Smith v. Lucas* (1881), 18 Ch. D. 531, 545; *Re Wheatley, Smith v. Spence* (1884), 27 Ch. D. 606; *Re Vardon's Trusts* (1885), 31 Ch. D. 275, C. A., overruling on this point *Willoughby v. Middleton* (1862), 2 John. & H. 344. A condition attached to a legacy to a married woman that she shall convey her separate estate, as to which she is restrained from alienation, does not raise a case of election, and the legacy fails (*Robinson v. Wheelwright* (1855), 21 Beav. 214).

of the instrument that the married woman shall not be put to election (r). And this intention prevails although at the time for election the woman has become discovort (s).

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If the property belonging to a married woman which the instrument purports to dispose of belongs to her as her separate estate, she can elect as though she were a *feme sole*. If it is not her separate estate, but she can dispose of it by observing certain formalities, she can also elect by the observance of these formalities. Otherwise she cannot elect out of court (a); but in appropriate proceedings the court will direct an inquiry as to what is for her benefit, and will elect on her behalf accordingly (b); or if the matter is clear, will elect without inquiry (c).

Non-separate
property.

146. The committee of a lunatic so found by inquisition can elect on his behalf under the direction of the court (d); where he was not so found, the court formerly elected—after inquiry, if necessary—under its general jurisdiction to act on behalf of

Lunatics.

(r) *Re Whalley, Smith v. Spence* (1884), 27 Ch. D. 606, 613.

(s) *Haynes v. Foster*, [1901] 1 Ch. 361.

(a) *Williams v. Mayne* (1867), 1 I. R. Eq. 519; *Harle v. Jarman*, [1895] 2 Ch. 419; *contra, Ardesoife v. Bennet* (1772), Dick. 463; and see note to *Gretton v. Haward* (1819), 1 Swan. 409, 413. Questions of election proper—that is, where the person electing has to choose between two things—are to be distinguished from cases where a married woman chooses whether to affirm or repudiate a settlement which was originally not binding on her, either because she was an infant when she executed it, or because she did not execute it at all (*Harle v. Jarman, supra*). Where the married woman is an infant, she can, after attaining full age and during the coverture, elect to confirm the settlement, even though the effect is to render subject to the settlement property which she could not by reason of coverture dispose of; and this is on the ground that the settlement was voidable only, and not void, and that it would be fraudulent for her afterwards to repudiate the settlement, or better, perhaps, that she is estopped from doing so (*Barrow v. Barrow* (1858), 4 K. & J. 409; *Wilder v. Pigott* (1832), 22 Ch. D. 263; *Re Hodson, Williams v. Knight*, [1894] 2 Ch. 421; *Harle v. Jarman, supra*; see *Williams v. Bailly* (1866), L. R. 2 Eq. 731, 734). And if she does not, within a reasonable time after attaining twenty-one, avoid the settlement, she is bound by it (*Hilwards v. Carter*, [1893] A. C. 360; *Re Hodson, Williams v. Knight, supra*; *Vulitz v. O'Hagan*, [1899] 2 Ch. 569, 575, reversed on another ground, [1900] 2 Ch. 87, C. A.); see *Ashton v. M'Dougall* (1842), 5 Beav. 56. And the principle has been extended so as to enable a woman who was adult on marriage to confirm an ante-nuptial marriage settlement not originally binding on her, and thereby to settle property of which she was, while covert, incompetent to dispose (*Greenhill v. North British and Mercantile Insurance Co.*, [1893] 3 Ch. 474). But this is apparently erroneous; the principle only applies where there has been a settlement before marriage which is binding unless avoided; see *Harle v. Jarman, supra*. Consequently, a post-nuptial settlement cannot be confirmed except by an instrument which would pass the property at the time of confirmation (*Seaton v. Seaton* (1888), 13 App. Cas. 61; see *Burnaby v. Equitable Reversionary Interest Society* (1835), 28 Ch. D. 416, 424. Where the wife's settlement made by her before marriage, while an infant, relates to her separate property, she can *à fortiori* confirm it after attaining full age (*Smith v. Lucas* (1881), 18 Ch. D. 531). Where she takes benefits in the property of other persons under a post-nuptial settlement, which also includes her own property and is not binding on her, and subsequently becomes discovort and claims against the settlement, she is put to her election (*Codrington v. Codrington* (1875), L. R. 7 H. L. 854; see *Hamilton v. Hamilton*, [1892] 1 Ch. 396).

(b) *Cooper v. Cooper* (1874), L. R. 7 H. L. 53, 67; see *Davis v. Page* (1804), 9 Ves. 350.

(c) *Wilson v. Townsend (Lord John)* (1795), 2 Ves. 693.

(d) *Re Sefton (Earl)*, [1898] 2 Ch. 378, O. A.

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Infants.

persons under disability (e); but now the *quasi*-committee has the same powers as a committee (f).

Where the person to elect is an infant, the court, if there is no doubt as to what is for his benefit, elects for him at the hearing of the matter in which the question arises (g); if there is doubt, an inquiry is directed what course is for the benefit of the infant, and the court elects in accordance with the result of the inquiry (h).

SECT. 4.—Satisfaction.

Different cases of satisfaction.

147. Satisfaction is the donation of a thing with the intention that it shall be taken either wholly or partly in extinguishment of some prior claim of the donee (i). It may occur (1) when a covenant to settle property is followed by a gift by will or settlement in favour of the person entitled beneficially under the covenant (j); (2) when a testamentary disposition is followed during the testator's lifetime by a gift or settlement in favour of the devisee or legatee (k); and (3) when a legacy is given to a creditor (l). In all these cases the question of satisfaction is one of the intention of the settlor or testator (m); and if he expressly declares that the later disposition is to be in satisfaction of the earlier obligation or disposition, the matter is governed by this expression of his intention, and effect is given to the later disposition accordingly (n). In the absence of

(e) *Wilder v. Pigott* (1882), 22 Ch. D. 263, 268; see *Jones v. Lloyd* (1874), L. R. 18 Eq. 265, 275, and title **INJUNCTIONS AND PERSONS OF UNSOUND MIND**.

(f) Lunacy Act, 1908 (8 Edw. 7, c. 47), s. 1.

(g) *Blunt v. Lack* (1856), 3 Jur. (N. S.) 195, C. A.; *Lamb v. Lamb* (1857), 5 W. R. 772; *Re Montagu, Faber v. Montagu*, [1896] 1 Ch. 549.

(h) *Bigland v. Huddleston* (1789), 3 Bro. C. C. 285, n.; *Brown v. Brown* (1866), L. R. 2 Eq. 481, 486; *Bennett v. Houldsworth* (1877), 6 Ch. D. 671, 680. Originally the election was deferred until the infant came of age (*Streetfield v. Streetfield* (1735-6), Cas. temp. Talb. 176, 183; *Boughton v. Boughton* (1750), 2 Ves. Sen. 12, 16); see note to *Gretton v. Haward* (1819), 1 Swan. 409, 413, and cases there cited, and title **INFANTS AND CHILDREN**.

(i) See the definition in 2 White & Tud. I. C., 7th ed., p. 379, adopted by Lord ROMILLY in *Chichester (Lord) v. Coventry* (1867), L. R. 2 H. L. 71, 93.

(j) See *Hinchcliffe v. Hinchcliffe* (1797), 3 Ves. 516; *Weall v. Rice* (1831), 2 Russ. & M. 251; *Thynne (Lady F.) v. Glengall (Earl)* (1848), 2 H. L. Cas. 131.

(k) *Ex parte Pye, Ex parte Dubost* (1811), 18 Ves. 140; 2 White & Tud. I. C., 7th ed., p. 366; *Pym v. Lockyer* (1841), 5 My. & Cr. 29. This, though similar in its effect to satisfaction, is strictly ademption (*Chichester (Lord) v. Coventry, supra*, at p. 90); see the rule stated in *Trimmer v. Bayne* (1802), 7 Ves. 508, 515. The settlement may be by way of covenant to pay (*Cooper v. Macdonald* (1873), L. R. 16 Eq. 258).

(l) *Tulbot v. Shrewsbury (Duke)* (1714), Prec. Ch. 391; 2 White & Tud. I. C., 7th ed., p. 375.

(m) *Weall v. Rice, supra*, at p. 265; *Hopwood v. Hopwood* (1859), 7 H. L. Cas. 728, 737; *Chichester (Lord) v. Coventry, supra*, at p. 82. Hence regard must be paid to the circumstances at the date of the instrument alleged to constitute satisfaction, and not to the actual result (*Cartwright v. Cartwright*, [1903] 2 Ch. 306).

(n) *Davis v. Chambers* (1857), 7 De G. M. & G. 386; see *Twisden v. Twisden* (1804), 9 Ves. 413; *Hardingham v. Thomas* (1854), 2 Drew. 353. But a direction that portions are to be deemed to be satisfied by subsequent advances made by a specified person during his life is not operative as regards benefits passing under his will (*Cooper v. Cooper* (1873), 8 Ch. App. 813); or on his intestacy (*Twisden v. Twisden, supra*); and see *Cooper v. Cooper, supra*, as to certain inconsistencies in the earlier cases.

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Satisfaction.
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such expression, certain presumptions as to his intention are raised in equity, and evidence, intrinsic and, in certain cases, extrinsic, may be used to rebut or to support such presumptions (*o*). A case of satisfaction only arises where the person who makes the payment is himself the party bound to pay, or is the owner of the estate charged with the payment (*p*); or is exercising a power of appointment (*q*). The three cases stated above are shortly described as (1) satisfaction of portions by legacies or subsequent portions; (2) ademption of legacies by portions; and (3) satisfaction of debts by legacies. In the first two cases the court leans in favour of satisfaction; in the third case it leans against it (*r*).

148. In the cases of a portion followed by a legacy, and of a legacy followed by a portion, where the gifts are substantially of the same nature and in favour of the same person, there arises a presumption of satisfaction (1) where the settlor and testator is the father of the donee, or has placed himself in *loco parentis* to the donee (*s*); (2) where the first disposition is expressed to be made for a specific purpose, and the second disposition effects that purpose. In the first case the presumption is founded on the leaning of the court against double portions (*t*); in the second it is founded upon the intention of the testator or settlor as appearing from the instruments and from the circumstances of the later disposition (*a*). The presumption arises also as regards two dispositions, both made for the purpose of satisfying a specified moral obligation (*b*).

Presumption of satisfaction of portion by legacy and legacy by portion.

(*o*) See p. 136, *post*.

(*p*) *Samuel v. Ward* (1856), 22 Beav. 317, 350.

(*q*) *Re Ashton, Ingram v. Papillon*, [1897] 2 Ch. 574.

(*r*) *Thynne (Lady E.) v. Glengall (Earl)*, (1848) 2 H. L. Cas. 131, at p. 153. A question as to presumption against double gifts arises also where legacies are left to the same person by different testamentary instruments, or different legacies by the same instrument; as to this, see *Ridges v. Morrison* (1784), 1 Bro. C. C. 389; *Coote v. Boyd* (1789), 2 Bro. C. C. 521; *Benyon v. Benyon* (1810), 17 Ves. 34; *Currie v. Pye* (1811), 17 Ves. 462; *Hurst v. Beach* (1821), 5 Madd. 351; *Yockney v. Hansard* (1844), 3 Hare, 620; *Lee v. Pain* (1845), 4 Hare, 201; *Roch v. Cullen* (1818), 6 Hare, 531; *Whyte v. Whyte* (1873), L. R. 17 Eq. 50; and title WILLS.

(*s*) If a child has to account on the footing of satisfaction, persons claiming under him are under the same liability (*Re Scott, Langton v. Scott*, [1903] 1 Ch. 1, C. A.). The rule against double portions to children does not apply in Scotland (*Johnstone v. Haviland*, [1896] A. C. 95).

(*t*) See *Ex parte Pye, Ex parte Dubost* (1811), 8 Ves. 140, *per* Lord ELDON, L.C., at p. 151; *Wuell v. Rice* (1831), 2 Russ. & M. 251, 267; *Chichester (Lord) v. Coventry* (1867), L. R. 2 H. L. 71, 86; *Montagu v. Sandwich (Earl)* (1886), 32 Ch. D. 525, 534, C. A.; *Re Lacon, Lacon v. Lacon*, [1891] 2 Ch. 482, C. A., *per* LINDLEY, L.J., at p. 492; *per* BOWEN, L.J., at p. 497.

(*a*) See *Monck v. Monck (Lord)* (1810), 1 Ball & B. 298, *per* Lord MANNERS, L.C., at p. 303; and compare *Roome v. Roome* (1744), 3 Atk. 181, 183; *Powel v. Cleaver* (1789), 2 Bro. C. C. 499; *Re Smythies, Weyman v. Smythies*, [1903] 1 Ch. 259; *Re Furness, Furness v. Stalkartt*, [1901] 2 Ch. 346, 349; *Re Corbett, Corbett v. Cobham (Lord)*, [1903] 2 Ch. 326. In *Pankhurst v. Howell* (1870), 6 Ch. App. 136, a legacy of a sum of money to the testator's wife to be paid within ten days of his death was not adeemed by a gift of the same amount made during his last illness in order that she might have money in hand on his death; see *Re Fletcher, Gillings v. Fletcher* (1888), 38 Ch. D. 373, 377.

(*b*) *Re Pollock, Pollock v. Worrall* (1885), 28 Ch. D. 552, C. A. There is no

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tion.

Both gifts
must be in
nature of
portions.

149. The presumption of satisfaction in the first case only arises when the two gifts are in the nature of portions (c). A portion is a sum of money given to a child by way of advancement, on marriage or for the purpose of establishing him in business (d), and in general it is only such a gift which will operate as a satisfaction of a prior gift (e); though, apparently, where a large sum has been given, and nothing is known as to the circumstances, it will be treated as raising the presumption (f). It follows that gifts of small sums (g), or payments of an annuity during the lifetime of the testator (h), will not raise the presumption. Moreover, in the case of ademption the gift must be subsequent to the date of the will (i).

Satisfaction
pro tanto.

150. The doctrine of satisfaction does not require that the second provision should be equal in value to or greater than the first; a smaller provision will, in a case which is otherwise suitable for raising the presumption, be a satisfaction *pro tanto* of the earlier provision (k); and, in the case of ademption, a later smaller provision does not destroy altogether the provision in the will; it only destroys it *pro tanto* (l). The value of the provision given by

presumption of satisfaction of a *donatio mortis causa* by a bequest of the same amount contained in a will executed after the gift (*Hudson v. Spencer*, [1910] 2 Ch. 285).

(c) *Re Lacon, Lacon v. Lacon*, [1891] 2 Ch. 482, C. A., per BOWEN, L.J., at p. 498. There is no presumption of satisfaction where two portions are derived from different estates (*Douglas v. Hales* (1849), 7 Hare, 318, 328).

(d) *Taylor v. Taylor* (1875), L. R. 20 Eq. 155, per JESSEL, M.R., at p. 158; see *Schofield v. Heap* (1858), 27 Beav. 93; *Re Lacon, Lacon v. Lacon*, *supra*. And it must be a benefit provided by the settlor, not merely a liability which he has incurred to the child—for example, by breach of trust (*Crichton v. Crichton*, [1895] 2 Ch. 853, 859).

(e) *Re Scott, Langton v. Scott*, [1903] 1 Ch. 1, C. A. Formerly, money provided by a father to pay his son's debts was treated as an advance (*Boyd v. Boyd* (1867), L. R. 4 Eq. 305; *Re Blockley, Blockley v. Blockley* (1885), 29 Ch. D. 250); but the view of JESSEL, M.R., in *Taylor v. Taylor*, *supra*, has prevailed, and the provision of sums for such a purpose does not raise a presumption of satisfaction (*Re Scott, Langton v. Scott*, *supra*).

(f) *Leighton v. Leighton* (1874), L. R. 18 Eq. 458, 468; *Re Scott, Langton v. Scott*, *supra*, at pp. 13, 16.

(g) *Schofield v. Heap*, *supra*; *Watson v. Watson* (1864), 33 Beav. 574; *Re Peacock's Estate* (1872), L. R. 14 Eq. 236, at p. 240. The court has never added up small sums in order to show that if the child claims those sums as well as the larger provision made for him by the parent, he would be taking a double portion (*Suisse v. Lowther (Lord)* (1843), 2 Hare, 424, per WIGRAM, V.-C., at p. 434).

(h) See *Hatfield v. Minet* (1878), 8 Ch. D. 136, C. A.

(i) Gifts made before the date of the will cannot operate as an ademption (*Re Peacock's Estate* (1872), L. R. 14 Eq. 236; *Taylor v. Cartwright* (1872), L. R. 14 Eq. 167, 176; *Leighton v. Leighton*, *supra*); unless so agreed by the donee (*Upton v. Prince* (1735), Cas. temp. Talb. 71).

(k) *Warren v. Warren* (1783), 1 Bro. C. C. 305; *Thynne (Lady E.) v. Glengall (Earl)* (1848), 2 H. L. Cas. 131, 154.

(l) There was at one time an impression that ademption by a smaller gift might destroy the provision in the will entirely (*Ex parte Pye, Ex parte Dubost* (1811), 18 Ves. 140, 151); but the cases were reviewed by Lord COTTENHAM, L.C., in *Pym v. Lockyer* (1841), 5 My. & Cr. 29, and he held that in such a case the ademption took effect only *pro tanto*, and this has been accepted as the settled rule (*Kirk v. Eddowes* (1844), 3 Hare, 509; *Re Pollock, Pollock v. Forrall* (1885), 28 Ch. D. 552, C. A.).

a subsequent settlement must be ascertained 'as at the date of the settlement, and the amount deducted from the legacy (*m*).

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In case of satisfaction of obligation, donee may elect.

151. In a case of ademption the beneficiary has no choice as to whether he will take the earlier or the later provision. The earlier depends solely on the bounty of the testator, and the ademption operates by way of revocation of the bounty, either wholly or in part. Where, however, a settlor has by a settlement undertaken an obligation, he has not the right of terminating that obligation by the substitution of a different provision by his will or by a later settlement (*n*). Hence where such different provision would operate as satisfaction, so that the beneficiary cannot take both provisions, he is entitled to elect between the two (*o*).

152. The presumption against double portions arises when the provisions are made by the father of, or by a person in *loco parentis* to, the donee (*p*). A person is *in loco parentis* when he has placed himself in the situation of the lawful father of the donee (*q*), so far as such situation relates to the duty of the father to make provision for the donee (*r*). Whether a person has placed himself in this relation is a question of fact as to which parol evidence is admissible (*s*). The relation will be readily inferred where the donee resides with, and is maintained by, the donor (*t*); or if the donee is an orphan and is maintained by the donor, though not residing with him (*a*). But a donor may be *in loco parentis* to a donee where the donee has a father living, and resides with and is maintained by the father, especially if the donor contributes to the family income (*b*). The mere leaving of a legacy does not show

Person in loco parentis.

(*m*) *Watson v. Watson* (1864), 33 Beav. 574; *Re Innes, Barclay v. Innes* (1908), 125 L. T. Jo. 60.

(*n*) Without the consent of those entitled under the settlement the settlor cannot substitute the benefits he may have chosen to confer by his will for those which he had already secured by deed (*Chichester (Lord) v. Coventry* (1867), L. R. 2 H. L. 71, per Lord CRANWORTH, at p. 87).

(*o*) *Chichester (Lord) v. Coventry*, *supra*, per Lord ROMILLY, M.R., at p. 91; see *Hinchcliffe v. Hinchcliffe* (1797), 3 Ves. 516, 528; *Thynne (Lady E.) v. Glengull (Earl)* (1848), 2 H. L. Cas. 131, 155; and compare *Pole v. Somers (Lord)* (1801), 6 Ves. 309.

(*p*) *Suisse v. Lowther (Lord)* (1843), 2 Hare, 424, 435; compare *Powel v. Cleaver* (1789) 2 Bro. O. C. 499.

(*q*) *Ex parte Pye, Ex parte Dubost* (1811), 18 Ves. 140, 154.

(*r*) *Powys v. Mansfield* (1837), 3 My. & Cr. 359; *Fowkes v. Pascoe* (1875), 10 Ch. App. 343, 350; the rule is sometimes stated as including provisions by a parent or a person in *loco parentis*; but the word "parent" must be restricted to "father," since it is only on him that the duty of making provision for the child *primâ facie* falls (*Re Ashton, Ingram v. Papillon*, [1897] 2 Ch. 574).

(*s*) Strictly the evidence is of intention by the donor to put himself *in loco parentis*; from such intention the presumption against double portions arises, and parol evidence is admissible to prove or disprove the facts upon which the presumption is to depend, namely, whether, in the language of Lord ELDON in *Ex parte Pye, Ex parte Dubost, supra*, he had meant to put himself *in loco parentis* (per Lord COTTENHAM, L.C., in *Powys v. Mansfield, supra*, at p. 370; see *Booker v. Allen* (1831), 2 Russ. & M. 270, 299).

(*t*) *Watson v. Watson, supra*. In *Twining v. Powell* (1845), 2 Coll. 262, the testatrix also referred to the legatee as her adopted child.

(*a*) *Booker v. Allen* (1831), 2 Russ. & M. 270.

(*b*) *Powys v. Mansfield, supra*. "A rich unmarried uncle," said Lord COTTENHAM, L.C., in that case, "taking under his protection the family of a

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tion.

an intention on the part of the testator to place himself *in loco parentis* to the legatee (c). A grandfather or a collateral relation is in the position of a stranger for the purpose of the rule, and evidence must be given of his intention to put himself *in loco parentis* (d). It used to be held that a father was in a similar position in respect of his illegitimate child (e); but in such a case there is an obvious duty to make provision for the child, and probably the presumption would now arise without evidence (f).

Strength of
presumption
of satisfaction
in different
cases.

153. The rule against double portions is only a rule of presumption, and the presumption is liable to be rebutted; but the strength of the presumption varies according to the nature of the instruments and the order in which they are executed. The presumption is strongest in the case where a testamentary provision for a child is followed by a settlement. Here both provisions are still under the testator's control when he executes the later instrument. The presumption is less strong where a settlement, which creates an obligation remaining unperformed, is followed by a testamentary provision. The testator is not free from the obligation of the settlement when he makes his will, and it is not so readily presumed that he meant the latter to take the place of the former (g). And where the settlement precedes the will, a direction in the will to pay debts may be held to include the liability under the settlement so as to rebut the presumption of satisfaction (h); but only if it is of such a nature as properly to constitute a debt (i).

The strength of the presumption is further reduced when the double provision is contained in consecutive settlements, since in the case of a will the testator is supposed to be disposing of the whole of his property and distributing it among the different objects

brother, who has not the means of adequately providing for them, and furnishing through the father to the children the means of their maintenance and education, may surely be said to intend to put himself, for the purpose in question, *in loco parentis* to the children, although they never leave their father's roof."

(c) *Shudal v. Jekyll* (1742), 2 Atk. 516; *Lyddon v. Ellison* (1854), 19 Beav. 565; *Re Smythies, Weyman v. Smythies*, [1903] 1 Ch. 259.

(d) As to a grandfather, see *Roome v. Roome* (1744), 3 Atk. 181, 183; *Powel v. Cleaver* (1789), 2 Bro. C. C. 499, 517; *Perry v. Whitehead* (1801), 6 Ves. 544; *Lyddon v. Ellison*, *supra*, at p. 572; compare *Ellis v. Ellis* (1802), 1 Sch. & Lef. 1; as to collaterals, see *Shudal v. Jekyll*, *supra*.

(e) *Grave v. Salisbury (Earl)* (1785), 1 Bro. C. C. 425; *Perry v. Whitehead*, *supra*; *Ex parte Pye, Ex parte Dubost* (1811), 18 Ves. 140, 152.

(f) In *Re Lawes, Lawes v. Lawes* (1881), 20 Ch. D. 81, C. A., JESSEL, M.R., at p. 86, treated a father as being *in loco parentis* towards his illegitimate son.

(g) *Chichester (Lord) v. Coventry* (1867), L. R. 2 H. L. 71, 87; *Re Tussaud's Estate, Tussaud v. Tussaud* (1878), 9 Ch. D. 363, C. A.; and as to this distinction, see *Dawson v. Dawson* (1867), L. R. 4 Eq. 504, 512; *Cooper v. Macdonald* (1873), L. R. 16 Eq. 258, 268.

(h) *Chichester (Lord) v. Coventry*, *supra*, at pp. 85, 88; *Dawson v. Dawson*, *supra*; see *Lethbridge v. Thurlow* (1851), 15 Beav. 334; *Re Franklin, Franklin v. Franklin* (1907), 52 Sol. Jo. 12. Where the will precedes the settlement, a direction to pay debts can have no such effect (*Trimmer v. Bayne* (1802), 7 Ves. 508; *Dawson v. Dawson*, *supra*; *Cooper v. Macdonald*, *supra*).

(i) *Bennett v. Houldsworth* (1877), 6 Ch. D. 671; *Re Vernon, Garland v. Shaw* (1906), 96 L. T. 48.

of his bounty (*k*); but not so in the case of a settlement. And if the first settlement contains a power of revocation which is not exercised, this will be an indication that the provisions are intended to be cumulative (*l*).

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tion.

154. Slight differences between the two provisions—that is, such as in the opinion of the judge leave the two provisions of substantially the same nature—do not rebut the presumption against double portions (*m*). Thus the presumption is not rebutted by slight differences as to the time of payment of the two portions (*n*), and sums agreed to be advanced may be satisfied *pro tanto* by a share of residue (*o*); and similarly a bequest of a share of residue may be adeemed by a subsequent advance of a specific sum (*p*). Satisfaction by a residue and ademption of a residue cannot for this purpose be distinguished (*q*).

Slight differ-
ences do not
rebut pre-
sumption.

But the second portion must be *ejusdem generis* with the first. Thus a pecuniary legacy is not adeemed by the father afterwards taking his son into partnership and giving him an interest in the business stock (*r*). If, however, the father himself sets a pecuniary value on the property given, or gives it with reference to its pecuniary value, it ceases to be of a different nature for this purpose (*s*). Similarly, land is not to be taken in satisfaction for money, nor money for land (*t*), unless the testator estimates the value of the land at a fixed sum, and desires it to be made up to a particular amount (*a*). And an interest subject to a contingency will not be a satisfaction of a vested interest (*b*), unless the contingency is so remote that it may be disregarded (*c*).

The gifts
must be
ejusdem
generis.

(*k*) *Palmer v. Newell* (1855), 20 Beav. 32.

(*l*) *Palmer v. Newell* (1856), 8 De. G. M. & G. 74, 78, C. A.; and see *Cartwright v. Cartwright*, [1903] 2 Ch. 306, where satisfaction was rebutted by the differences in the limitations.

(*m*) *Weall v. Rice* (1831), 2 Russ. & M. 251, 268.

(*n*) *Hartopp v. Hartopp* (1810), 17 Ves. 184; compare *Lethbridge v. Thurlow* (1851), 15 Beav. 334.

(*o*) *Schofield v. Heap* (1858), 27 Beav. 93.

(*p*) *Thynne (Lady E.) v. Glengall (Earl)* (1848), 2 H. L. Cas. 131.

(*q*) *Montefiore v. Guedalla* (1859), 1 De G. F. & J. 93, 101, C. A. But where the residue is left to other persons jointly with the children, advances to the children are brought into account only so as to increase the share of residue going to the children (*Meinertzen v. Walters* (1872), 7 Ch. App. 670), and if the residue is left between a stranger and a single child, the presumption of satisfaction is not admitted at all, since the effect would be to compel the child to bring advances into account for the benefit of the stranger, but not *vice versa* (*Re Heather, Pumphrey v. Fryer*, [1906] 2 Ch. 230).

(*r*) *Holmes v. Holmes* (1783), 1 Bro. C. C. 555; *Re Jaques, Hodgson v. Braishy*, [1903] 1 Ch. 267, C. A.; dissenting from *Re Vickers, Vickers v. Vickers* (1888), 37 Ch. D. 525, where NORTH, J., considered *Holmes v. Holmes*, *supra*, overruled by the observations of JESSEL, M.R., in *Re Lawes, Lawes v. Lawes* (1881), 20 Ch. D. 81, 87, C. A.

(*s*) *Bengough v. Walker* (1808), 15 Ves. 507; *Re Lawes, Lawes v. Lawes*, *supra*.

(*t*) *Bellasis v. Uthwatt* (1737), 1 Atk. 426, 428; and see *Davys v. Boucher* (1839), 3 Y. & C. (ex.) 397.

(*a*) *Chichester (Lord) v. Coventry* (1867), L. R. 2 H. L. 71, *per Lord Romilly*, M.R., at p. 96, referring to *Bengough v. Walker*, *supra*.

(*b*) *Bellasis v. Uthwatt*, *supra*; *Hanbury v. Hanbury* (1788), 2 Bro. C. C. 352.

(*c*) *Powys v. Mansfield* (1837), 3 My. & Cr. 359, 374.

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tion.
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Difference in
limitations.

155. Differences between the limitations in the two provisions will only exclude the rule against double portions where they are so great as to indicate that the donor did not intend the later to be in satisfaction of the earlier (*d*). Satisfaction is compatible with greater differences of limitation when the will precedes the settlement, since the testator is at liberty to vary as he pleases the bounty given by his will. Thus, where a father has by his will given a portion to his daughter absolutely, this may well be satisfied by a settlement under which she takes a life interest. It is simply such a settlement as she might be expected herself to make if she received the portion under the will (*e*).

But in accordance with the principle already stated (*f*), where the settlement precedes the will greater weight is given to differences in the limitations. The testator is already under an obligation to dispose of property in manner defined by the settlement, and his will is no satisfaction unless, in making it, he could have supposed himself to be satisfying that obligation (*g*).

(*d*) *Trimmer v. Bayne* (1802), 7 Ves. 508, 515.

(*c*) *Chichester (Lord) v. Coventry* (1867), L. R. 2 H. L. 71, 88; *Stevenson v. Masson* (1873), L. R. 17 Eq. 78; see *Re Innes, Barclay v. Innes* (1908), 125 L. T. Jo. 60; and a legacy given absolutely to a son may be adeemed by a subsequent settlement of money on the marriage of the son (*Hopwood v. Hopwood* (1859), 7 H. L. Cas. 728). This is not necessarily prevented by a later codicil expressly declaring other portions to be in satisfaction of legacies, but not referring to the legacy in question (*ibid.*). Similarly, where the will settles a sum on a daughter and her children, a subsequent settlement on the daughter and her children will be an ademption, notwithstanding differences in the trusts (*Re Furness, Furness v. Stalkartt*, [1901] 2 Ch. 346).

(*f*) See p. 132, *ante*.

(*g*) *Chichester (Lord) v. Coventry*, *supra*, at p. 89. The three leading cases on this subject are *Durham (Earl) v. Wharton* (1836), 3 Cl. & Fin. 146, H. L.; *Thynne (Lady E.) v. Glengall (Earl)* (1848), 2 H. L. Cas. 131; and *Chichester (Lord) v. Coventry*, *supra*.

In *Durham (Earl) v. Wharton*, *supra*, where the will preceded the settlement, there were substantial differences in the trusts; in particular by the will £10,000 was given in trust for the testator's daughter and her children; under the settlement £15,000 was to be paid to the husband who at the same time made provision for the daughter and for younger children. But the rule against double portions prevailed; see *Re Furness, Furness v. Stalkartt*, *supra*.

In *Thynne (Lady E.) v. Glengall (Earl)*, *supra*, the settlement preceded the will, and the chief differences were that, by the settlement, the power of appointment among children was given to husband and wife jointly, under the will to the wife alone; under the settlement, the children of the marriage, under the will, the daughter's children generally, were objects of the power. It was held that these were not differences which negated the presumption of satisfaction. The limitations of the will were in effect a fulfilment of the obligations of the settlement. In *Chichester (Lord) v. Coventry*, *supra*, also, the settlement (which was by covenant to pay £10,000 on demand) preceded the will, but it was held that there was no satisfaction, partly on the ground that a direction to pay debts contained in the will included the obligation under the settlement, which might at any time have been turned into a present debt by demand; but also because the differences between the limitations of the £10,000 in the settlement and those of the will were so marked as to be sufficient to overcome any presumption against a double provision; see *Re Tussaud's Estate, Tussaud v. Tussaud* (1878), 9 Ch. D. 363, Q. A.; *Re Vernon, Garland v. Shaw* (1906), 95 L. T. 48; *Re Franklin, Franklin v. Franklin* (1907), 52 Sol. Jo. 12. But where a portion is by the effect of the settlement, charged on all the settlor's real estate, and subsequently by will makes such provision for the donee as to raise the presumption of satisfaction, this is not rebutted by the circumstance that it

SECT. 4.
Satisfac-
tion.Difference in
beneficiaries.

156. A provision by will may be adeemed in whole or in part by a subsequent advance, although the persons mentioned in the will and those to whom the advance is made are not the same. This difference is a matter to be considered in determining whether or not there is ademption; but if the decision is in favour of ademption, the ademption is final, and affects all the persons within the scope of the testamentary provision (*h*). Satisfaction of a settlement by a will is different, and may operate as to certain persons benefited by the settlement, and not as to others. Consequently those who benefit both under the settlement and under the will are put to their election; but a beneficiary under the settlement who does not take under the will—as where a daughter's husband takes a life interest under the settlement but not under the will (*i*)—cannot be put to election, and he retains his right under the settlement (*k*). Conversely, if there are beneficiaries under the will who are not within the settlement, the beneficiaries under both settlement and will must elect. If they elect to take under the will, the provision of the will is substituted for that in the settlement, and the beneficiaries mentioned only in the will are let in to share in the whole property; if they elect against the will, then they cannot benefit under the will without compensating the

devisors his real estate “subject to the charges and incumbrances thereon” (*Montagu v. Sandwich (Earl)* (1886), 32 Ch. D. 525, C. A.).

(*h*) *Chichester (Lord) v. Coventry* (1867), L. R. 2 II. J. 71, 90; *Twining v. Powell* (1845), 2 Coll. 262.

(*i*) See *Mayd v. Field* (1876), 3 Ch. D. 587.

(*k*) *Chichester (Lord) v. Coventry*, *supra*, per Lord ROMILLY, M.R., at pp. 92, 93, 95: “If a father, on the marriage of his daughter, should settle £10,000 on her for life, remainder to the children of the marriage, a bequest of £10,000 to that daughter would satisfy her life interest in the £10,000, but would not satisfy or touch the interests of her children.” In *McCarogher v. Whieldon* (1867), L. R. 3 Eq. 236, a father, on the marriage of his son, covenanted to give, by will or otherwise, one-fifth of his real and personal estate at his death on trust for the son for a protected life interest, then for the wife and issue of the marriage. By his will he gave his real and personal estate for all his children living at his death. There were five such children. This gift did not operate as a satisfaction as regards the wife and children, and they retained their rights under the settlement; but it operated as a satisfaction as regards the son, and he had to elect whether to take his life interest under the settlement or one-fifth of the residue remaining after satisfaction of the covenant. He elected to take under the will. This meant that he was cut out of the covenant, and the life estate of his wife thereunder was accelerated; see *Mayd v. Field*, *supra*; and compare *Bethell v. Abraham* (1874), 22 W. R. 745, C. A., 3 Ch. D. 590, n. In *Re Blundell, Blundell v. Blundell*, [1906] 2 Ch. 222, a bequest to a wife absolutely was a satisfaction as to her life interest under a preceding settlement, but not as to the interests of her husband and children, notwithstanding that, under an after-acquired property clause in the settlement, her legacy had to be brought into the settlement. But in general where the will follows the settlement, the circumstance that certain persons included in the settlement are not included in the testamentary provision precludes the presumption (*Re Tussaud's Estate, Tussaud v. Tussaud* (1878); 9 Ch. D. 363, 368, C. A.; and see *Hall v. Hill* (1841), 1 Dr. & War. 94; *Re Vernon, Garland v. Shaw* (1906), 95 L. T. 48).

Moreover, where the settlement follows the will the presumption will not arise (in the absence of express direction) if the persons taking under the several instruments are altogether different. Thus a legacy in favour of a daughter and her children is not adeemed by a subsequent gift in favour of her husband absolutely (*Cooper v. Macdonald* (1873), L. R. 16 Eq. 258, 269); see *Baugh v. Read* (1790), 1 Ves. 257; and compare *Twining v. Powell* (1845), 2 Coll. 262.

SECT. 4.
Satisfaction.

Admission
of parol
evidence.

beneficiaries under the will alone for the loss thus caused to them (*l*).

157. Parol evidence cannot be admitted to add to or vary a written instrument (*m*); but where from two written instruments, taken in conjunction with the surrounding circumstances, the court raises a presumption of satisfaction, then parol evidence is admissible to rebut the presumption, and therefore also to support it (*n*). In the case of a will and a settlement, the rule is the same whether the will precedes or follows the settlement (*o*). And where a disposition has been made by one written instrument, parol evidence may be given of the circumstance of a subsequent transaction which has not been reduced to writing, for the purpose of showing an intention on the part of the donor that it should be a satisfaction (*p*).

Satisfaction
of debt by
legacy.

158. Where a testator, being at the time of making his will (*q*) indebted, leaves to his creditor a legacy of a sum equal to or greater than the debt, the legacy is presumed to be a satisfaction of the debt, and the creditor cannot have both his debt and the legacy (*r*),

(*l*) This would have been the case in *Thynne (Lady E.) v. Glengall (Earl)* (1848), 2 H. L. Cas. 131, had there been children of a second marriage (see the hypothesis worked out by Lord ROMILLY, M.R., in *Chichester (Lord) v. Coventry* (1867), L. R. 2 H. L. 71, at p. 93).

(*m*) But it may be given to explain the surrounding circumstances; see title DEEDS AND OTHER INSTRUMENTS, Vol. X., p. 448.

(*n*) *Trimmer v. Bayne* (1802), 7 Ves. 508; *Kirk v. Eddowes* (1844), 3 Hare, 509, and cases there referred to; *Hall v. Hill* (1841), 1 Dr. & War. 94; *Curtin v. Evans* (1875), 9 I. R. Eq. 553, 557; *Montagu v. Sandwich (Earl)* (1886), 32 Ch. D. 525, 535, C. A.; *Re Scott, Langton v. Scott*, [1903] 1 Ch. 1, C. A., where the presumption was rebutted; see *Debeze v. Mann* (1787), 2 Bro. C. O. 165, 619. In such cases the evidence is not admitted on either side for the purpose of proving, in the first instance, with what intent either writing was made, but for the purpose only of ascertaining whether the presumption which the law has raised be well or ill founded (*Kirk v. Eddowes*, *supra*, per WIGHAM, V.-C., at p. 517). In *Weall v. Rice* (1831), 2 Russ. & M. 251, LEACH, M.R., at p. 268, treated extrinsic evidence as being admissible both to raise and to rebut the presumption, and in *Booker v. Allen* (1831), 2 Russ. & M. 270, he admitted extrinsic evidence to raise the presumption where the provisions of the instruments were so different as to prevent it from being raised by intrinsic evidence. But the other authorities cited show that the presumption must first be raised on the language of the instruments, and on the relationship of the parties as one of the surrounding circumstances, before parol evidence of intention against or for satisfaction can be admitted. Otherwise the parol evidence would be admitted simply to vary the written instrument (*Re Tussaud's Estate, Tussaud v. Tussaud* (1878), 9 Ch. D. 363, 374, C. A.).

(*o*) *Re Tussaud's Estate, Tussaud v. Tussaud*, *supra*, at p. 373.

(*p*) *Kirk v. Eddowes*, *supra*.

(*q*) A legacy will not be presumed to be a satisfaction of a debt not existing at the date of the will, since an intention to that effect cannot be imputed to the testator (*Fowler v. Fowler* (1735), 3 P. Wms. 353; *Thomas v. Bennet* (1725), 2 P. Wms. 341; *Haynes v. Mico* (1781), 1 Bro. C. O. 129, 131; *Plunkett v. Lewis* (1844), 3 Hare, 316, 330); and the fact that the debt is created contemporaneously with the will is a strong reason against satisfaction (*Horlock v. Wiggins, Wiggins v. Horlock* (1888), 39 Ch. D. 142, C. A.).

(*r*) *Talbot v. Shrewsbury (Duke)* (1714), Prec. Ch. 394; 2 White & Tud. L. C., 7th ed., p. 375; *Re Rattenberry, Ray v. Grant*, [1906] 1 Ch. 667; but a legacy of less amount than the debt is not a satisfaction *pro tanto* (*Atkinson v. Webb* (1704), 2 Vern. 478; *Cranmer's Case* (circ. 1711), 2 Salk. 508; *Eastwood v. Vinke* (1731), 2 P. Wms. 613, 616; *Thynne (Lady E.) v. Glengall (Earl)* (1848),

and if the debt is discharged before the testator's death the legacy will not be payable (s). But this is a presumption which is not favoured by the court, and it will be rebutted by slight circumstances, whether appearing on the will or incident to the nature of the debt and of the legacy, which suggest that the testator did not intend the legacy to operate as a satisfaction (t).

Thus it will be rebutted where the will contains a direction for the payment of debts and legacies (a), and even where the direction is only for payment of debts (b), or where the will states a particular motive for the legacy other than satisfaction of the debt (c).

The presumption will also be rebutted where the legacy is so

2 H. L. Cas. 131, 153; see *Graham v. Graham* (1749), 1 Ves. Sen. 262; *Dor v. Bor* (1756), 3 Bro. Parl. Cas. 167, 179), unless there is evidence that the legacy was intended as part payment and that the creditor assented (*Hammond v. Smith* (1864), 33 Beav. 452). There is only satisfaction where the creditor and the legatee are the same; hence there is no satisfaction where the debt is due to the husband and the legacy is given to his wife (*Hall v. Hill* (1841), 1 Dr. & War. 94); or where the debt is due from the testator as trustee and the legacy is to one of the *cestuis que trust* (*Fairer v. Park* (1876), 3 Ch. D. 309; see *Smith v. Smith* (1861), 3 Giff. 263, 272). A legacy given in satisfaction of a debt is liable to abate with other legacies (*Re Wedmore*, *Wedmore v. Wedmore*, [1907] 2 Ch. 277). As to a gift of residue to creditors in proportions corresponding to their debts, see *Philips v. Philips* (1841), 3 Haro, 281.

(s) *Re Fletcher, Gillings v. Fletcher* (1888), 38 Ch. D. 373.

(t) *Thynne (Lady E.) v. Glengall (Earl)* (1848), 2 H. L. Cas. 131. The presumption is founded on the maxim *debitor non presumitur donare*—or, that a man should be just before he is bountiful; but of course there is in principle no room for such maxims where the debtor leaves sufficient to pay both debts and legacies (*Chancey's Case* (1717), 1 P. Wms. 408; *Fowler v. Fowler* (1735), 3 P. Wms. 353; *Mathews v. Mathews* (1755), 2 Ves. Sen. 635); and while it is settled that where there is a debt due in the testator's life, and nothing but a plain general legacy of equal or greater amount given to the creditor, the presumption will prevail, yet the court will not go further, and it will avail itself of slight circumstances to exclude the presumption (*Richardson v. Greese* (1743), 3 Atk. 65, 68; *Hinchcliffe v. Hinchcliffe* (1797), 3 Ves. 516, 529; *Re Horlock, Culham v. Smith*, [1895] 1 Ch. 516, 519); it will "rely on the minutest shade of difference to escape from that false principle" (*Hassell v. Hawkins* (1859), 4 Drow. 468, 470). There is no difference in this respect between debts due to children of the testator and debts due to strangers (*Tolson v. Collins* (1799), 4 Ves. 483; *Stocken v. Stocken* (1831), 4 Sim. 152).

(a) *Chancey's Case*, *supra*; *Richardson v. Greese*, *supra*; *Field v. Mostin* (1778), 1 Dick. 543; *Jefferies v. Michell* (1855), 20 Beav. 15; *Hassell v. Hawkins*, *supra*. But where the will contains such a direction, and the testator subsequently contracts a debt and then by codicil leaves an equal or greater legacy to the creditor, the presumption is not rebutted (*Gaynon v. Wood* (1759), 1 P. Wms. 410, n.).

(b) *Re Huish, Bradshaw v. Huish* (1889), 43 Ch. D. 260; see *Cole v. Willard* (1858), 25 Beav. 568; *Pinchin v. Simms* (1861), 30 Beav. 119; *Dawson v. Dawson* (1867), L. R. 4 Eq. 504, 514; *Atkinson v. Littlewood* (1874), L. R. 18 Eq. 595, 604; compare *Glover v. Hartcup* (1864), 34 Beav. 74; *Chichester (Lord) v. Coventry* (1867), L. R. 2 H. L. 71. It had previously been held that the mere direction to pay debts was not enough to rebut the presumption (*Edmunds v. Low* (1857), 3 K. & J. 318); though it was an element to be considered in regard to the question of intention (*Rowe v. Rowe* (1848), 2 Do G. & Sm. 294, 298). The direction to pay debts covers the testator's indebtedness on a covenant in favour of his wife or other beneficiary, although payment under the covenant is not to be made till after his death (*Cole v. Willard*, *supra*; *Atkinson v. Littlewood*, *supra*, at p. 605; see *Chichester (Lord) v. Coventry*, *supra*, at p. 85; *contra*, *Wathen v. Smith* (1819), 4 Madd. 325).

(c) See *Mathews v. Mathews*, *supra*.

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tion.

different as not to be a proper equivalent for the debt; as where it is payable at a later time than the debt, so as to be less advantageous to the creditor (*d*), or where it is different in kind. Such difference may exist either in the things themselves, as where they are not *ejusdem generis*—thus a devise of land is not a satisfaction of a debt (*e*)—or in their incidents, as where the legacy is either contingent (*f*) or of uncertain amount (*g*). And the presumption may be excluded by differences in the title to the debt and legacy, as where the debt belongs to a married woman for her separate use and the legacy is not so given (*h*); or the debt and legacy are secured by different charges on property (*i*); or the debt and the legacy are vested in different trustees (*k*); or the debt is due on a negotiable instrument (*l*). Where a testator is liable as trustee for a breach of trust, a bequest of money for the purposes of the

(*d*) Thus, where the debt is due at the testator's death, the legacy must not be made payable at a fixed date after the death (*Nicholls v. Judson* (1742), 2 Atk. 300; *Clark v. Sewell* (1744), 3 Atk. 96; *Re Roberts, Roberts v. Parry* (1902), 50 W. R. 469); and where the debt is due at a fixed date after the death, the legacy must not be made payable at a later date (*Haynes v. Mico* (1781), 1 Bro. C. C. 129; see *Jeacock v. Falkener* (1783), 1 Bro. C. C. 295, 297). Moreover, if the debt is due at a fixed date after death, and the legacy is given without a fixed date, there is no satisfaction, since the legacy is not, according to the ordinary rule, payable for a year (*Re Horlock, Culham v. Smith*, [1895] 1 Ch. 516); and similarly where an annuity given by deed is payable at a fixed date within the year, and an annuity is given by will generally (*Re Dowse, Dowse v. Glass* (1881), 50 L. J. (CH.) 285), or different fixed times are settled for the two annuities (*Atkinson v. Webb* (1704), Proc. Ch. 236; *Hales v. Darell* (1840), 3 Beav. 324). But if the debt is payable at the death, and the legacy is given generally, the fact that the legacy may not be paid for a year does not rebut the presumption of satisfaction (*Re Rattenberry, Ray v. Grant*, [1906] 1 Ch. 667); and since a legacy so given in satisfaction of a debt carries interest from the death (*Clark v. Sewell*, *supra*, at p. 99), there is no difference as to interest which will rebut the presumption (*Re Rattenberry, Ray v. Grant*, *supra*). An acceleration in the date of payment is consistent with satisfaction (*Wathen v. Smith* (1819), 4 Madd. 325, 332). It has been recognised that the exceptions, equally with the rule, are unsatisfactory (*Re Horlock, Culham v. Smith*, *supra*).

(*e*) *Eastwood v. Vinke* (1731), 2 P. Wms. 613, 616; *Byde v. Byde* (1761), 1 Cox, Eq. Cas. 44, 48; see *Forsight v. Grant* (1791), 1 Ves. 298; *Richardson v. Elphinstone* (1794), 2 Ves. 463.

(*f*) *Crompton v. Sale* (1729), 2 P. Wms. 553; *Tolson v. Collins* (1799), 4 Ves. 483; *Crichton v. Crichton*, [1895] 2 Ch. 853.

(*g*) Thus a residue or a share of residue is not a satisfaction of a debt (*Barret v. Beckford* (1750), 1 Ves. Sen. 519; *Devese v. Pontet* (1785), 1 Cox, Eq. Cas. 188, 192; *Thynne (Lady E.) v. Glengall (Earl)* (1848), 2 H. L. Cas. 131, 155). There may be satisfaction of a debt of unascertained amount (*Edmunds v. Low* (1857), 3 K. & J. 318, 323; *Smith v. Smith* (1861), 3 Giff. 263, 269), unless it is on an open account in respect of which nothing, so far as the testator knows, may be owing (*Raulins v. Povel* (1715), 1 P. Wms. 297).

(*h*) *Bartlett v. Gillard* (1827), 3 Russ. 149, 156; *Fourdrin v. Goudey* (1834), 3 My. & K. 383, 410; *Rowe v. Rowe* (1848), 2 De G. & Sm. 294, 298; *Fairer v. Park* (1876), 3 Ch. D. 309, 314; *contra*, *Atkinson v. Littlewood* (1874), L. R. 18 Eq. 595; and see *Edmunds v. Low*, *supra*, as to the effect of the marriage of a woman who was creditor-legatee, whereby the debt might formerly become payable to her husband.

(*i*) *Bartlett v. Gillard*, *supra*; *Hales v. Darell*, *supra*; but see *Atkinson v. Littlewood*, *supra*.

(*k*) *Pinchin v. Simms* (1861), 30 Beav. 119.

(*l*) *Carr v. Eastbrooke* (1797), 3 Ves. 561; *Re Roberts, Roberts v. Parry* (1902), 50 W. R. 469.

trust will *primâ facie* be a satisfaction of the breach of trust (*m*), and sums charged on the testator's estate may be satisfied by a legacy to the owner of the charge (*n*). A declaration in the will that certain legacies are in satisfaction of debts will assist to rebut the presumption of satisfaction in the case of a debt not so mentioned (*o*).

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Satisfac-
tion.

159. Since the presumption of satisfaction is opposed to the language of the will, parol evidence is admissible to rebut it and also to affirm it (*p*).

Parol
evidence.

160. Where a debt exists from a parent to a child, an advancement, in the parent's lifetime, upon the child's marriage or on some other occasion, of a portion equal to or exceeding the debt is *primâ facie* a satisfaction of the debt (*q*). The presumption may be rebutted by circumstances showing that satisfaction was not intended (*r*); but it will not be rebutted merely because the gift is expressed to be in consideration of natural love and affection, or, in the case of a gift on the marriage of a daughter, because her husband was ignorant of her rights (*s*).

Debt from
parent to
child.

SECT. 5.—Performance.

161. A man under an obligation, who does an act which is suitable to be the means of performing the obligation, will be presumed in equity to have done the act with that intention. Thus, where a man covenants to purchase and settle lands (*t*), and afterwards purchases lands which are suitable to be the subject of the settlement but does not settle them, it will be presumed that he purchased them with the intention of performing his covenant (*a*);

Performance
of covenant
to purchase
lands.

(*m*) *Bensusan v. Nehemias* (1851), 4 De G. & Sm. 381.

(*n*) *Shadbolt v. Vanderplank* (1861), 29 Beav. 405.

(*o*) *Atkinson v. Webb* (1704), Prec. Ch. 236; *Jacocks v. Falkener* (1783), 1 Bro. C. C. 295, 297; *Charlton v. West* (1861), 30 Beav. 124.

(*p*) See *Plunkett v. Lewis*, (1844), 3 Ilare, 316, 323; *Hall v. Hill* (1811), 1 Dr. & War. 94, 122. In *Fowler v. Fowler* (1735), 3 P. Wms. 353, such evidence was considered not admissible, but it is only to be rejected when the intention in favour of satisfaction is expressed in the will itself; see *Hall v. Hill*, *supra*; in *Wallace v. Pomfret* (1805), 11 Ves. 542, this distinction was overlooked; compare p. 136, *ante*.

(*q*) *Plunkett v. Lewis*, *supra*; *Reade v. Reade* (1881), 9 L. R. Ir. 409, C. A.; see *Wood v. Briant* (1742), 2 Atk. 521; *Seed v. Bradford* (1750), 1 Ves. Sen. 501; *Chave v. Farrant* (1810), 18 Ves. 8; compare *Hardingham v. Thomas* (1854), 2 Drew. 353. The advancement must be subsequent to the debt (*Plunkett v. Lewis*, *supra*, at p. 330).

(*r*) As where the gift is of less amount, or uncertain or contingent in its nature (*Crichton v. Crichton*, [1895] 2 Ch. 853). And as to the circumstances which will rebut the presumption, see S. C., [1896] 1 Ch. 870, C. A.

(*s*) *Plunkett v. Lewis*, *supra*.

(*t*) Or to convey and settle lands (*Deacon v. Smith* (1746), 3 Atk. 323). It is the same where the obligation to purchase arises under a statute (*Tubbs v. Broadwood* (1831), 2 Russ. & M. 487, 493).

(*a*) *Lechmere v. Lechmere (Lady)* (1735), Cas. temp. Talb. 80; 2 White & Tud. L. C., 7th ed., p. 399; the principle is that "where a man covenants to do an act, and he does an act which may be converted to a completion of this covenant, it shall be supposed that he meant to complete it" (*Sowden v. Sowden* (1785), 1 Cox, Eq. Cas. 165, per Lord KENYON, M.R., at p. 166; see *Perry v. Phelps* (1798), 4 Ves. 108, 116). A purchase of lands will be a performance, though the covenant was to settle lands or a rentcharge of a specified annual

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Perform-
ance.

and if he dies intestate as to these lands, they will be treated, as against his heir-at-law, as being bound by the trusts of the settlement (*b*); and the purchase will operate as a satisfaction of the covenant (*c*), either entirely, or, if the lands purchased are less in value than the amount covenanted to be laid out, *pro tanto* (*d*).

The presumption in favour of performance only arises where the lands are purchased subsequently to the covenant (*e*) and the interest purchased is of the same nature as that specified in the covenant (*f*). But it will not be rebutted by the fact that the purchase is not a literal compliance with the terms of the covenant: thus, where the covenant requires that the purchase shall be made with the consent of the trustees (*g*), or that the money shall be paid to the trustees to be applied by them in the purchase of lands (*h*), a purchase by the settlor himself without reference to the trustees will be a performance; and it is the same where the lands are purchased at different times (*i*). The presumption of intention is not rebutted by the fact that the settlor has mortgaged the lands; but the mortgagee's title is not affected, and it is only the equity of redemption in the hands of the heir which is subject to the settlement (*k*). Moreover, the trusts do not create a charge upon the lands during the lifetime of the settlor (*l*). It is only

value (*Deacon v. Smith* (1746), 3 Atk. 323). The principle applies, *a fortiori*, where trustees hold funds subject to investment in land, and a purchase by them will be taken to be a performance of the trust (*Mathias v. Mathias* (1858), 3 Sm. & G. 552); as to purchase by a beneficiary who has obtained the money from the trustees, see *Lench v. Lench* (1805), 10 Ves. 511. But expenditure by a tenant for life in permanent improvements to the settled land will not be a satisfaction of a covenant to pay money to the trustees (*Horlock v. Smith* (1853), 17 Beav. 572; see *Wiles v. Gresham* (1854), 2 Drew. 258; 5 De G. M. & G. 770, O. A.).

(*b*) *Deacon v. Smith*, *supra*; *Gurthshore v. Chalie* (1804), 10 Ves. 1, 18.

(*c*) *Wilcocks v. Wilcocks* (1706), 2 Vern. 558.

(*d*) *Lechmere v. Carlisle (Earl)* (1733), 3 P. Wms. 211; on appeal *Lechmere v. Lechmere (Lady)* (1735), Cas. temp. Talb. 80; 2 White & Tud. L. C., 7th ed., p. 399.

(*e*) *Lechmere v. Carlisle (Earl)*, *supra*.

(*f*) Thus, purchase of leaseholds for life, or the reversion expectant on such leaseholds, is not a performance of a covenant to purchase estates in fee simple in possession (*Lechmere v. Carlisle (Earl)*, *supra*; see *Lewis v. Hill* (1749), 1 Ves. Sen. 274), though a reversion on leaseholds for life may suffice if there is only one life outstanding (*Deacon v. Smith*, *supra*). A purchase of a moiety of a house is not a performance of a covenant to purchase lands of inheritance (*Pinnell v. Hallett* (1751), Amb. 106); and a purchase of copyholds is not a performance of a covenant to settle freeholds (*A.-G. v. Whorwood* (1750), 1 Ves. Sen. 534, p. 541; *contra*, *Wilks v. Wilks* (1713), 5 Vin. Abr. 293, Sugden, Vendors and Purchasers, 14th ed., p. 710); at any rate, when the settlement is in favour of a tenant for life without impeachment of waste (*Pinnell v. Hallett*, *supra*).

(*g*) *Deacon v. Smith*, *supra*.

(*h*) *Sowden v. Sowden* (1785), 1 Cox, Eq. Cas. 165; 1 Bro. C. C. 582.

(*i*) *Lechmere v. Carlisle (Earl)*, *supra*; *Deacon v. Smith*, *supra*.

(*k*) *Re Symes, Ex parte Poole* (1847), De G. 581; but according to a dictum of Lord HARDWICKE in *Deacon v. Smith*, *supra*, at p. 327, a subsequent sale or mortgage shows an intention that the lands shall not be bound by the articles, though not where the land is purchased subject to a mortgage.

(*l*) *Mornington (Countess) v. Keane* (1858), 2 De G. & J. 292, O. A.; compare *Wellesley v. Wellesley* (1839), 4 My. & Cr. 561; and as to covenants affecting after-acquired property, see *Tailby v. Official Receiver* (1888), 13 App. Cas. 523, 548. A covenant to settle specific lands already acquired binds them, and so, too, although they have only been contracted for (*Warde v. Warde* (1852), 16 Beav.

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ance.

when he has died, without completing the settlement by conveyance to the trustees, that the doctrine of performance applies so as to bring the lands into the settlement. Where the purchase is treated as performance, the value of the lands will be taken to be the price paid for them, provided the purchase is *bond fide* (m).

162. The doctrine of performance has been extended to the case where a man is under a covenant to provide money at or after his death, and upon his death intestate a share of his estate devolves upon the covenantee (n); and equally so though the covenantee is his wife (o). This operates as a performance of the covenant either in whole or in part, according to the amount received under the intestacy (p); although the share of residue is not necessarily payable till the end of a year from the death, while the money due under the covenant is payable earlier (p). It is immaterial whether the covenant is that the covenantor shall leave, or that his executors shall pay (q); but the principle does not apply where the money has become due in the covenantor's life, so that an action could have been brought for breach of covenant (r). It applies where the covenant is for conveyance to the covenantor's wife of a specified share of all his real and personal estate; and she cannot take her distributive third share of the personal estate in addition, whether that share comes to her on an entire intestacy (s), or because her husband's will has become inoperative (t). But it does not apply where the benefit under the covenant is an annuity or life interest only (a); and since the covenant is entire, and the distributive share in the intestacy is not a performance as to a life interest under it, it is not a performance as to a sum payable under it absolutely (a).

Performance
by intestacy.

103). On a subsequent exchange of the lands for other lands and a sum of money, the lands will be taken in substitution, and the money will be a specialty debt (*Powdrell v. Jones* (1854), 2 Sm. & G. 335).

(m) See *Pinnell v. Hallett* (1751), Amb. 106; *Tyrconnell (Lord) v. Ancaster (Duke)* (1754), Amb. 237; compare *Wace v. Bickerton* (1850), 3 De G. & Sm. 751.

(n) *Blandy v. Widmore* (1716), 1 P. Wms. 324; 2 White & Tud. L. O., 7th ed., p. 407. The principle has been applied to a covenant to exercise a limited testamentary power, so that, on non-exercise of the power, the covenant is satisfied by the covenantee receiving the amount in default of appointment (*Thacker v. Key* (1869), L. R. 8 Eq. 408, 415). But as to the validity of such a covenant, see *Palmer v. Lock* (1880), 15 Ch. D. 294, C. A.; *Re Evered, Molineux v. Evered*, [1910] 2 Ch. 147, 156, C. A.

(o) *Lee v. D'Aranda* (1747), 1 Ves. Sen. 1; 3 Atk. 419.

(p) *Garthshore v. Chalie* (1804), 10 Ves. 1, 7. The amount received under the intestacy includes the sum of £500 which the widow takes, if there are no issue of the husband, under the Intestates' Estates Act, 1890 (53 & 54 Vict. c. 29); see *Re Hogan, Hogan v. Hogan*, [1901] 1 I. R. 168.

(q) *Lee v. D'Aranda, supra*.

(r) *Oliver v. Brighthouse or Brickland* (1732), cited 1 Ves. Sen. 1; 3 Atk. 420, 422; *Lee v. D'Aranda, supra*; see *Lang v. Lang* (1837), 8 Sim. 451.

(s) *Garthshore v. Chalie, supra*. This does not depend on the widow having taken out administration, although stress was laid on this point in *Haynes v. Mico* (1781), 1 Bro. C. C. 129; see *Garthshore v. Chalie, supra*, at p. 12.

(t) *Goldsmid v. Goldsmid* (1818), 1 Swan. 211.

(a) *Couch v. Stratton* (1799), 4 Ves. 391; *Salisbury v. Salisbury* (1848), 6 Hare, 526. And the widow can take under a covenant a life interest in the entire estate, and also her distributive share in the intestacy (*Young v. Young* (1871), 5 I. R. Eq. 615).

SECT. 5.

Performance.

No performance by testamentary provision.

163. Where a covenantor who has covenanted to provide money at or after his death actually makes provision for the covenantee by will, this will not *prima facie* be a performance of the covenant, since a legacy implies bounty. To operate as a performance it must appear that the legacy was given with that intention (b), or the circumstances must be such as bring the case within the rule as to satisfaction of a debt by a legacy (c).

SECT. 6.—*Marshalling.*

The doctrine of marshalling.

164. Where one claimant, A., has two funds, X and Y, to which he can resort for satisfaction of his claim, whether legal or equitable, and another claimant, B., can resort to only one of these funds, Y, equity interposes so as to secure that A. shall not by resorting to Y disappoint B. And, consequently, if the matter is under the control of the court, A. will be required in the first place to satisfy himself out of X, and only to resort to Y in case of deficiency; and if A. has already been paid out of Y, it will allow B. to stand in his place as against X (d). This is known as the doctrine of marshalling, and is adopted in order to prevent one claimant from depriving another claimant of his security (e). The doctrine is applied chiefly in regard to securities and to the administration of assets.

Application of marshalling.

165. In order that the doctrine of marshalling may be applied as regard claims by creditors, it is, in general, necessary (1) that they shall be against a single debtor; if one creditor has a claim against C. and D., and another creditor has a claim against D. only, the latter creditor cannot require the former to resort to C. unless the liability is such that D. could throw the primary liability on C., as where C. and D. are principal and surety (f); (2) that the two funds should be at the disposal of the debtor (g); and

(b) *Haynes v. Mico* (1781), 1 Bro. C. C. 129; *Devese v. Pontet* (1785), Prec. Ch. 240, n. (ed. Finch); see these cases discussed in *Garthshore v. Chalie* (1804), 10 Ves. 1; *Goldsmid v. Goldsmid* (1818), 1 Swan. 211, 218; and see *Wood v. Wood* (1844), 7 Beav. 183.

(c) See p. 136, *ante*.

(d) But the court does not interfere with the right of the first incumbrancer to satisfy himself out of the first security available (*Wallis v. Woodyear* (1855), 2 Jur. (N. S.) 179; see *Binns v. Nichols* (1866), L. R. 2 Eq. 256).

(e) *Aldrich v. Cooper* (1803), 8 Ves. 382, per Lord ELDON, L.C., at p. 395: "A person having two funds shall not by his election disappoint the party having only one fund; and equity, to satisfy both, will throw him, who has two funds, upon that which can be affected by him only; to the intent that the only fund to which the other has access may remain clear to him." "In the sense of a court of equity, the marshalling of assets is such an arrangement of the different funds under administration as shall enable all the parties having equities thereon to receive their due proportion, notwithstanding any intervening interests, liens, or other claims of particular persons to prior satisfaction out of a portion of those funds" (Story, s. 558). For the general principle, see *Clifton v. Burt* (1720), 1 P. Wms. 678, and reporter's note, p. 679; *Lanoy v. Athol* (*Duke and Duchess*) (1742), 2 Atk. 444, 446; *Trimmer v. Bayne* (1803), 9 Ves. 209; *Selby v. Selby* (1828), 4 Russ. 336.

(f) *Ex parte Kendall* (1811), 17 Ves. 514, 520.

(g) If they are not, then the persons interested in the fund not under his

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(3) that the two funds should be in existence when the question of marshalling arises (*h*).

The doctrine will be applied in favour of volunteers (*i*). Hence, if a settlor, after the settlement, creates a mortgage on the settled property so as to give it priority over the settlement (*k*), his unsettled property will be marshalled in favour of the beneficiaries under the settlement, and the mortgage debt thrown on that property (*l*). But it will not be applied to the prejudice of third persons (*m*), although they are volunteers; and where several estates—X, Y, and Z—belonging to the same owner are subject to mortgages, and he executes a voluntary settlement of Z, and then creates a further mortgage on Y alone, the second mortgagee of Y is not entitled to marshal so as to disappoint the beneficiaries under the settlement (*n*).

166. If the owner of two properties mortgages both to the same person, and afterwards mortgages only one to a second mortgagee, the court will marshal the two properties so as to throw the first mortgage as far as possible on the property not included in the second mortgage (*o*). This principle applies whatever be the nature of the estates—whether, for instance,

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of securities.

control have a right to throw his debts on the other which is under his control, and against them there is no marshalling. "To authorize marshalling, it is obviously necessary not only that a claim should exist against a fund, subject in common with another fund to a paramount liability; but also that those interested in that other fund should not have a right to throw the liability on the fund of the claimant" (*Douglas v. Cooksey* (1868), 2 L. R. Eq. 311, *per* WALSH, M.R., at p. 315). Similarly, where a debtor is bound to exonerate one fund, a person claiming through him has no right to have that fund marshalled in his favour. "It would be utterly impossible to apply the doctrine [of marshalling] to a case where the creditor with a right against only one fund is in truth himself bound to the party entitled to the other security" (*Dolphin v. Aylward* (1870), L. R. 4 IL. L. 486, 505, *per* Lord WESTBURY, meaning, apparently, "to the party entitled to the property subject to the other security").

(*h*) *Re Professional Life Assurance Co.* (1867), L. R. 3 Eq. 668, 680; see *Re International Life Assurance Society* (1876), 2 Ch. D. 476, C. A.

(*i*) *Lomas v. Wright* (1883), 2 My. & K. 769; unless their titles confine them to different properties (*Bouzman v. Johnston* (1830), 3 Sim. 377).

(*k*) Formerly he could do this, notwithstanding that the mortgagee took with notice of the settlement; but since the Voluntary Conveyances Act, 1893 (56 & 57 Vict. c. 21), the mortgagee will not obtain priority unless he takes the legal estate without notice.

(*l*) *Hales v. Cox* (1863), 32 Beav. 118; *Mallott v. Wilson*, [1903] 2 Ch. 494, 505.

(*m*) See *Averall v. Wade* (1835), L. & G. temp. Sugd. 252; *Hughes v. Williams* (1852), 3 Mac. & G. 683; and compare *Ker v. Ker* (1864), 4 L. R. Eq. 15. A surety for a mortgage debt, who pays off the debt and takes a transfer of the security, can hold it against another mortgagee claiming to marshal, but only to the extent of the debt and of costs properly incurred (*South v. Blozam* (1865), 2 Hem. & M. 457; see *Dixon v. Steel*, [1901] 2 Ch. 602).

(*n*) *Aldridge v. Forbes* (1839), 9 L. J. (CH.) 37; *Dolphin v. Aylward*, *supra*, at p. 501; see as to unsecured creditors, *Anstey v. Newman* (1870), 39 L. J. (CH.) 769.

(*o*) See *per* Lord HARDWICKE, L.C., in *Lanoy v. Athol (Duke and Duchess)*, (1742), 2 Atk. 444; *Re Cornwall*, *Baldwin v. Belcher* (1842), 3 Dr. & War. 173, 176; *Re Roddy's Estate* (1861), 11 L. Ch. R. 369; *Gibson v. Seagrim* (1855), 20 Beav. 614; *Webb v. Smith* (1885), 30 Ch. D. 192, C. A. In *Lanoy v. Athol (Duke and Duchess)*, *supra*, it was said that the second mortgage must be without notice of the first, but notice is not material.

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they are freehold or copyhold (*p*); and it extends to charges (*q*) and liens (*r*). But in accordance with the rule that marshalling will not be allowed to the prejudice of a third party, where two estates, X and Y, are mortgaged to A., and X to B., and then Y is mortgaged to C., B. cannot require A. to satisfy himself out of Y and so exclude C.; but A. must satisfy himself rateably out of the two estates (*s*). If, however, C.'s mortgage is expressly subject to prior satisfaction of A. and B.'s debts, then B. is entitled to marshal (*t*).

**Marshalling
of assets.**

167. The doctrine of marshalling is applied in the administration of estates, though the occasion for it has been diminished by statutory changes as to the recovery of debts. Formerly, certain classes of specialty debts were recoverable out of both the real and personal estate of a deceased debtor, while simple contract debts were recoverable only out of the personal estate. As between creditors, accordingly, the simple contract creditors were entitled to have the assets marshalled in their favour, so as to throw the specialty creditors on the real estate (*a*). This distinction between specialty and simple contract creditors is now abolished, and all are entitled to be paid rateably, first out of personal and then out of real estate (*b*).

But marshalling is also applied as between beneficiaries, so that if a creditor, with his remedy against the real and personal estate, has been paid out of the personal estate, a pecuniary legatee is entitled to be paid out of the real estate (*c*). This, however, is

(*p*) *Aldrich v. Cooper* (1803), 8 Ves. 382, 388; *Tidd v. Lister, Bassil v. Lister* (1852), 10 Hare, 140; on appeal (1854), 3 De G. M. & G. 857, 872.

(*q*) Such as a portion secured by charge (*Rancliffe (Lord) v. Parkyns (Lady)* (1818), 6 Dow, 149, 214, H. L.); or a jointure (*Lanoy v. Athol (Duke and Duchess)* (1742), 2 Atk. 444).

(*r*) Such as a vendor's lien (see *Trimmer v. Baynes* (1803), 9 Ves. 209; *Sproule v. Prior* (1836), 8 Sim. 189); though the question in these cases cannot arise since Locke King's Act (Real Estate Charges Act, 1854 (17 & 18 Vict. c. 113)); But there must be an actual lien. A mere claim to set off will not do (*Webb v. Smith* (1885), 30 Ch. D. 192, C. A.).

(*s*) *Barnes v. Rackster* (1842), 1 Y. & C. Ch. Cas. 401; *Gibson v. Seagrim* (1855), 20 Beav. 614, 619; *Trumper v. Trumper* (1872), L. R. 14 Eq. 295; affirmed (1873), 8 Ch. App. 870; compare *Re Lawder's Estate* (1861), 11 I. Ch. R. 346; *Re Rorke's Estate* (1865), 15 I. Ch. R. 316; *Flint v. Howard*, [1893] 2 Ch. 54, C. A.

(*t*) *Re Mower's Trusts* (1869), L. R. 8 Eq. 110.

(*a*) *Aldrich v. Cooper*, *supra*, at p. 394; see *Sagitary v. Hyde* (1687), 1 Vern. 455; and reporter's notes.

(*b*) See pp. 35, 37, *ante*. Under the Real Estate Charges Acts, 1854, 1867, and 1877 (17 & 18 Vict. c. 113; 30 & 31 Vict. c. 69; 40 & 41 Vict. c. 34), debts forming a specific charge or lien on real or leasehold estate of a deceased person are, as between the different persons claiming under him, to be borne by such estate, and where the creditor resorts to other property, the persons thus disappointed are entitled to be recouped out of the real or leasehold estate; see title EXECUTORS and ADMINISTRATORS. As to apportionment, where both real and personal estate are charged, see *Lipscomb v. Lipscomb* (1868), L. R. 7 Eq. 501; and as between different real properties, see *De Rochefort v. Davies* (1871), L. R. 12 Eq. 540.

(*c*) "The mere bounty of the testator enables the legatee to call for this species of marshalling:—that, if those creditors having the right to go to the real estate descended will go to the personal estate, the choice of the creditors

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ling.

restricted to the real estate which has not been specifically devised, but has been allowed to descend to the heir; for if the testator has devised his real estate, the devisee has a right preferable to that of the legatee (*d*); unless the devised estate is charged with debts by the will, and then, if the debts are paid out of the personal estate, the legatee is entitled to have the devised estate marshalled (*e*). Moreover, if the devised estate is subject to a mortgage which the testator has directed to be paid out of the personal estate, the pecuniary legatees are entitled to stand in the shoes of the mortgagee against the devised estate to the extent to which such payment disappoints them (*f*).

168. Before the Wills Act, 1837 (*g*), a residuary devise of real estate was treated as specific (*h*), and it is the same since that Act (*i*); so that a pecuniary legatee is not entitled to marshal against a residuary devisee (*j*). And where some legacies are charged on real and personal estate, and others on personal estate only, the latter legatees are entitled to have the real estate marshalled (*k*). Where, in the case of testators dying before 5th August, 1891 (*l*), charitable legacies were, under the former Mortmain Act (*m*), void as regards the real estate and impure personality, the assets were

Legacies.

shall not determine whether the legatees shall be paid or not" (*Aldrich v. Cooper* (1803), 8 Ves. 382, 396; see *Clifton v. Burt* (1720), 1 P. Wms. 678, and reporter's notes; *Tombs v. Roch* (1846), 2 Coll. 490; *Paterson v. Scott* (1852), 1 De G. M. & G. 531, C. A.).

(*d*) *Hanby v. Roberts* (1751), Amb. 127, 129. And so, too, where the devisee is heir (*Strickland v. Strickland* (1839), 10 Sim. 374).

(*e*) *Richard v. Barrett* (1857), 3 K. & J. 289; *Poster v. Cook* (1791), 3 Bro. C. C. 347. A direction to pay debts sufficiently charges them on the real estate to give the pecuniary legatees a right to marshal (*Re Stokes, Parsons v. Miller* (1892), 67 L. T. 223; *Re Salt, Brothwood v. Keeling*, [1895] 2 Ch. 203; *Re Roberts, Roberts v. Roberts*, [1902] 2 Ch. 834, overruling *Re Bate, Bate v. Bate* (1890), 43 Ch. D. 600). And the effect of the Land Transfer Act, 1897 (60 & 61 Vict. c. 65), is not to make the charge of debts meaningless so as to interfere with marshalling (*Re Kempster, Kempster v. Kempster* (1906), 54 W. R. 385; compare *Re Balls, Trewhay v. Balls*, [1909] 1 Ch. 791).

(*f*) That is, if the testator has excluded the application of Locke King's Acts (*Re Smith, Smith v. Smith*, [1899] 1 Ch. 365); see *Lutkins v. Leigh* (1734), Cas. temp. Talb. 53; *Johnson v. Child* (1844), 4 Hare, 87; *Porcher v. Wilson* (1866), 14 W. R. 1011. This rule, as ROMER, J., pointed out in *Re Smith, Smith v. Smith, supra*, is difficult to justify on principle.

(*g*) 7 Will. 4 & 1 Vict. c. 26.

(*h*) *Forrester v. Leigh* (Lord) (1753), Amb. 171; *Mirehouse v. Secife* (1837), 2 My. & Cr. 695.

(*i*) *Hensman v. Fryer* (1867), 3 Ch. App. 420, 426; *Lancefield v. Iggulden* (1874), 10 Ch. App. 136.

(*j*) *Collins v. Lewis* (1869), L. R. 8 Eq. 708; *Farquharson v. Floyer* (1876), 3 Ch. D. 109; not following on this point *Hensman v. Fryer, supra*.

(*k*) *Masters v. Masters* (1718), 1 P. Wms. 421; *Bonner v. Bonner* (1807), 13 Ves. 379; *Scales v. Collins* (1852), 9 Hare, 656. If a widow's right to paraphernalia can be considered as now in existence (see *Masson, Templier & Co. v. De Fries*, [1909] 2 K. B. 831, C. A.), the principle as regards legacies applies *a fortiori* to such a claim, and she is accordingly entitled to have the assets marshalled in her favour (*Tipping v. Tipping* (1721), 1 P. Wms. 729; *Tynt v. Tynt* (1729), 2 P. Wms. 642; *Incedon v. Northcote* (1746), 3 Atk. 430, 438; *Boynton v. Parkhurst* (1784), 1 Bro. C. C. 576; *Aldrich v. Cooper* (1803), 8 Ves. 382, 397).

(*l*) The date of the commencement of the Mortmain and Charitable Uses Act, 1891 (54 & 55 Vict. c. 73).

(*m*) Charitable Uses Act, 1735 (9 Geo. 2, c. 36).

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marshalling.

not marshalled so as to throw these legacies on the pure personal estate (*n*), unless the testator had so directed (*o*).

The doctrine of marshalling is applied also as regards the claims of the Crown against the whole property of the debtor, where other creditors can take only part (*p*); in bankruptcy (*q*); and in admiralty (*r*); and it is the foundation of the rights of a surety to the securities of the creditor (*s*).

SECT. 7.—*Merger of Estates and Charges.*In equity
merger
depends on
intention.

169. At law, when a less estate was vested in the same person as a greater estate without any intermediate estate between them, the less estate merged in the greater and was extinguished, without regard to the intention of the parties concerned (*t*). Equity is not guided by the rules of law as to merger, and both as regards the merger of a less estate in a greater, and a merger of a charge in the land, the question depends upon the intention, actual or presumed, of the person in whom the interests become united (*u*). In this respect the prevalence of the equitable doctrine is secured by s. 25 (4) of the Judicature Act, 1873 (*v*), which provides that there shall not be any merger by operation of law only of any estate the beneficial interest in which would not be deemed to be merged or extinguished in equity.

Merger of
estates.

170. It follows that a less estate is not merged in a greater if there is an express or presumed intention that it shall be kept alive. Where no intention is expressed the intention may be presumed from the circumstances, as where the estates are held by the same person in different rights—*e.g.*, one beneficially and the other as trustee (*a*)—or where it is for the advantage of the holder of the two estates that the less estate should be kept alive (*b*).

(*n*) *Mogg v. Hodges* (1750), 2 Ves. Sen. 52; *Foster v. Blagden* (1771), Amb. 704; *Hiljyard v. Taylor* (1773), Amb. 713; *Hobson v. Blackburn* (1836), 1 Keen, 273; *Re Percy, Whitwham v. Percy*, [1898] 1 Ch. 565, C. A.

(*o*) *Wills v. Bourne* (1873), L. R. 16 Eq. 487; *Miles v. Harrison* (1874), 9 Ch. App. 316; *Re Ovey, Broadbent v. Barrow* (1885), 31 Ch. D. 113, 118; *Re Arnold, Ravenscroft v. Workman* (1888), 37 Ch. D. 637; see *Re Somers-Cocks, Wegg-Prosser v. Wegg-Prosser*, [1895] 2 Ch. 449; and see title CHARITIES, Vol. IV., p. 152.

(*p*) *Aldrich v. Cooper* (1803), 8 Ves. 382, 388; *Sagitary v. Hyde* (1687), 1 Vern. 455.

(*q*) *Re Stephenson, Ex parte Stephenson* (1847), 10 G. 586 (proceeds of goods distrained marshalled in favour of mortgagee of a part only); *Re Holland, Ex parte Alston* (1868), 4 Ch. App. 168; *Re Stratton, Ex parte Salting* (1883), 25 Ch. D. 148, C. A.

(*r*) *The Trident* (1839), 1 Wm. Rob. 29, 35; *The Edward Oliver* (1867), L. R. 1 A. & E. 379; *The Eugénie* (1873), L. R. 4 A. & E. 123; see title SHIPPING and NAVIGATION.

(*s*) *Aldrich v. Cooper, supra*, at p. 389; *Duncan, Fox & Co. v. North and South Wales Bank* (1880), 6 App. Cas. 1, 12; see title GUARANTEE.

(*t*) *Burton v. Barclay* (1831), 7 Bing. 745, 756; see *Doe d. Rawlings v. Walker* (1826), 5 B. & C. 111, 121.

(*u*) *Forbes v. Moffatt* (1811), 18 Ves. 384, 390.

(*v*) 36 & 37 Vict. c. 68.

(*a*) *Chambers v. Kingham* (1878), 10 Ch. D. 743.

(*b*) *Ingle v. Vaughan Jenkins*, [1900] 2 Ch. 368. As regards merger a long term

171. Where a person entitled to land acquires a charge upon it, and at the same time expresses his intention that the charge shall not merge, this is sufficient to keep it alive (c). It is not necessary to take a transfer of the charge to a trustee. This is only useful as evidence of an intention to avoid merger, where no intention is expressed, and there would otherwise be a presumption of merger (d). On the other hand, if there is an express or presumed intention in favour of merger, the charge will be extinguished, notwithstanding that it is outstanding in a trustee (e).

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**Merger of
Estates and
Charges.**

Merger of
charges.

172. Where no intention is expressed, or the person is incapable of expressing any, the court considers what is most advantageous for him, and decides for or against merger accordingly (f). And on this are founded two presumptions: First, when the ownership in fee simple of the land and the absolute ownership of the charge become vested in the same person, and there is no special reason for keeping the charge alive, the presumption is in favour of merger; the title is simplified by the charge being extinguished, and its continued existence is useless to the owner (g); and it is the same where the owner in fee simple pays off the charge (h). The presumption applies also to a tenant in tail (i), unless he is by statute forbidden to bar the entail (k), so that he cannot become owner in fee simple. But it does not apply where the fee is liable to be defeated by an executory devise (l). Secondly, where the charge is acquired by a limited owner, or where a limited owner pays it off, the presumption is against merger. It is not for his advantage that his charge should sink for the benefit of the remainderman (m). And merger will be prevented if there is a prior life interest in the charge which does not terminate in the lifetime of the owner of the land (n).

Presumption
of merger.

Absolute
ownership.

Limited
ownership.

is treated as less than a freehold estate, such as an estate for life; see *Capital and Counties Bank, Ltd. v. Rhodes*, [1903] 1 Ch. 631, C. A.

(c) *Watts v. Synnes* (1851), 1 De G. M. & G. 210, C. A.; *Adams v. Angell* (1877), 5 Ch. D. 634, C. A.

(d) *Hood v. Phillips* (1841), 3 Beav. 513; see *Bailey v. Richardson* (1852), 9 Hare, 734; and p. 148, *post*.

(e) *Asley v. Milles* (1827), 1 Sim. 298; *Pitt v. Pitt* (1856), 22 Beav. 294.

(f) *Forbes v. Moffatt* (1811), 18 Ves. 384; *Grice v. Shaw* (1852), 10 Hare, 76; *Tyrwhitt v. Tyrwhitt* (1863), 32 Beav. 244; *Thorne v. Cann*, [1895] A. C. 11, 18.

(g) *Donisthorpe v. Porter* (1762), 2 Edon, 162; *Forbes v. Moffatt*, *supra*; *Grice v. Shaw*, *supra*; *Swinfen v. Swinfen* (No. 3) (1860), 29 Beav. 199, 203.

(h) *Buckinghamshire (Earl) v. Hobart* (1818), 3 Swan. 186.

(i) *Drinkwater v. Combe* (1825), 2 Sim. & St. 340.

(k) *Shrewsbury (Countess) v. Shrewsbury (Earl)* (1790), 3 Bro. C. C. 120.

(l) *Drinkwater v. Combe*, *supra*.

(m) *Burrell v. Egremont (Earl)* (1844), 7 Beav. 205, 232; *Pitt v. Pitt*, *supra*. If a remainderman in tail, whose estate is preceded by another estate tail, pays off a charge, the presumption is originally against merger, and this continues although his estate falls into possession (*Wigsell v. Wigsell* (1825), 2 Sim. & St. 364, 369; *Horton v. Smith* (1858), 4 K. & J. 624, 628). And similarly, where a tenant for life, with ultimate remainder in fee simple, who has paid off a charge, becomes immediately entitled in fee simple by the failure of intermediate estates, the charge does not thereupon merge (*Wyndham v. Egremont (Earl)* (1775), Amb. 753; *Trevor v. Trevor* (1833), 2 My. & K. 675).

(n) *Wilkes v. Collin* (1869), L. R. 8 Eq. 338.

SECT. 7.
Merger of
Estates and
Charges.

Where the
 presumptions
 are excluded.

173. These presumptions only furnish *prima facie* rules as to merger, and they yield to the intention, whether express or implied (*o*). The actual intention may be inferred from acts done, either at the time of the union of the charge with the estate, or subsequently during the life of the owner (*p*). Taking a transfer of the charge in the name of a trustee is evidence against merger, but is not by itself conclusive (*q*). Subsequent dispositions of the property, whether by will (*r*) or *inter vivos*, may show that the property was intended to pass free from the charge; and this will usually be the case if there is an alienation for value (*a*). And the presumptions have no place where the owner is incapable of having an intention. Hence, where the court pays off a charge on the estate of an infant tenant in tail, there is no merger (*b*).

Moreover, the first presumption does not apply in the case of an owner in fee simple who pays off a charge, if it is for his benefit that the charge should be kept alive. And this is the case where there are subsequent charges which would be advanced by its extinction. But an exception exists as regards a mortgagor, and he cannot pay off a first mortgage and then set it up against a subsequent charge which he has himself created (*c*); and the exception was formerly extended to a purchaser of the equity of redemption, so as to prevent him from keeping alive an incumbrance which he had paid off against other incumbrances of which he had notice (*d*). But this extension has been disapproved of (*e*). The purchaser can keep alive a prior incumbrance by expressing an intention to that effect; and although no intention is expressed, yet it will be sufficient if the circumstances indicate the intention (*f*). And it seems correct to say generally that in the case of a purchaser of an equity of redemption the ordinary rule will now prevail; and where it is for his advantage that a charge which he has paid off shall be kept alive, an intention to this effect

(*o*) *Grice v. Shaw* (1852), 10 Hare, 76, 79.

(*p*) *Hatch v. Skelton* (1855), 20 Beav. 455.

(*q*) *Hood v. Phillips* (1841), 3 Beav. 513. A declaration by the owner that the charge is to be held in trust for himself, his executors, administrators and assigns, will prevent merger (*Tyrwhitt v. Tyrwhitt* (1863), 32 Beav. 244); and so where the owner in fee buys up a lease (*Gunter v. Gunter* (1857), 23 Beav. 571).

(*r*) *Hood v. Phillips*, *supra*.

(*a*) *Gower v. Gower* (1783), 1 Cox, Eq. Cas. 53 (marriage settlement); *Tyler v. Lake* (1831), 4 Sim. 351 (mortgage); *Bulkeley v. Hope* (1855), 1 K. & J. 482; but see *Neame v. Moorsom* (1866), L. R. 3 Eq. 91.

(*b*) *Alsop v. Bell* (1857), 24 Beav. 461; and so, apparently, as regards a lunatic, since the court does not interfere to alter the rights of the personal representatives; see *Ware v. Polhill* (1805), 11 Ves. 257, 278. But where the charge and estate devolve, otherwise than by purchase, upon a lunatic owner in fee simple, there is a merger (*Compton (Lord) v. Oxenden* (1793), 2 Ves. 261).

(*c*) *Otter v. Vaux (Lord)* (1856), 6 De G. M. & G. 638, 642.

(*d*) *Toulmin v. Steere* (1817), 3 Mer. 210, *per* GRANT, M.R.

(*e*) *Adams v. Angell* (1877), 5 Ch. D. 634, O. A.; see *Watts v. Symes* (1851), 1 De G. M. & G. 240, O. A.; *Stevens v. Mid-Hants Rail. Co., London Financial Association v. Stevens* (1873), 8 Ch. App. 1064, 1069; *Thorne v. Cann*, [1895] A. C. 11.

(*f*) *Phillips v. Gutteridge* (1859), 4 De G. & J. 531, O. A.; *Adams v. Angell*, *supra*; *Thorne v. Cann*, *supra*. And a stranger who pays off a mortgage is in general entitled to the benefit of it (*Butler v. Rice*, [1910] 2 Ch. 277).

will be presumed, unless there are indications of a contrary intention (*g*).

174. Upon a similar principle equity will keep alive conditions which have become inoperative at law. Thus where land is devised to the testator's heir-at-law subject to a condition to pay a pecuniary legacy, the condition is at law useless to the legatee, since it is the heir himself who will take advantage of the condition broken. But payment of the legacy is enforced in equity; and the heir, and a purchaser from him with notice, must make it good (*h*). And it is the same though the devise on condition is to a stranger. The heir on entering for breach of the condition is a trustee for the legatee (*i*).

SECT. 7.
Merger of
Estates and
Charges.

Conditions
kept alive.

SECT. 8.—Subrogation.

175. Where one person has a claim against another, a third person is, in certain circumstances, allowed to have the benefit of the claim and the remedy for enforcing it, although it has not been assigned to him, and he is then said to be subrogated to the rights of the first person. The doctrine of subrogation is applied at law in cases of insurance, where the insurance is a contract of indemnity only. The underwriter or assurer, upon paying the assured his loss, is entitled to the benefit of all remedies of the assured against persons liable for the loss, whether in contract or in tort (*k*), and is entitled to sue in the name of the assured (*l*).

Subrogation
at law.

176. In equity the doctrine has been applied in three cases: (1) Where a person has supplied money to a wife for necessaries; (2) where a person has lent money to a company which borrowed it in excess of its borrowing powers, and the money has been applied in reducing the liabilities of the company; and (3) where an executor has incurred debts in carrying on the business of a testator.

Subrogation
in equity.

In the first case the persons who provided the necessaries would have had a remedy against the husband, and he who has found the money and satisfied their claims is allowed in equity to stand in their place as regards the remedy on these claims (*m*).

Wife's
necessaries.

In the second case no debt is created against the company, and

Ultra vires
borrowing.

(*g*) *Thorne v. Cann*, [1895] A. C. 11; *Liquidation Estates Purchase Co. v. Willoughby*, [1898] A. C. 321; and see S. C., [1896] 1 Ch. 726, C. A., per LINDLEY, L.J., at p. 734.

(*h*) *Smith v. Atterly* (1648), Freem. (OH.) 136; *sub nom. Smith v. Atterby*, 3 Rep. Ch. 93; see *Winchelsea (Earl) v. Norcliff* (1686), Freem. (OH.) 95, 96, n. (b).

(*i*) *Mohun's (Lord) Case* (undated), cited in *Cook v. Fountain* (1672), 3 Swan. 585, at p. 592; *Anon* (1704), Freem. (OH.) 278.

(*k*) *Randal v. Cockran* (1748), 1 Ves. Sen. 98; *Castellain v. Preston* (1883), 11 Q. B. D. 380, 388, C. A.; *Dufourcet v. Bishop* (1880), 18 Q. B. D. 373; see *Assicurazioni Generali de Trieste v. Empress Assurance Corporation, Ltd.*, [1907] 2 K. B. 814.

(*l*) *Mason v. Sainsbury* (1782), 3 Doug. (K. B.) 61; *London Assurance Co. v. Sainsbury* (1783), 3 Doug. (K. B.) 245; *Simpson v. Thomson* (1877), 3 App. Cas. 279; *King v. Victoria Insurance Co.*, [1896] A. C. 250, P. C. As to the right of the insured himself to sue and have control of the action, see *Commercial Union Assurance Co. v. Iister* (1874), 9 Ch. App. 483; see also, generally, titles GUARANTEE; INSURANCE.

(*m*) *Harris v. Lee* (1718), 1 P. Wms. 482; *Jenner v. Morris* (1861), 3 De G. F. & J. 45, C. A.; *Deare v. Soutien* (1869), L. R. 9 Eq. 151, 154, overruling *May*

**SECT. 8.
Subroga-
tion.**

prima facie the lender has no remedy for recovering the loan. But to the extent to which the money has been applied in discharging the claims of other creditors, the lender has been said to be subrogated to their rights (*n*); though the case has been stated alternatively by saying that, to the extent to which liabilities are reduced, the borrowing is not in substance in excess of the borrowing powers (*o*); and at any rate the lender is not placed in the shoes of prior creditors who are paid with his money, so as to acquire their priority for all purposes. Thus he does not rank before later creditors who have been partly paid with his money (*p*), and he is not entitled to the benefit of any securities of the creditor paid off (*q*).

**Creditor of
executor**

In the third case the executor is personally liable for the debts of the business, but he has a right of indemnity against the assets of the testator's estate, so far as they are authorised to be employed in the business (*r*); the creditor, on the other hand, has no legal claim against the estate, but he is allowed in equity to enforce on his own behalf the executor's right of indemnity. He is subrogated to this right, while he retains also his legal claim against the executor (*s*); but, in asserting the right, he is subject to any defences which would avail against the executor (*t*).

Part V.—Equitable Relief against Penalties and Forfeitures.

SECT. 1.—Penalties.

**Relief against
penalties.**

177. Equity relieves against penalties when the intention of the penalty is to secure the payment of a sum of money or the attainment of some other object, and when the event upon which

v. Skey (1849), 16 Sim. 588. In *Jenner v. Morris*, *supra*, Lord CAMPBELL, L.C., treated the subrogation as resting on an equitable assignment of their claims by the tradespeople to the person who paid them. TURNER, L.J., regarded it as an instance of equity supplying the omission of the law to provide a legal remedy.

(*n*) *Re National Permanent Benefit Building Society, Ex parte Williamson* (1869), 5 Ch. App. 309, 313; *Blackburn Building Society v. Cunliffe, Brooks & Co.* (1882), 22 Ch. D. 61, C. A.; *Wenlock (Baroness) v. River Dee Co.* (1887), 19 Q. B. D. 155, C. A.

(*o*) *Re Wrexham, Mold, and Connah's Quay Railway*, [1899] 1 Ch. 440, C. A., *per* LINDLEY, M.R., at p. 446; see Ashb., p. 333; and compare judgment in *Blackburn Building Society v. Cunliffe, Brooks & Co.*, *supra*, at p. 71. On the same principle, where an agent borrows in excess of his authority, the lender can in equity recover the loan from the principal to the extent to which the money has in fact been applied in paying the principal's debts (*Bannatyne v. MacIver*, [1906] 1 K. B. 103, C. A.).

(*p*) *Re Wrexham, Mold, and Connah's Quay Railway*, *supra*.

(*q*) *Bannatyne v. MacIver*, *supra*, at p. 109.

(*r*) *Ex parte Garland* (1804), 10 Ves. 110. As to the case of an executor carrying on a business, see title EXECUTORS and ADMINISTRATORS.

(*s*) *Re Johnson, Shearman v. Robinson* (1880), 15 Ch. D. 548, 555; *Douss v. Gorton*, [1891] A. C. 190; *Re Frith, Newton v. Rolfe*, [1902] 1 Ch. 342; see *Re Blundell, Blundell v. Blundell* (1890), 44 Ch. D. 1, C. A.

(*t*) *Re Johnson, Shearman v. Robinson*, *supra*; compare *Re Frith, Newton v. Rolfe*, *supra*.

the penalty is made payable can be adequately compensated by payment of interest or otherwise (*u*). Thus relief is granted in equity against the penalty in a money bond, and also against penal sums made payable on breach of bonds, covenants, and agreements for payment of money by instalments, or for doing or omitting to do a particular act (*a*). But the relief is only granted where compensation can be made for the breach (*b*). And by statute similar relief was introduced into the practice of the common law courts (*c*). Before relief can be given it has to be ascertained whether the specified sum is in fact a penalty or liquidated damages (*d*). If it is a penalty, then the actual damages only are payable, not exceeding the amount of the penalty (*e*). On the other hand, the fact that a sum is made payable by way of penalty for breach of a negative covenant does not in general deprive the covenantee of his right to an injunction (*f*).

178. Where there is a stipulation that, on non-payment of a smaller sum, a larger sum shall be paid, the larger sum is a penalty, and will be relieved against (*g*); as where, upon non-payment of interest upon a mortgage debt at the stated times, interest at a higher rate is made payable. Such interest is penal interest, and is not recoverable or chargeable in account between mortgagee and mortgagor (*h*). And any clause forfeiting an interest in property on non-payment of money is treated in equity as penal, and relief

Non-payment
of money.

(*u*) "The true ground of relief against penalties is from the original intent of the case, where the penalty is designed only to secure money, and the court gives him all that he expected or desired" (*Peachy v. Somerset (Duke)* (1721), 1 Stra. 447, per Lord MACCLESFIELD, L.C., at p. 453; 2 White & Tud. L. C., 7th ed., p. 250; *Davis v. Thomas* (1831), 1 Russ. & M. 506, per LEACH, M.R., at p. 507). But the relief goes beyond money bonds, and extends to all cases where the sum specified is in fact a penalty and secures some collateral object (*Sloman v. Walter* (1784), 1 Bro. C. C. 418, per Lord THURLOW, L.C.; *Prolector Loan Co. v. Grice* (1880), 5 Q. B. D. 592, C. A.; *Law v. Redditch Local Board*, [1892] 1 Q. B. 127, C. A., per KAY, L.J., at p. 134; see also title BONDS, Vol. III., pp. 93–96).

(*a*) *Seton v. Slade, Hunter v. Seton* (1802), 7 Ves. 265, 273; *Forward v. Duffield* (1747), 3 Atk. 555 (relief against penalty in charterparty). And relief was granted although the violation of the condition of the bond was wilful (*Wilson v. Barton* (1671), Nels. 148).

(*b*) *Tall v. Ryland* (1670), 1 Cas. in Ch. 183; *Withers v. Kilrea* (1670), 1 Cas. in Ch. 189, n.

(*c*) As to common money bonds, by stat. (1705) 4 & 5 Ann. c. 3, ss. 12, 13; Common Law Procedure Act, 1860 (23 & 24 Vict. c. 126), s. 25 (repealed, Statute Law Revision and Civil Procedure Act, 1883 (46 & 47 Vict. c. 49), but see s. 7); *Preston v. Dania* (1872), L. R. 8 Exch. 19; *Re Dixon, Heynes v. Dixon*, [1900] 2 Ch. 561, C. A., per RIGBY, L.J., at p. 578; as to bonds or penalties to secure payment of money by instalments, or the performance of any covenants or agreements, by stat. (1696) 8 & 9 Will. 3, c. 11, s. 8; *Betts v. Burch* (1859), 4 H. & N. 506, 511; see title BONDS, Vol. III., p. 94.

(*d*) See title DAMAGES, Vol. X., p. 328.

(*e*) *Law v. Redditch Local Board*, *supra*. Formerly an issue at law, *quantum damnificatus*, was directed (*Benson v. Gibson* (1746), 3 Atk. 395; *Hardy v. Martin* (1783), 1 Bro. C. C. 419, n.; *Sloman v. Walter*, *supra*; *Errington v. Aynealy* (1788), 2 Bro. C. C. 341).

(*f*) *French v. Macale* (1842), 2 Dr. & War. 269, 274; see title DEEDS AND OTHER INSTRUMENTS, Vol. X., p. 495.

(*g*) *Thompson v. Hudson* (1869), L. R. 4 H. L. 1, 15.

(*h*) *Holles v. Wyse* (1693), 2 Vern. 289; *Strode v. Parker* (1694), 2 Vern. 316;

SECT. 1.
Penalties.

will be given on payment of the money, with interest as compensation for the delay (*i*). Upon this principle was founded the right of relief against a conveyance by way of mortgage after the conveyance had become absolute at law (*j*); a right which constituted the equity of redemption.

**Provision for
reducing
amount pay-
able.**

179. Where money is actually payable, or to become payable, a provision may validly be made for diminishing the amount, or making it payable by instalments, or allowing other concessions to the debtor upon stipulated terms; and if the debtor complies with the terms he is entitled to the benefit of the provision (*k*). But he must purchase the benefit by strict compliance with the terms; and, if he is in default, the full debt is payable and he cannot claim relief as against a penalty (*l*). Upon this principle, when a higher rate of interest has been stipulated for in a mortgage, interest at a lower rate may be substituted on condition of punctual payment (*m*); and where a debt is made payable by instalments, a stipulation that on non-payment of any instalment the entire debt shall become due is not in the nature of a penalty (*n*).

**Right
dependent
on perform-
ance of a
condition.**

180. Where under a contract, conveyance, or will a beneficial right is to arise upon the performance by the beneficiary of some act in a stated manner, or at a stated time, the act must be performed accordingly in order to obtain the enjoyment of the right, and in the absence of fraud, accident, or surprise, equity will not relieve against a breach of the terms (*o*). In the case of a

Seton v. Slade, *Hunter v. Seton* (1802), 7 Ves. 265, 273. But a commission in addition to interest, payable on default in payment of instalments, is not a penalty (*General Credit and Discount Co. v. Glegg* (1883), 22 Ch. D. 549).

(*i*) See *Re Dagenham (Thames) Dock Co., Ex parte Hulze* (1873), 8 Ch. App. 1022, where, on non-payment of the balance of purchase-money, the vendors were to resume possession of the property without any obligation to repay the part of the purchase-money already paid.

(*j*) Perhaps this was first allowed when the non-payment on the appointed day was due to accident. In the first half of the seventeenth century the right of redemption had become fully established (Ashb., p. 47; see Story, s. 1014). When mortgages came to be recognised as merely securities for money, this reason for the allowance of the equity of redemption disappeared (see *Seton v. Slade*, *Hunter v. Seton*, *supra*; *Cashorne v. Scarfe* (1737), 1 Atk. 603; 2 White & Tud. L. C., 7th ed., p. 6); and as to the relation of mortgagor and mortgagee, see *Cholmondeley (Marquis) v. Clinton (Lord)* (1820), 2 Jac. & W. 1, 182; Co. Litt. 205 a, Butler's note (1).

(*k*) *Thompson v. Hudson* (1869), L. R. 4 H. L. 1, 15.

(*l*) Thus, where the creditor agrees to accept part of the debt in full satisfaction if paid within a stated time, equity will not relieve against the provision as to time (*Ford v. Chesterfield (Earl)* (1854), 19 Beav. 428; *Sewell v. Musson* (1683), 1 Vern. 210; *Ex parte Bennet* (1743), 2 Atk. 527; *Re Neil, Ex parte Burden* (1881), 16 Ch. D. 675, C. A.).

(*m*) *Powis (Marquis) v. Maynard* (1747), 3 Atk. 519; *Stanhope v. Manners* (1763), 2 Eden, 197. Punctual payment means payment on the day fixed for payment (*Leeds and Hanley Theatre of Varieties v. Broadbent*, [1898] 1 Ch. 343, C. A.; see *Keene v. Biscoe* (1878), 8 Ch. D. 201).

(*n*) *Sterne v. Beck* (1863), 1 De G. J. & Sm. 595, C. A.; *Wallingford v. Mutual Society* (1880), 5 App. Cas. 685; *Protector Loan Co. v. Grice* (1880), 5 Q. B. D. 592, C. A.

(*o*) Thus, where there is a sale with a right of repurchase within a specified time, and the sale is in the first instance absolute, so that the transaction is not really a mortgage, the right of repurchase is lost unless exercised within the

condition contained in a will, ignorance of the condition is no ground for relief (p).

SECT. 1.
Penalties.

SECT. 2.—Forfeitures.

181. Equity does not assume a general jurisdiction to relieve against the forfeiture of the estate of a lessee for breach of the covenants in the lease (q). At one time it was thought that this would be done in cases where compensation could be made for the breach (r); but so extensive a power was disclaimed, and the relief was confined to forfeiture for non-payment of rent (s). The relief in this case was justified on the ground that the right of re-entry was to be regarded simply as a security for the rent, and it was granted on payment of the arrears of rent and costs (t). There was no express limitation of time within which the relief would be granted, and if the lease had been determined by re-entry, the lessor was ordered to grant a new lease (u). But by statute equitable relief was limited to six months after possession recovered in ejectment, and the necessity for a new lease was dispensed with (a). Ultimately jurisdiction to grant relief in the case of non-payment of rent was conferred on the courts of common law (b); and jurisdiction to grant relief in this and other cases of forfeiture (with certain exceptions) is now vested in the High Court (c).

Breach of
covenant in
lease.

time (*Barrell v. Sabine* (1684), 1 Vern. 268; *Joy v. Birch* (1836), 4 Cl. & Fin. 57, II. L.); and so, where a mortgagor releases his equity of redemption with a clause of repurchase (*Ensworth v. Griffiths* (1706), 5 Bro. Parl. Cas. 184; *Davis v. Thomas* (1831), 1 Russ. & M. 506). And the court cannot vary the terms on which a right of pre-emption is given by will, so as to allow any relaxation (*Brooke v. Garrod* (1857), 2 De G. & J. 62); or on which a debt is remitted (*Glover v. Portington* (1664), Freem. (CH.) 182); or any other privilege conferred (*Franco v. Alvares* (1746), 3 Atk. 342, p. 345).

(p) *Re Hodges' Legacy* (1873), L. R. 16 Eq. 92; *Astley v. Essex (Earl)* (1874), L. R. 18 Eq. 290; see *Fry's (Lady Anne) Case* (1672), 1 Vent. 199.

(q) The cases for relief in equity are fraud, accident, surprise or mistake (*Hill v. Barclay* (1811), 18 Ves. 56, 62; *Gregory v. Wilson* (1852), 9 Hare, 683, 689; see *Bamford v. Creasy* (1862), 3 Giff. 675; *Bargent v. Thompson* (1864), 4 Giff. 473); but not negligence (*Barrow v. Isaacs & Son*, [1891] 1 Q. B. 417, O. A.).

(r) *Hack v. Leonard* (1724), 9 Mod. Rep. 90; *Davis v. West* (1806), 12 Ves. 475; *Sanders v. Pope* (1806), 12 Ves. 282.

(s) *Wadman v. Calcraft* (1804), 10 Ves. 67; *Hill v. Barclay* (1811), 18 Ves. 56; *Reynolds v. Pitt* (1812), 19 Ves. 134; *Bracebridge v. Buckley* (1816), 2 Price, 200, 215; *Gregory v. Wilson*, *supra*. Thus there was no relief for breach of a covenant to repair, including a covenant to lay out a specified sum in repairs (*Bracebridge v. Buckley*, *supra*, overruling *Sanders v. Pope*, *supra*). If there were other breaches, relief for non-payment of rent could not be granted (*Bowser v. Colby* (1841), 1 Hare, 109, 134).

(t) *Howard v. Fanshawe*, [1895] 2 Ch. 581, 588. It was granted whether the lease was determined under a power of re-entry, or under a proviso that it should be void (*Bowser v. Colby*, *supra*).

(u) *Bowser v. Colby*, *supra*, at p. 130; see *Dendy v. Evans*, [1910] 1 K. B. 263, C. A.

(a) First by the Landlord and Tenant Act, 1730 (4 Geo. 2, c. 28); see *Bowser v. Colby*, *supra*, at p. 125; then by the Common Law Procedure Act, 1852 (15 & 16 Vict. c. 76), ss. 210—212. The provision of s. 212 continuing the old lease applies although the lessor has recovered possession out of court, and not under a judgment (*Howard v. Fanshawe*, *supra*).

(b) Common Law Procedure Act, 1860 (23 & 24 Vict. c. 126), s. 1; *Hare v. Elms*, [1893] 1 Q. B. 604.

(c) Under the Common Law Procedure Act, 1860, and the Conveyancing Act,

SECT. 2.
Forfeitures.
 Time not of
 essence of
 contract.

182. Analogous to relief against forfeiture is the rule of equity that time is not of the essence of a contract unless the parties have either expressly so stipulated, or the nature of the contract requires it (*d*). But where there has been default or unreasonable delay by one party, the other party may give notice requiring completion within a specified time, and if the time specified is reasonable it becomes of the essence of the contract (*e*). At the present time stipulations in contracts, as to time or otherwise, which would not before the passing of the Judicature Act, 1873, have been deemed to be or to have become of the essence of the contract in a court of equity, receive in all courts the same construction as they would formerly have received in equity (*f*).

Part VI.—Equitable Relief in Cases of Fiduciary Relationship.

SECT. 1.—*The Fiduciary Character.*

SUB-SECT. 1.—*Express, Constructive, and Resulting Trusts.*

Express
 trusts.

183. A court of equity imposes special liabilities and duties upon persons who stand in a fiduciary relationship to others, and, in particular, it will not allow them to purchase the trust property, or to make a profit out of the trust, unless there are such circumstances of consent on the part of the *cestui que trust* as to warrant an exception from these rules. Trusts are either express or arising by operation of law. An express trust as regards land is a trust expressly declared by a deed, will, or other written instrument (*g*); as to personality (other than leaseholds) the trust can be expressly created by parol (*h*). To constitute an express trust three matters

1881 (44 & 45 Vict. c. 41) and 1892 (55 & 56 Vict. c. 13); see title **LANDLORD AND TENANT**.

(*d*) "Where from the contract, or from the nature of the case, time is not shown to be of the essence of the contract, courts of equity have long been in the habit of relieving against mere lapse of time, where it has been consistent with the substance of justice to do so" (*Roberts v. Berry* (1853), 3 De G. M. & G. 284, C. A., per KNIGHT BRUCE, L.J., at p. 290; *Seton v. Slade*, *Hunter v. Seton* (1802), 7 Ves. 265; *Lennon v. Napper* (1802), 2 Sch. & Lef. 682, 685; *Levy v. Lindo* (1817), 3 Mer. 81, 84; *Parkin v. Thorold* (1852), 16 Beav. 59, 65; and compare *Honeyman v. Marryat* (1855), 21 Beav. 14, 24). On the sale of a public-house as a going concern time is of the essence of the contract (*Tadcaster Tower Brewery Co. v. Wilson*, [1897] 1 Ch. 705); and so, too, in a contract for a lease of mines which are being worked (*Macbryde v. Weekes* (1856), 22 Beav. 533); and generally where possession is immediately required (*Tilley v. Thomas* (1867), 3 Ch. App. 61; see *Walker v. Jeffreys* (1842), 1 Hare, 341, 348; *Crawford v. Tongood* (1879), 13 Ch. D. 163); and see title **CONTRACT**, Vol. VII., p. 413.

(*e*) *Green v. Sevin* (1879), 13 Ch. D. 589; *Compton v. Bagley*, [1892] 1 Ch. 313.

(*f*) Judicature Act, 1873 (36 & 37 Vict. c. 66), s. 25 (8); see *Noble v. Edwardes*, *Edwardes v. Noble* (1877), 5 Ch. D. 378, C. A., as to the law in a case not affected by this enactment; and title **SALE OF LAND**.

(*g*) *Petre v. Petre* (1852), 1 Drew. 371, 393; *Cunningham v. Foot* (1878), 3 App. Cas. 974, 984.

(*h*) *Harris v. Truman* (1881), 7 Q. B. D. 340, 356; *Sands to Thompson* (1883), 22 Ch. D. 614.

must be defined—the property subject to the trust, the persons to be benefited, and the interests which they are to take (i). But it is not necessary to use the word “trust” (k), and the trust is express although it has to be made out from all the terms of the instrument (l). All that is necessary to establish the relation of trustee and *cestui que trust* is to prove that the legal title is in one person and the equitable title in another (m).

SECT. 1.
The
Fiduciary
Character.

184. Trusts arising by operation of law are either constructive or resulting trusts. A constructive trust arises when, although there is no express trust affecting specific property, equity considers that the legal owner should be treated as a trustee for another (n). This happens, for instance, where one who is already trustee takes advantage of his position to obtain a new legal interest in the property (o), as where a trustee of leaseholds takes a new lease in his own name (p). And the rule applies where a person, although not an express trustee, is in a fiduciary position, e.g., a tenant for life in regard to the remaindermen (q).

Constructive
and resulting
trusts.

A resulting trust may arise solely by operation of law, as where, upon a purchase of land, one person provides the purchase-money and the conveyance is taken in the name of another. There is then a resulting trust in favour of the person providing the money, unless from the relation between the two, or from other circumstances, it appears that a gift was intended (r). But there is another class of resulting trusts, and here the creation of the trust is express, though, in the events which happen, the beneficial destination of the property is undetermined. This is the case when there is a failure—entire or partial—in the objects of the trust, and then, to the extent of the failure, the benefit of the trust results to the settlor or his representatives (s). In all these cases

(i) *Malim v. Keighley* (1794), 2 Ves. 333, 335; *Knight v. Knight* (1840), 3 Beav. 148, 173.

(k) *Donations Commissioners v. Wybrants* (1845), 2 Jo. & Lat. 182, 189.

(l) *Re Williams, Williams v. Williams*, [1897] 2 Ch. 12, 27, C. A.; but the courts are less ready now than formerly to construe words of recommendation as creating a precatory trust (*Lambe v. Eames* (1871), 6 Ch. App. 597, 599); compare *Re Hanbury, Hanbury v. Fisher*, [1904] 1 Ch. 415, C. A.; reversed *sub nom. Comiskey v. Bowring-Hanbury*, [1905] A. C. 84.

(m) *Hardoon v. Belilios*, [1901] A. C. 118, 123, P. O. The trustee may himself have only an equitable interest, where, e.g., a trust fund is settled by the *cestui que trust* by way of derivative settlement; see *Stephens v. Green, Green v. Knight*, [1895] 2 Ch. 148; and title TRUSTS AND TRUSTEES.

(n) The rule has been said to be based on public policy (*Griffin v. Griffin* (1804), 1 Sch. & Lef. 352, 354; *Blewett v. Millett* (1774), 7 Bro. Parl. Cas. 367).

(o) See *Pickering v. Vowles* (1783), 1 Bro. C. C. 197, 198; *James v. Dean* (1805), 11 Ves. 383, 395.

(p) *Keech v. Sandford* (1726), Cas. temp. King, 61; *Rawe v. Chichester* (1773), Amb. 715, 719.

(q) See *Re Biss, Biss v. Biss*, [1903] 2 Ch. 40, C. A., and cases there cited; and see further, as to the relations between tenant for life and remainderman, *Dicconson v. Talbot* (1870), 6 Ch. App. 32; *Hickman v. Upsall* (1876), 4 Ch. D. 144, C. A.

(r) *Dyer v. Dyer* (1788), 2 Cox, Eq. Cas. 92, per EYRE, C.B., at p. 93; 2 White & Tud. L. C., 7th ed., p. 803.

(s) *Salter v. Cavanagh* (1838), 1 Dr. & Wal. 668; *Patrick v. Simpson* (1889), 24 Q. B. D. 128.

SECT. 1.

The
Fiduciary
Character.Fiduciary
relations.

the legal owner of the property holds it in a fiduciary capacity, and is subject to the equitable rules affecting that character.

SUB-SECT. 2.—*Fiduciary Relationship.*

185. Apart from the creation of trusts of specific property, the position held by a person may itself involve confidence so as to impress him with a fiduciary character, and when he gets possession of money or other property in this character he holds it as a trustee. This is so in most cases of agency, since the agent has duties to perform which involve the placing of confidence in him by the principal (*t*). On the same footing are directors (*u*) and promoters (*a*) of companies; and a receiver and a trustee in bankruptcy hold property received by them in a fiduciary capacity (*b*). But a partner does not receive the assets of the partnership on account of himself and his partners in a fiduciary capacity (*c*).

SECT. 2.—*Disability of Trustee to Purchase.*Purchase by
trustee from
himself.

186. It is a settled rule of equity that no one having duties of a fiduciary nature to discharge shall be allowed to enter into engagements in which he has or can have a personal interest conflicting, or which possibly may conflict, with the interests of those whom he is bound to protect (*d*). One consequence of the rule is that a

(*t*) *Burdick v. Garrick* (1870), 5 Ch. App. 233; *Lyell v. Kennedy*, *Kennedy v. Lyell* (1889), 14 App. Cas. 437, 463; see *Friend v. Young*, [1897] 2 Ch. 421, 432. And as to the fiduciary nature of an agent's employment, see *Putwick v. Stanley* (1852), 9 Hare, 627; *Crowther v. Elgood* (1887), 34 Ch. D. 691, C. A.; *Lamb v. Evans*, [1893] 1 Ch. 218, C. A.; *Robb v. Green*, [1895] 2 Q. B. 315, C. A. But an agency is not necessarily fiduciary. A solicitor or other agent who receives money merely for transmission to his principal is not trustee of it (*Re Hindmarsh* (1860), 1 Drew. & Sm. 129); to become such he must have duties to perform in the disposition of the property, as to invest or manage it (*Gray v. Bateman* (1872), 21 W. R. 137; *Power v. Power* (1884), 13 L. R. Ir. 281; *Douby v. Watson* (1888), 39 Ch. D. 178). And a banker is not an agent of a customer so as to be in a fiduciary relation, but merely a debtor (*Foley v. Hill* (1848), 2 H. L. Cas. 28).

(*u*) *Fitcroft's Case* (1882), 21 Ch. D. 519, C. A.; see *Re Forest of Dean Coal Mining Co.* (1878), 10 Ch. D. 450, 453.

(*a*) *Erlanger v. New Sombrero Phosphate Co.* (1878), 3 App. Cas. 1218, 1236.

(*b*) *Seagram v. Tuck* (1881), 18 Ch. D. 296; *Re Gent, Gent-Davis v. Harris* (1888), 40 Ch. D. 190. In general, a person who receives money or property in a fiduciary capacity is treated as an express trustee for the purpose of depriving him of the benefit of the Statutes of Limitation, other than the Trustee Act, 1888 (51 & 52 Vict. c. 59), s. 8 (see *Burdick v. Garrick*, *supra*; *Re Bell, Lake v. Bell* (1886), 34 Ch. D. 462; *Re Sharpe, Re Bennett, Masonic and General Life Assurance Co. v. Sharpe*, [1892] 1 Ch. 154, 166, C. A.); and persons who, though strangers to the trust, participate in a fraudulent breach of trust (*Barnes v. Addy* (1874), 9 Ch. App. 244), or receive trust moneys and deal with them in violation of the trust (*Lee v. Sankey* (1873), L. R. 15 Eq. 204), are treated as express trustees; see *Wilson v. Moore* (1834), 1 My. & K. 337, 350; *Bridgman v. Gill* (1857), 24 Beav. 302; *Foxton v. Manchester and Liverpool District Banking Co.* (1881), 44 L. T. 406; and as to "fiduciary capacity," see the Debtors Act, 1869 (32 & 33 Vict. c. 62), s. 4, exception (3); and title CONTEMPT OF COURT AND ATTACHMENT, Vol. VII., p. 299.

(*c*) *Piddocke v. Burt*, [1894] 1 Ch. 343 (on the Debtors Act, 1869 (32 & 33 Vict. c. 62), s. 4 (3)). As to stockbrokers, see note (*g*), p. 159, *post*.

(*d*) *Aberdeen Rail. Co. v. Blaikie Brothers* (1854), 1 Macq. 461, H. L., *per Lord CRANWORTH*, L.C., at p. 471.

trustee for sale may not purchase the trust property from himself (e). It makes no difference whether he in fact gains an advantage from the transaction or not. If the purchase is made while he is trustee, and without the consent of the *cestuis que trust*, it is necessarily invalid, and the *cestuis que trust* are entitled either to confirm the sale or to take back the property (f). It is the same though the trustee has purchased by himself or an agent at auction (g), or from his co-trustees (h).

SECT. 2.
Disability of
Trustees to
Purchase.

187. The rule, however, is not absolute with regard to a purchase by the trustee after he has ceased to be a trustee, or when he purchases with the consent of his *cestuis que trust*. He may retire from being a trustee, and divest himself of that character, in order to qualify himself to become a purchaser (i); and the sale will then be good if he has taken this step sufficiently long before the sale to avoid the possibility of his making use of special information acquired by him as trustee (k); or, without ceasing to be trustee, he may enter into a contract of sale with the *cestui que trust*. Such a contract will be looked at with jealousy, but it will be supported if it is distinct and clear, if it appears that the *cestui que trust* intended that the trustee should buy, and if there is neither fraud, nor concealment, nor advantage taken by the trustee of information acquired by him in his character of trustee (l).

Purchase
from *cestui
que trust*.

188. A *cestui que trust* who wishes to set aside a purchase of the trust property by the trustee (m) must repay the purchase-money, with interest at £4 per cent., and sums expended in repairs and permanent improvements, the trustee making an allowance for depreciation caused by his acts, and accounting for rents and profits, and paying an occupation rent if he has been in occupation (n); but a trustee who has been guilty of fraud will not have an allowance for improvements (o).

Terms on
which relief
is granted.

(e) *Re Bloye's Trust* (1849), 1 Mac. & G. 488, 495.

(f) *Fox v. Mackreth*, *Pitt v. Mackreth* (1788), 2 Bro. C. C. 400; 2 White & Tud. I. C., 7th ed., p. 709; *Hardwicke (Lord) v. Vernon* (1799), 4 Ves. 411; *Ex parte Lacey* (1802), 6 Ves. 625; *Ex parte James* (1803), 8 Ves. 337, 348; *Ex parte Bennett* (1805), 10 Ves. 381, 388, 394; *Randall v. Errington* (1805), 10 Ves. 423; *Hamilton v. Wright* (1842), 9 Cl. & Fin. 111, H. L. As to sale by a mortgagee to a company of which he is a member, see *Farrar v. Farrars, Ltd.* (1888), 40 Ch. D. 395, C. A.

(g) *Ex parte Bennett* (1805), 10 Ves. 381, 393; *Ingle v. Richards* (No. 1) (1860), 28 Beav. 361. The presence of the trustees as buyers is a discouragement to others to bid (*Ex parte Lacey*, *supra*, at p. 629). As to purchase by agent, see *Downes v. Grazebrook* (1817), 3 Mer. 200; and compare *Delves v. Delves* (1875), L. R. 20 Eq. 77, 83.

(h) *Whichcote v. Lawrence* (1798), 3 Ves. 740; *Hall v. Noyes* (circa 1796), cited *ibid.* at p. 748.

(i) *Downes v. Grazebrook*, *supra*, at p. 208.

(k) *Ex parte James*, *supra*, at p. 352; see *Re Boles and British Land Co.'s Contract*, [1902] 1 Ch. 244.

(l) *Coles v. Trecothick* (1804), 9 Ves. 234, 247; see *Ex parte James*, *supra*; *Morse v. Royal* (1806), 12 Ves. 355, 372.

(m) See, as to his right to do this, *Thompson v. Eastwood* (1877), 2 App. Cas. 215, 238; *Silkestone and Haigh Moor Coal Co. v. Edey*, [1900] 1 Ch. 167.

(n) *York Buildings Co. v. Mackenzie* (1795), 8 Bro. Parl. Cas. 42; *Campbell v. Walker* (1800), 5 Ves. 678; *Ex parte Bennett*, *supra*, at pp. 400, 401.

(o) *Mill v. Hill* (1852), 3 H. L. Cas. 828, 869.

SECT. 3.

Disability of Trustees to Purchase

Dealings by other persons in fiduciary relationship.

189. The principle applies also to other persons in a fiduciary position, and a director or promoter cannot deal on behalf of the company with himself or with a firm of which he is a member (*p*). And since the principle depends, not on the subject-matter of the agreement, but on the fiduciary character of the contracting party, it is equally applicable to real and personal estate, and to mercantile transactions (*q*). But the principle does not apply to a person who has only the power to become trustee, and has not in fact done so, such as, *e.g.*, an executor who has neither proved nor disclaimed (*r*).

SECT. 3.—*Disability of Trustee to make a Profit.*

Trustee not allowed to make a profit.

190. From the rule that a person shall not be allowed to put himself in a position where his interest and duty conflict, it follows that a person in a fiduciary position is not allowed, unless otherwise expressly provided, to make a profit out of his trust (*s*). This rule obliges him to account for any advantages which he has obtained by reason of his ownership of the trust property. Benefits acquired by him as the owner of the property cannot be retained, but must be surrendered for the advantage of those beneficially interested (*t*).

And so, if the trustee retains trust money in his own hands, he is charged with interest (*a*); and if he mixes it with his own money, and employs it in his business, the *cestui que trust* is entitled to take a proportionate share of the profits of the business instead of interest (*b*).

Trustee not entitled to remuneration.

191. The rule has also been inflexibly established that, in the absence of a remuneration clause, a trustee shall have no allowance for his time and care (*c*); though he is entitled to

(*p*) *Aberdeen Rail. Co. v. Blaikie Brothers* (1854), 1 Macq. 461, II. L.; *Erlanger v. New Sombrero Phosphate Co.* (1878), 3 App. Cas. 1218.

(*q*) *Aberdeen Rail. Co. v. Blaikie Brothers*, *supra*, at p. 472.

(*r*) *Clark v. Clark* (1884), 9 App. Cas. 733, P. C. And see as to purchases by agents, title AGENCY, Vol. I., p. 189; by solicitors, title SOLICITORS; and, generally, title TRUSTS AND TRUSTEES.

(*s*) *Bray v. Ford*, [1896] A. C. 44, *per* Lord HERSCHELL, at p. 51; see *Parker v. McKenna* (1874), 10 Ch. App. 96, 118; *Archer's Case*, *Re North Australian Territory Co.*, [1892] 1 Ch. 322, C. A.

(*t*) *Aberdeen Town Council v. Aberdeen University* (1877), 2 App. Cas. 544, *per* Lord CAIRNS, at p. 549. Upon this consideration is based the constructive trust raised where the trustee renews a lease in his own favour. And the trustee cannot enjoy the right of sporting over the trust estate (*Webb v. Shaftesbury (Earl)*, *Shaftesbury (Earl) v. Arrowsmith* (1802), 7 Ves. 480, 488).

(*a*) *A.-G. v. Alford* (1855), 4 De G. M. & G. 843; *Blogg v. Johnson* (1867), 2 Ch. App. 225, 228; *Re Barclay, Barclay v. Andrew*, [1899] 1 Ch. 674.

(*b*) *Docker v. Simes* (1834), 2 My. & K. 655. The principle applies also where one who is not expressly a trustee has bought or trafficked with another's money. "The law raises a trust by implication, clothing him, though a stranger, with the fiduciary character, for the purpose of making him accountable" (*ibid.*, *per* Lord BROUGHAM, L.O., at p. 665). But in such a case the constructive trustee is entitled to an allowance for his time and care (*Brown v. Litton* (1711), 1 P. Wms. 140); see further on this subject titles EXECUTORS AND ADMINISTRATORS; TRUSTS AND TRUSTEES.

(*c*) *Robinson v. Pett* (1734), 3 P. Wms. 249 (2 White & Tud. L. O., 7th ed., p. 606), *per* TALBOT, L.O., at p. 251: "The reason seems to be that on these pretences, if allowed, the trust estate might be loaded and rendered of little value"; see *Moore v. Frowd* (1837), 3 My. & Cr. 45, *per* Lord COTTENHAM, L.O., at p. 50. As to a solicitor-trustee's remuneration clause, see *Re Fish, Bennett*

his expenses (*d*), and has a first charge for these on the trust estate (*e*).

SECT. 4.—*Following Assets.*

192. As between *cestui que trust* and trustee, and persons claiming under the trustee otherwise than by purchase for valuable consideration without notice, all property belonging to a trust, however much it may be changed or altered in its nature or character, and all the fruits of such property, whether in its original or in its altered state, continue to be subject to or affected by the trust (*f*). Upon this rule is based the doctrine of following trust property. The doctrine is not confined to express trustees, but applies to all persons in a fiduciary relation (*g*). Hence, if property has been sold, whether rightfully or wrongfully, the *cestui que trust* can take the proceeds of sale if he can identify them. There is no distinction between a rightful and a wrongful disposition of the property as regards the right of the beneficial owner to follow the proceeds (*h*).

If the proceeds have been invested, without the addition of further money, in the purchase of other property, the beneficial owner has the right to elect either to take the property purchased, or to have a charge on it for the amount of the trust money (*h*). If the trustee has mixed the trust money with money of his own, and has applied the whole in the purchase of property, the beneficial owner is entitled to a charge on the property purchased for the amount of the trust money, and this ranks before any claim by the trustee (*h*).

Since equity does not admit that money has no ear-mark, the money itself can be followed in equity; and whether the trustee mixes it with his own money, and retains the whole as money, or places the whole in a bank, or invests it in personal securities, effect is given to the beneficial owner's right by allowing him a first charge on the whole mass of money, or the securities which represent it (*i*).

v. Bennett, [1893] 2 Ch. 413, C. A.; *Re Chalinder and Herington*, [1907] 1 Ch. 58; and title SOLICITORS.

(*d*) *A.-G. v. Norwich Corporation* (1837), 2 My. & Cr. 406, 424; see *Hide v. Haywood* (1740), 2 Atk. 126; *Dawson v. Clarke* (1811), 18 Ves. 247, 254.

(*e*) *Re Exhall Coal Co., Ltd., Re Bleckley* (1866), 35 Beav. 449.

(*f*) *Pennell v. Deffell* (1853), 4 De G. M. & G. 372, C. A., *per* TURNER, L.J., at p. 388.

(*g*) *Re Hallett's Estate, Knatchbull v. Hallett* (1880), 13 Ch. D. 696, C. A., *per* JESSEL, M.R., at p. 709; overruling *Re West of England and South Wales District Bank, Ex parte Dale & Co.* (1879), 11 Ch. D. 772, and see *per* FRY, J., at p. 778. Thus, a client's money can be followed into the assets of a stockbroker, since he is an agent into whose hands the money is put to be applied in a particular way (*Taylor v. Plumer* (1815), 3 M. & S. 562; *Re Strachan, Ex parte Cooke* (1876), 4 Ch. D. 123, C. A.); and though the relation of banker and customer is in general that of debtor and creditor, yet where a cheque is handed to a banker to collect and hold the proceeds for the customer, this is a trust and the money can be followed (*Re Brown, Ex parte Plitt* (1889), 37 W. R. 463).

(*h*) *Re Hallett's Estate, Knatchbull v. Hallett, supra*; and, similarly, where a tenant for life receives the purchase-money of the property (*Price v. Blakemore* (1843), 6 Beav. 507).

(*i*) *Re Hallett's Estate, Knatchbull v. Hallett, supra*, at p. 711; *Pennell v. Deffell, supra*. But the principle does not apply where money has not been actually received, but only credited in account, so that it is incapable of identification (*Re Hallett & Co., Ex parte Blane*, [1894] 2 Q. B. 237, C. A.).

SECT. 3.
Disability of
Trustee to
make a
Profit.

Trust pro-
perty may be
followed.

Investments
of proceeds.

Following
money.

SECT. 4.
Following
Assets.

In such circumstances the rule as to appropriation of payments (*k*) does not apply, and if the trustee draws out any money, the drawing will be attributed to his own money, and not to trust money which may have been paid into the account earlier (*l*). But the right to follow trust money is no more than an equity, and it does not prevail against a purchaser for valuable consideration without notice (*m*). Where an agent has received money as a bribe, there is no trust of the money until it has been declared by a judgment to be the principal's property, and till then it cannot be followed as trust money (*n*).

Refunding by
legatees.

193. A right to follow assets is allowed in equity in favour of creditors and legatees when an executor has paid away the estate of a deceased person to the prejudice of their claims (*o*).

At suit of
creditor.

A creditor is entitled to follow the assets into whosoever hands they come (*p*), and consequently he can require a legatee to refund (*q*); and a specific legatee is under this liability, but without prejudice to his rights against the executor or the residuary legatee (*r*).

Of another
legatee.

And if the estate was originally insufficient to pay all legacies, a legatee who is unpaid can require a legatee who has been paid more than his due proportion to refund (*s*). This is upon the ground that

(*k*) See *Devaynes v. Noble, Clayton's Case* (1816), 1 Mer. 572, and title CONTRACT, Vol. VII., pp. 449, 452, as to appropriation.

(*l*) *Re Hallett's Estate, Knatchbull v. Hallett* (1880), 13 Ch. D. 696, C. A., at p. 724; see per JESSEL, M.R., at p. 730, overruling on this point *Pennell v. Deffell* (1853), 4 De G. M. & G. 372, C. A.; see *Re Oatway, Hertslet v. Oatway*, [1903] 2 Ch. 356. But, as between two trust funds which the trustee has paid into his own account, the rule in *Clayton's Case, supra*, applies, so that the sum first paid in is held to have been first drawn out (*Re Hallett's Estate, Knatchbull v. Hallett, supra, per FRY, J.; Hancock v. Smith* (1889), 41 Ch. D. 456, C. A.; *Re Stenning, Wood v. Stenning*, [1895] 2 Ch. 433).

(*m*) *Pennell v. Deffell, supra, per TURNER, L.J.*, at p. 388. Where an executor, who is also residuary legatee, charges assets of the testator in favour of a mortgagee who has no notice of unsatisfied debts, or that the dealing with the assets is improper, his title prevails over that of the testator's creditors, although he may not obtain the legal estate in or control over the assets (*Graham v. Drummond*, [1896] 1 Ch. 968).

(*n*) *Lister & Co. v. Stubbs* (1890), 45 Ch. D. 1, C. A.; *Archer's Case*, [1892] 1 Ch. 322, 338, C. A.

(*o*) The creditor's right to follow assets is expressly reserved in the statutory provisions relating to an executor (Law of Property Amendment Act, 1859 (22 & 23 Vict. c. 35), ss. 27, 28, 29).

(*p*) *Newman v. Burton* (1690), 2 Vern. 205. It is a case of following trust funds, since it is a breach of trust for the executor to pay legacies while the debts remain unpaid (*Fordham v. Wallis* (1853), 10 Hare, 217, 226).

(*q*) *Noel v. Robinson* (1682), 1 Vern. 94; *March v. Russell* (1837), 3 My. & Cr. 31. Formerly the legatee was required to give security to refund in case further debts were discovered; but, though this was discontinued, his personal liability remained (*March v. Russell, supra*); see *Re King, Mellor v. South Australian Land Mortgage and Agency Co.*, [1907] 1 Ch. 72; *National Assurance Co. v. Scott*, [1909] 1 I. R. 325. The right can be exercised against volunteers under the legatee (*ibid.*); but not against purchasers (*Noble v. Brett* (1858), 24 Beav. 499; *Dilkes v. Broadmead* (1860), 2 De G. F. & J. 566).

(*r*) *Davies v. Nicolson* (1858), 2 De G. & J. 693, C. A.; *Noble v. Brett, supra*. Where some legatees have been paid out of a fund in court, see *Gillespie v. Alexander* (1827), 3 Russ. 130, 138.

(*s*) *Noel v. Robinson, supra*; *Anon.* (1718), 1 P. Wms. 495; *Edwards v. Freeman* (1727), 2 P. Wms. 435, 447; *Walcott v. Hall* (1788), 2 Bro. C. C. 305;

SECT. 4.
Following
Assets.

the payment to the first legatee was in fact improper whether this was known to the executor or not (*t*). Where, on the other hand, the estate was sufficient at the time of the payment to one legatee, but afterwards there is a deficiency, due either to the executor's insolvency or to accidental loss (*u*), the paid legatee, who has received no more than at the time he was entitled to, cannot be required to refund (*v*).

In general, the executor himself cannot call upon a legatee to refund, since, by voluntarily paying the legacy, he admits that the assets are sufficient (*x*); but if the executor has paid under an order of the Court he can require the legatee to refund (*a*); and so, too, if debts, of which he had no notice at the time of payment, are afterwards discovered (*b*). But in this respect a distinction exists between debts and contingent liabilities—such as a liability on unpaid shares—and an executor paying legacies with notice of the latter can require the legatee to refund (*c*), but without interest (*d*). Where an executor has by mistake made an overpayment, though he cannot call for repayment (*e*), he can reimburse himself out of funds in which the legatee is interested which remain in his hands (*f*).

At suit of
executor.

Part VII.—Equitable Defences.

SECT. 1.—*Equitable Set-off* (*g*).

194. Where the nature of dealings between two parties necessitates the keeping of an account, consisting of receipts and payments, debts and credits, on either side, no question of set-off arises. It is only by taking the account, and ascertaining the balance, that the amount due from one party to the other can be ascertained, and it is such balance only that can be recovered. Where there is no such current account, but there are simply mutual debts between two parties, then apart from statute and the modern rules of procedure,

Set-off by
statute.

see *contra Newman v. Barton* (1690), 2 Vern. 205; and compare *Orr v. Kaines* (1751), 2 Ves. Sen. 194.

(*t*) See 2 Bro. C. C. (Belt's ed.) 305, n. (2).

(*u*) *Fenwick v. Clarke* (1862), 4 De G. F. & J. 240, C. A.

(*v*) *Anon.* (1718), 1 P. Wms. 495; *Walcott v. Hall* (1788), 2 Bro. C. C. 305; *Fenwick v. Clarke*, *supra*; *Peterson v. Peterson* (1866), L. R. 3 Eq. 111; *Le Winslow, Frere v. Winslow* (1890), 45 Ch. D. 249.

(*x*) *Hodges v. Waddington* (1679), 2 Cas. in Ch. 9; *Orr v. Kaines*, *supra*; see title EXECUTORS AND ADMINISTRATORS.

(*a*) *Newman v. Barton*, *supra*.

(*b*) *Nelthrop v. Hill* (1669), 1 Cas. in Ch. 135; *Jewon v. Grant* (1677), 3 Swan. 659; see *German v. Colston* (1678), 2 Rep. Ch. 137.

(*c*) *Jervis v. Wolferstan* (1874), L. R. 18 Eq. 18; *Whittaker v. Kershaw* (1890), 45 Ch. D. 320, C. A.

(*d*) *Jervis v. Wolferstan*, *supra*; see *Gittins v. Steele* (1818), 1 Swan. 199.

(*e*) *Hilliard v. Fulford* (1876), 4 Ch. D. 389.

(*f*) *Livesey v. Livesey* (1827), 3 Russ. 287; *Cooper v. Pitcher* (1845), 4 Hare, 485.

(*g*) As to set-off in bankruptcy, see title BANKRUPTCY, Vol. II., p. 211; and, generally, see title SET-OFF AND COUNTERCLAIM.

SECT. 1.
Equitable
Set-off.

Set-off in
equity.

no right of set-off exists at law, and each party would be obliged to sue in a different action to recover his own debt (*h*). At law a right to set off mutual debts between the plaintiff and defendant, or between either party and a deceased person of whom the other party was executor or administrator, was given by the Statutes of Set-off (*i*); and a right of set-off where there have been mutual credits, mutual debts, or other mutual dealings has been, under successive bankruptcy statutes, allowed in bankruptcy (*k*).

Before these statutes, the Court of Chancery recognised the right to set off (*l*). It was natural equity that cross-demands should compensate each other, by deducting the less sum from the greater, and the difference was the only sum which was justly due (*m*). But equity did not allow set-off as between mutual independent debts generally. In addition to the existence of cross-demands, it was necessary that there should be some special equity to call for a set-off (*n*). Such equity existed where, although the debts were distinct, one party had given credit to the other on the faith of the debt to himself being paid (*o*).

And where there are cross-demands between two parties of such a nature that, if both were recoverable at law, they would be the subject of legal set-off, then if either of the demands is matter of equitable jurisdiction, the set-off will be enforced in equity (*p*).

(*h*) *Green v. Farmer* (1768), 4 Burr. 2214, per Lord MANSFIELD, at p. 2221; compare *Dale v. Sollet* (1767), 4 Burr. 2133.

(*i*) Stat. (1728) 2 Geo. 2, c. 22, s. 13; stat. (1734) 8 Geo. 2, c. 24, s. 4; both now repealed, though only as regards the Supreme Court of Judicature by the Civil Procedure Acts Repeal Act, 1879 (42 & 43 Vict. c. 59); but the statutory right is preserved by R. S. C., Ord. 19, r. 3.

(*k*) Beginning with stat. (1704) 4 Ann. c. 17, s. 11; and stat. (1731) 5 Geo. 2, c. 30, s. 28; and now under the Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 38.

(*l*) *Ex parte Stephens* (1805), 11 Ves. 24, per Lord ELDON, L.C., at p. 27; *Ex parte Blagden* (1815), 19 Ves. 465, 467; see *Freeman v. Lomas* (1851), 9 Hare, 109, per TURNER, V.-C., at pp. 112, 113.

(*m*) *Green v. Farmer*, *supra*, per Lord MANSFIELD, C.J., at p. 2220.

(*n*) *Rawson v. Samuel* (1841), Cr. & Ph. 161, per Lord COTTENHAM, L.C., at p. 178: "Equitable set-off exists in cases where the party seeking the benefit of it can show some equitable ground for being protected against his adversary's demand;" doubting *Williams v. Davies* (1829), 2 Sim. 461; see *Whyte v. O'Brien* (1824), 1 Sim. & St. 551. Otherwise equity follows the statutory right at law (*Ex parte Stephens*, *supra*; *James v. Kynnier* (1799), 5 Ves. 108). The set-off is restricted to liquidated demands (*Rawson v. Samuel*, *supra*; *Best v. Hill* (1872), L. R. 8 C. P. 10), unless the unliquidated claim directly impeaches the right to recover the cross-claim (*Piggott v. Williams* (1821), Madd. & G. 95).

(*o*) Thus, where A. is indebted to B. in £10,000 on bond, and B. borrows of A. £2,000 on his own bond, the bonds being payable at different times, the nature of the transaction leads to the presumption that there was a mutual credit between the parties as to the £2,000, as an ultimate set-off *pro tanto* from the debt of £10,000 (Story, s. 1435). In all cases of mutual credit it is natural justice and equity that only the balance should be paid (*Lanesborough (Lord) v. Jones* (1716), 1 P. Wms. 325, per Lord COWPER, L.C., at p. 326); this is based on the presumed intention or agreement of the parties; "the least evidence of an agreement for a stoppage [*i.e.* a set-off] will do; and in these cases equity will take hold of a very slight thing to do both parties right" (*Jeffs v. Wood* (1723), 2 P. Wms. 127, 130; see *Ex parte Prescott* (1753), 1 Atk. 230, 231).

(*p*) *Clark v. Cort* (1840), Cr. & Ph. 154; *Freeman v. Lomas*, *supra*; compare *Thornton v. Maynard* (1875), L. R. 10 C. P. 695, 699; *Taylor v.*

SECT. 1.
**Equitable
 Set-off.**
 —

But equity, following the law, usually requires that the debts which are to be set off against each other shall be due from and to the parties in the same right. It does not allow a set-off of debts accruing in different rights (*g*)—as of a joint debt against a separate debt (*r*)—unless there is a series of transactions clearly showing that joint credit was given on account of the separate debt (*s*); or of a debt due from an executrix and residuary legatee against a debt due to her testator (*t*).

In order that demands may be set off against each other, it is necessary that each should be recoverable by action (*a*), since set-off is in the nature of a cross-action (*b*), and set-off cannot be used so as indirectly to make a debt transferable which is by statute not transferable (*c*). Where, under an order of the court or an arbitrator's award, each party has to pay a sum to the other, the sums are set off (*d*); but there is no set off of costs in independent proceedings (*e*).

195. Where a testator leaves a legacy or a share of residue to his debtor, the debtor is not entitled to receive anything out of the estate until he has paid his debt, and consequently the executor can retain the debt out of the legacy or share of residue, even though it is statute-barred (*f*). Where the debtor has become bankrupt

Retainer of
 debt out of
 legacy or
 share of
 residue.

Taylor (1875), L. R. 20 Eq. 155, 160; see, generally, title SET-OFF AND COUNTER-CLAIM.

(*g*) *Story*, s. 1437; *Freeman v. Lomas* (1851), 9 Hare, 109, 114; see *Cavendish v. Geaves* (1857), 24 Beav. 163; *Black & Co.'s Case* (1872), 8 Ch. App. 254, 261; *Phillips v. Howell*, [1901] 2 Ch. 773. For cases where set-off was allowed, or a debt extinguished, where the debt was the husband's, and a sum was due to the wife, see *Re Price, deceased*, *Price v. Price* (1879), 11 Ch. D. 163, C. A.; *Re Batchelor, Sloper v. Oliver* (1873), L. R. 16 Eq. 481; *Re Briant, Poulter v. Shackel* (1888), 39 Ch. D. 471. A debt may be set off though acquired by assignment (*Bennett v. White* (1910), 103 L. T. 52, C. A., reversing S. C. [1910] 2 K. B. 1).

(*r*) *Ex parte Twoood* (1805), 11 Ves. 517; *Addis v. Knight* (1817), 2 Mer. 117, 122; but this may be done in the interest of a joint debtor who is a surety (*Ex parte Hanson* (1811), 18 Ves. 232; (1806), 12 Ves. 346), or where there is fraud raising a special equity to a set-off (*Ex parte Stephens* (1805), 11 Ves. 24).

(*s*) *Vulliamy v. Noble* (1817), 3 Mer. 593, 618.

(*t*) *Bishop v. Church* (1748), 3 Atk. 691; see *Cherry v. Boulbee* (1839), 4 My. & Cr. 442; *Freeman v. Lomas*, *supra*; *Middleton v. Pollock, Ex parte Mayes* (1875), L. R. 20 Eq. 29; *Re Willis, Percival & Co., Ex parte Morier* (1879), 12 Ch. D. 491, C. A. But set-off may be allowed as between a debtor to the estate and the administrator and sole next of kin after the estate has been cleared (*Jones v. Mossop* (1844), 3 Hare, 568).

(*a*) *Francis v. Dodsworth* (1847), 4 C. B. 202, 220; *Rawley v. Rawley* (1876), 1 Q. B. D. 460, C. A.; *Smith v. Betty*, [1903] 2 K. B. 317, C. A.

(*b*) *Walker v. Clements* (1850), 15 Q. B. 1046; see R. S. C., Ord. 19, r. 3. Hence a statute-barred debt cannot be set off against a debt not barred (*Walker v. Clements, supra*).

(*c*) *Gathercole v. Smith* (1881), 17 Ch. D. 1, C. A.

(*d*) *Pringle v. Glog* (1879), 10 Ch. D. 676; R. S. C., Ord. 65, rr. 14, 27 (21); see *Goodfellow v. Gray*, [1899] 2 Q. B. 498, C. A.

(*e*) *David v. Rees*, [1904] 2 K. B. 435, C. A.; *Bake v. French*, [1907] 1 Ch. 428; and see title SET-OFF AND COUNTERCLAIM.

(*f*) *Courtenay v. Williams* (1844), 3 Hare, 539; *Coates v. Coates* (1864), 33 Beav. 249; and see title EXECUTORS AND ADMINISTRATORS. This is a right of the executor to pay himself out of the fund in hand, rather than set off (*Cherry v. Boulbee, supra*, at p. 447); and where the legatee is entitled to a share of residue, it may be referred to the principle that a debtor to an estate must contribute to the general mass of the estate what he owes to it before he

SECT. 1.
Equitable
Set-off.

in the lifetime of the testator, the executors are entitled to receive only dividends on the debt, and they are not entitled to retain the whole debt out of the legacy (*g*), notwithstanding that the testator did not prove in the bankruptcy (*h*). But if the bankruptcy occurs after the testator's death, the executors are entitled to retain the legacy to meet the debt (*i*), if the debt is ascertained (*k*) and they have not proved in the bankruptcy (*l*).

No set-off
against calls
in winding-
up.

In the winding up of companies a creditor of the company who is also a shareholder is not allowed to set off the debt against calls on his shares; before participating as a creditor in the assets, he must make the contribution to the assets which is due from him (*m*).

Assignee of
choses in
action.

An assignee of a chose in action takes subject to rights of set-off between the debtor and creditor (*n*), unless expressly excluded by the contract creating the chose in action or otherwise (*o*).

SECT. 2.—Release and Waiver.

Release.

196. At law a right of action arising solely on an instrument under seal can only be released under seal; a right of action arising otherwise can be discharged either by release under seal or by accord and satisfaction (*p*); but in equity an agreement to release the right made for valuable consideration is in all cases effective as a release, and this rule now applies both to legal and equitable rights (*q*). Moreover, although there is no consideration,

can claim an aliquot share out of it (*Re Akerman, Akerman v. Akerman*, [1891] 3 Ch. 212, 219); but the share must be payable to the debtor as legatee, not to a legatee under whom the debtor claims (*Re Bruce, Lawford v. Bruce*, [1908] 2 Ch. 682, C. A.); and the debt must be immediately payable (*Re Abrahams, Abrahams v. Abrahams*, [1908] 2 Ch. 69). Executors cannot retain the debt after they have appropriated funds to meet the legacy and have become trustees of it (*Ballard v. Marsden* (1880), 14 Ch. D. 374). As to the application of the principle between a company and a debenture-holder, see *Re Goy & Co., Ltd., Farmer v. Goy & Co., Ltd.*, [1900] 2 Ch. 149.

(*g*) *Cherry v. Boulbee* (1839), 4 My. & Cr. 442; *Re Orpen, Beswick v. Orpen* (1880), 16 Ch. D. 202.

(*h*) *Re Hodgson, Hodgson v. Fox* (1878), 9 Ch. D. 673.

(*i*) *Re Watson, Turner v. Watson*, [1896] 1 Ch. 925.

(*k*) *Re Binns, Lee v. Binns*, [1896] 2 Ch. 584.

(*l*) *Armstrong v. Armstrong* (1871), L. R. 12 Eq. 614; *Stammers v. Elliott* (1868), 3 Ch. App. 195; compare as to claims in winding-up, *Re West Coast Gold Fields, Ltd., Rowe's Trustee's Claim*, [1906] 1 Ch. 1, C. A.

(*m*) *Grissell's Case* (1866), 1 Ch. App. 528; *Re West of England Bank, Ex parte Brown* (1879), 12 Ch. D. 823; *Re Auriferous Properties, Ltd.*, [1898] 1 Ch. 691; *Re Hiram Maxim Lamp Co.*, [1903] 1 Ch. 70.

(*n*) *Roxburghe v. Cox* (1881), 17 Ch. D. 520, 526, C. A.; *Newfoundland (Government) v. Newfoundland Rail. Co.* (1888), 13 App. Cas. 199; compare *Green v. Sevin* (1879), 13 Ch. D. 589, where in specific performance the defendant was allowed to deduct his costs from the purchase-money against a mortgagee whose mortgage was subsequent to the contract of sale.

(*o*) *E.g.*, under the common clause in debentures making them assignable free from equities. As to set-off between a company and a trade customer, notwithstanding a floating charge created by debentures, see *Biggerstaff v. Rowatt's Wharf, Ltd., Howard v. Rowatt's Wharf, Ltd.*, [1896] 2 Ch. 93, C. A.; *Nelson (Edward) & Co., Ltd. v. Faber & Co.*, [1903] 2 K. B. 367; and see p. 104, ante.

(*p*) See title CONTRACT, Vol. VII., pp. 441 *et seq.*, where these and other methods of discharging a right of action are discussed.

(*q*) *Steeds v. Steeds* (1889), 22 Q. B. D. 537; *Edwards v. Walters*, [1896] 2 Ch. 157, 168, C. A.

a release of an equitable right of action can,, it would seem, be effected by instrument under hand, or even verbally, provided the intention is to grant an immediate release (*r*); and such a release, though not in itself effective as to a legal right of action, will become effective if the legal right of action is subsequently extinguished (*s*). But in practice a gratuitous release of a legal or equitable right of action should be under seal.

SECT. 2.
Release and
Waiver.

197. Waiver is the abandonment of a right, and is either express or implied from conduct. A person who is entitled to the benefit of a stipulation in a contract or of a statutory provision (*t*) may waive it, and allow the contract or transaction to proceed as though the stipulation or provision did not exist. Waiver of this kind depends upon consent (*a*), and the fact that the other party has acted upon it is sufficient consideration (*b*). Where the waiver is not express, it may be implied from conduct which is inconsistent with the continuance of the right (*c*). Waiver.

Where the right is a right of action, or an interest in property, an express waiver depends upon the same considerations as a release. If it is a mere statement of an intention not to insist upon the right, it is not effectual unless made with consideration; but where there is consideration the statement amounts to a promise and operates as a release (*d*). And although there is no express

(*r*) The gratuitous release of an equitable demand appears to be subject to the same considerations as the gratuitous assignment or release of an equitable interest in property; see title DEEDS AND OTHER INSTRUMENTS, Vol. X., pp. 376, 377, and the discussion there of *Re Hancock, Hancock v. Berrey* (1888), 57 L. J. (CH.) 793. And there seems to be no objection to its being verbal, provided the evidence of the release is clear; compare *Strong v. Bird* (1874), L. R. 18 Eq. 315; but the evidence must show an immediate release, not a mere expression of intention not to enforce the debt (*Byrn v. Godfrey* (1798), 4 Ves. 6).

(*s*) *Strong v. Bird*, *supra*; and see other cases cited note (*u*), p. 98, *ante*.

(*t*) But sometimes waiver of a statutory provision is forbidden, e.g., the "waiver clause" in a prospectus (Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 81 (4)).

(*a*) E.g., waiver of notice prior to sale by a mortgagee (*Selwyn v. Garfit* (1888), 38 Ch. D. 273, C. A., *per* BOWEN, L.J., at p. 284: "waiver is consent to dispense with the notice"; *Re Thompson and Holt* (1890), 44 Ch. D. 492); and as to waiver of stipulations in a contract, see title CONTRACT, Vol. VII.; and as to parol waiver of the contract itself, see *Price v. Dyer* (1810), 17 Ves 356. Delay is not necessarily waiver, though it may be evidence of waiver (*Selwyn v. Garfit, supra*); and see *Darnley (Earl) v. London, Chatham and Dover Rail. Co.* (1867), L. R. 2 H. L. 43.

(*b*) See *Re Stokoe, Ex parte Moore* (1876), 2 Ch. D. 802, C. A. (waiver of statutory requirement as to time for disclaimer by trustee in bankruptcy).

(*c*) *Keene v. Biscoe* (1878), 8 Ch. D. 201, 203 (acceptance of mortgage interest in arrear not inconsistent with, and therefore not a waiver of right to call in principal for non-punctual payment; but see *Norton v. Wood* (1830), 1 Russ. & M. 178). As to waiver of forfeiture or of notice to quit, see title LANDLORD AND TENANT.

(*d*) "A waiver is nothing unless it amounts to a release. It is by a release, or something equivalent only, that an equitable demand can be taken away. A mere waiver signifies nothing more than an intention not to insist upon the right, which in equity will not without consideration bar the right any more than at law accord and satisfaction would be a plea" (*Stackhouse v. Barnston* (1805), 10 Ves. 453, *per* GRANT, M.R., at p. 466). Similarly a promise not to enforce an accrued legal right, e.g., a right to seize goods under a bill of sale, is not binding unless there is consideration for it, or the debtor has altered his position (*Williams v. Stern* (1879), 5 Q. B. D. 409, C. A.).

SECT. 2. **Release and Waiver.** waiver, the person entitled to the right may so conduct himself that it becomes inequitable to enforce it, and this is sometimes called an implied waiver. But in such cases the right is lost either on the ground of estoppel, or of acquiescence, whether by itself or accompanied by delay (e).

Knowledge of rights essential.

198. For a release (f) or waiver (g) to be effectual it is essential that the person granting it should be fully informed as to his rights; and similarly, a confirmation of an invalid transaction is inoperative unless the person confirming knows of its invalidity (h).

SECT. 3.—Acquiescence.

Meanings of acquiescence.

199. The term "acquiescence" is used in two senses. In its proper legal sense it implies that a person abstains from interfering while a violation of his legal rights is in progress (i); in another sense it implies that he refrains from seeking redress when a violation of his rights, of which he did not know at the time, is brought to his notice. Here the term is used in the former sense; in the second sense acquiescence is an element in laches (k).

Estoppel by acquiescence.

200. Acquiescence operates by way of estoppel. It is quiescence in such circumstances that assent may reasonably be inferred, and is an instance of estoppel by words or conduct (l). Consequently, if the whole circumstances are proper for raising this estoppel, the party acquiescing cannot afterwards complain of the violation of his right. For this purpose the lapse of time is of no importance. He is estopped immediately by his conduct; and hence the effect of acquiescence is expressly preserved by the Real

(e) Thus, from the open use of premises for many years in violation of a restrictive covenant a waiver or release of the covenant will be presumed (*Hepworth v. Pickles*, [1900] 1 Ch. 108). A *cestui que trust* who obtains part satisfaction of a breach of trust does not thereby waive his right to further relief (*Re Cross*, *Harston v. Tenison* (1882), 20 Ch. D. 109, 122, C. A.).

(f) *Pusey v. Desbouverie* (1734), 3 P. Wms. 315; *Ramsden v. Hyllton*, *Hyllton v. Biscoe* (1751), 2 Ves. Sen. 304; see *McCarthy v. Decaix* (1831), 2 Russ. & M. 614.

(g) *Vyvyan v. Vyvyan* (1861), 30 Beav. 65; see *Moxon v. Payne* (1873), 8 Ch. App. 881, 885; *Federal Supply Co. v. Angehrn* (1910), 26 T. L. R. 626, P. C.

(h) *Crove v. Ballard* (1790), 3 Bro. C. C. 117; *Roche v. O'Brien* (1810), 1 Ball & B. 330; *Savery v. King* (1856), 5 H. L. Cas. 627.

(i) If a party having a right stands by and sees another dealing with the property in a manner inconsistent with that right, and makes no objection while the act is in progress, he cannot afterwards complain. That is the proper sense of the word 'acquiescence' (*Leeds (Duke) v. Amherst (Earl)* (1846), 2 Ph. 117, per Lord COTTENHAM, L.C., at p. 124).

(k) See p. 169, *post*.

(l) *De Bussche v. Alt* (1878), 8 Ch. D. 286, C. A.; compare *Kent v. Jackson* (1851), 14 Beav. 367. The estoppel rests upon the circumstance that the party standing by in effect makes a misrepresentation as to a fact, namely, his own title. A mere statement that he intends to do something—as to abandon his right—is not enough (*Jorden v. Money* (1854), 5 H. L. Cas. 185, 214, 215; *Citizens' Bank of Louisiana v. First National Bank of New Orleans* (1873), L. R. 6 H. L. 352, 360). The principle of estoppel by representation applies both in law and in equity, though its application to acquiescence is equitable (see *Ashb.*, p. 635; and see title ESTOPPEL, *post*; *R. v. Butterson (Inhabitants)* (1796), 6 Term Rep. 554, 556).

SECT. 3.
Acquies-
cence.

Property Limitation Act, 1833 (*m*), s. 25, as regards matters falling within that statute. But when once the violation has been completed without any knowledge or assent upon the part of the person whose right has been infringed, the legal result is quite different. A right of action has then vested in him which, as a general rule, cannot be divested without accord and satisfaction or release under seal (*n*).

201. When A. stands by while his right is being infringed by B., the following circumstances must be present in order that the estoppel may be raised against A. (*a*): (1) B. must be mistaken as to his own legal rights; if he is aware that he is infringing the rights of another, he takes the risk of those rights being asserted (*b*); (2) B. must expend money, or do some act, on the faith of his mistaken belief (*c*); otherwise, he does not suffer by A.'s subsequent assertion of his rights; (3) acquiescence is founded on conduct with a knowledge of one's legal rights, and hence A. must know of his own rights (*d*); (4) A. must know of B.'s mistaken belief; with that knowledge it is inequitable for him to keep silence and allow B. to proceed on his mistake (*e*); (5) A. must encourage B. in his expenditure of money or other act, either directly or by abstaining from asserting his legal right (*f*).

Elements in
the estoppel.

202. The doctrine of acquiescence operating as an estoppel has been applied where a person interested in property, whether as owner or incumbrancer, has stood by while another has purchased what he supposed to be a good title to the property; thus the person so standing by cannot afterwards set up his title against the innocent

Applications
of the
estoppel

(*m*) 3 & 4 Will. 4, c. 27, s. 25.

(*n*) *De Bussche v. Alt* (1878), 8 Ch. D. 286, C. A.; see p. 164, *ante*.

(*a*) *Willmott v. Barber* (1880), 15 Ch. D. 96, *per* FRY, J., at p. 105; *Civil Service Musical Instrument Association v. Whiteman* (1899), 68 L. J. (CH.) 484.

(*b*) If a person builds on land of another knowing him to be the owner thereof, there is no principle of equity which would prevent the owner from claiming the land with the benefit of all the expenditure on it (*Ramsden v. Dyson* (1866), L. R. 1 H. L. 129, *per* Lord CRANWORTH, L.C., at p. 141; compare *Rennie v. Young* (1858), 2 De G. & J. 136, C. A.; Story, s. 799 b).

(*c*) *Dann v. Spurrier* (1802), 7 Ves. 231, 235; *Rochdale Canal Co. v. King* (1851), 2 Sim. (N. s.) 78; *Archbold v. Scully* (1861), 9 H. L. Cas. 360, 383.

(*d*) *Neesom v. Clarkson* (1845), 4 Hare, 97.

(*e*) The knowledge by A. of B.'s mistake imposes on A. the duty to undeceive him. "The doctrine as to a person lying by so as to create an equity against him arises . . . if he knows facts which are unknown to the other persons acting in violation of the right which those facts give, and does not inform them about it, but lies by and lets them run into a trap" (*Russell v. Watts* (1883), 25 Ch. D. 559, C. A., *per* COTTON, L.J., at p. 576), a principle not affected by the reversal of the decision on appeal (10 App. Cas. 590); it is his duty to be active and to state his adverse title (*Ramsden v. Dyson*, *supra*, at p. 141; Ashb., p. 636). The duty to give information is of course still greater when the person lying by, and permitting expenditure by another, is in a fiduciary relation to that other (see *Cawdor (Lord) v. Lewis* (1835), 1 Y. & C. (EX.) 427).

(*f*) The estoppel is founded on the consideration that it is fraudulent under the circumstances for A. not to give notice to B. (see *Savage v. Foster* (1723), 9 Mod. Rep. 35; 1 White & Tud. L. C., 7th ed., p. 455). But if he gives notice of a claim, this is sufficient to avoid the equity against him, although he does not repeat it while the expenditure is being incurred, and although the claim is excessive (*Clare Hall (Master etc.) v. Harding* (1848), 6 Hare, 273).

**SECT. 3.
Acquies-
cence.**

purchaser (*g*), or a person deriving title under him (*h*). And it has been applied where the owner, knowing his own title to land, has suffered another who was ignorant of that title to expend money on the land in buildings or other improvements (*i*); and the person so expending money will be entitled to have his supposed title to the property confirmed (*k*), or, at any rate, to be compensated for his outlay (*l*).

SECT. 4.—Laches.

**The defence
of laches.**

203. A plaintiff in equity is bound to prosecute his claim without undue delay. This is in pursuance of the principle which underlies the Statutes of Limitation, *vigilantibus et non dormientibus lex succurrit* (*m*). A court of equity refuses its aid to stale demands, where the plaintiff has slept upon his right and acquiesced for a great length of time (*n*). He is then said to be barred by his laches. The defence of laches, however, is only allowed where there is no statutory bar. If there is a statutory bar, operating either expressly or by way of analogy, the plaintiff is entitled to the full statutory period before his claim becomes unenforceable (*o*); and

(*g*) "For it was apparent fraud in him not to give notice of his title to the intended purchaser" (*Savage v. Foster* (1723), 9 Mod. Rep. 35; see *Hobbs v. Norton* (1682), 1 Vern. 136; *Clare v. Bedford (Earl)* (1690), 13 Vin. Abr. 536; 2 Vern. 151; cited in *Bath (Earl) v. Mountague (Earl)* (1693), 3 Cas. in Ch. 55, 85, 104; *Berrisford v. Milward* (1740), 2 Atk. 49; *Nicholson v. Hooper* (1838), 4 My. & Cr. 179, 185, 186; *Boyd v. Belton* (1844), 1 Jo. & Lat. 730; *Stronge v. Hawkes* (1853), 4 De G. M. & G. 186, 196, C. A.; *Olliver v. King* (1856), 8 De G. M. & G. 110, C. A.; compare *Vaughan v. Vanderstegen* (1854), 2 Drew. 363; *Sharpe v. Foy* (1868), 4 Ch. App. 35; *Re Lush's Trusts* (1869), 4 Ch. App. 591). Ordinarily, ignorance of his title on the part of the person standing by prevents the estoppel being raised against him (*Dyer v. Dyer* (1682), 2 Cas. in Ch. 108); but not in the case of a marriage settlement; at any rate where he is a near relation of one of the spouses (*Teasdale v. Teasdale* (1726), C. temp. King, 59; see *Olliver v. King*, *supra*, at p. 118). A married woman cannot be deprived of her separate property, as to which she is restrained from anticipation, by estoppel (*Bateman (Lady) v. Faber*, [1898] 1 Ch. 144, C. A.).

(*h*) *Nicholson v. Hooper*, *supra*.

(*i*) *Hunsing v. Ferrers* (1710), Gilb. (Ch.) 35; *East India Co. v. Vincent* (1740), 2 Atk. 83; *Steel v. Whitaker* (1740), Barn. (Ch.) 220; *Stiles v. Cowper* (1748), 3 Atk. 692; *Shannon v. Bradstreet* (1803), 1 Sch. & Lef. 52, 73, 74; see *Oxford's (Earl) Case* (1615), 1 Rep. Ch. 1; 1 White & Tud. L. O., 6th ed., p. 730.

(*k*) *Ramsden v. Dyson* (1866), L. R. 1 H. L. 129, *per* Lord CRANWORTH, L. O., at p. 140: "If a stranger begins to build on my land supposing it to be his own, and I, perceiving his mistake, abstain from setting him right, and leave him to persevere in his error, a court of equity will not allow me afterwards to assert my title to the land on which he had expended money on the supposition that the land was his own"; *Proctor v. Bennis* (1887), 36 Ch. D. 740, 760, C. A.; see *Powell v. Thomas* (1848), 6 Hare, 300.

(*l*) *Neesom v. Clarkson* (1845), 4 Hare, 97; see *Plimmer v. Wellington Corporation* (1884), 9 App. Cas. 699, P. C.; and compare *Clavering's Case* (undated), cited in *Jackson v. Cator* (1800), 5 Ves. 688, 690.

(*m*) *Cholmondeley (Marquis) v. Clinton (Lord)* (1820), 2 Jac. & W. 1, 140.

(*n*) *Smith v. Clay* (1767), 3 Bro. C. C. 639, n., *per* Lord CAMDEN; see *Pickering v. Stamford (Lord)* (1793), 2 Ves. 272, 280.

(*o*) *Archbold v. Scully* (1861), 9 H. L. Cas. 360, *per* Lord WENSLEYDALE, at p. 383; *Rochdale Canal Co. v. King* (1851), 2 Sim. (N. s.) 78, 89; *Re Baker, Collins v. Rhodes, Re Seaman, Rhodes v. Wish* (1881), 20 Ch. D. 230, C. A.; *Re Maddever, Three Towns Banking Co. v. Maddever* (1884), 27 Ch. D. 523, C. A.; *Penny v. Allen* (1857), 7 De G. M. & G. 409, 426; see *Moors v. Marriott* (1878), 7 Ch. D. 543, 546; *Re Birch, Roe v. Birch* (1884), 27 Ch. D. 622; and compare *Fildridge v. Knott* (1744), 1 Cowp. 214.

an injunction in aid of a legal right is not barred till the legal right is barred (*p*), though laches may be a bar to an interlocutory injunction (*q*).

SECT. 4.
Laches.

The nature of
laches.

204. The legislature, in enacting a statute of limitation, specifies fixed periods after which claims are barred; equity does not fix a specific limit, but considers the circumstances of each case (*r*). In determining whether there has been such delay as to amount to laches the chief points to be considered are (1) acquiescence on the plaintiff's part, and (2) any change of position that has occurred on the defendant's part. Acquiescence in this sense does not mean standing by while the violation of a right is in progress, but assent after the plaintiff has become aware of the violation. It is unjust to give the plaintiff a remedy where he has by his conduct done that which might fairly be regarded as equivalent to a waiver of it; or where by his conduct and neglect he has, though not waiving the remedy, put the other party in a position in which it would not be reasonable to place him if the remedy were afterwards to be asserted. In such cases lapse of time and delay are most material. Upon these considerations rests the doctrine of laches (*s*).

205. The chief element in laches is acquiescence, and sometimes this has been described as the sole ground for creating a bar in equity by the lapse of time (*t*). Acquiescence implies that the person acquiescing is aware of his rights, and is in a position to complain of an infringement of them (*a*). Hence acquiescence depends on knowledge, capacity, and freedom. As regards knowledge, persons cannot be said to acquiesce in the claims of others unless they are fully cognisant of their right to dispute

Acquiescence
as an element
in laches.

(*p*) *Fullwood v. Fullwood* (1878), 9 Ch. D. 176; compare *Cooper v. Hubbuck* (1860), 30 Beav. 160, 167.

(*q*) *Johnson v. Wyatt* (1863), 2 De G. J. & S. 18; especially where expenditure has been incurred by the defendant (*Birmingham Canal Co. v. Lloyd* (1812), 18 Ves. 515; *Great Western Rail. Co. v. Oxford, Worcester and Wolverhampton Rail. Co.* (1853), 3 De G. M. & G. 341, 359, C. A.).

(*r*) *Smith v. Clay* (1767), 3 Bro. C. C. 639, n.

(*s*) *Lindsay Petroleum Co. v. Hurd* (1874), L. R. 5 P. C. 221, *per* Lord SELBORNE, at p. 239: "Two circumstances always important in such cases are, the length of the delay and the nature of the acts done during the interval, which might affect either party and cause a balance of justice or injustice in taking the one course or the other, so far as relates to the remedy"; see *Erlanger v. New Sombrero Phosphate Co.* (1878), 3 App. Cas. 1218, *per* Lord BLACKBURN, at p. 1279; *Re Sharpe, Re Bennett, Masonic and General Life Assurance Co. v. Sharpe*, [1892] 1 Ch. 154, 168, C. A.; *Rochevoucauld v. Boustead* [1897] 1 Ch. 196, 210, C. A.; *Re Gallard, Ex parte Gallard*, [1897] 2 Q. B. 815.

(*t*) "Length of time, where it does not operate as a statutory or positive bar, operates, as I apprehend, simply as evidence of assent or acquiescence," *per* TURNER, L.J., in *Life Association of Scotland v. Siddal, Cooper v. Greene* (1861), 3 De G. F. & J. 58, 72, C. A.; compare *Morse v. Royal* (1806), 12 Ves. 355, 374.

(*a*) From the difficulty of concerted action, laches is less readily imputed to a class than to an individual (*A.-G. v. Bradford Canal (Proprietors)* (1866), L. R. 2 Eq. 71, 82; *Evans v. Smallcombe* (1868), L. R. 3 H. L. 249, 259; *Boswell v. Coaks* (1884), 27 Ch. D. 424, 457, C. A.). As to acquiescence by shareholders in *ultra vires* acts of directors, see *London Financial Association v. Kelk* (1884), 26 Ch. D. 107, 152; *Re Sharpe, Re Bennett, Masonic and General Life Assurance Co. v. Sharpe*, *supra*.

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them (b). But it is not necessary that the plaintiff should have known the exact relief to which he was entitled; it is enough that he knew the facts constituting his title to relief (c). As regards capacity, there is no acquiescence, and laches is not imputed, while the party is under the disability of infancy or lunacy (d); but it may be imputed to a married woman (e). As regards freedom, a person does not acquiesce while he is subject to such circumstances of undue influence or other pressure as to deprive him of the ability to give a true consent, and laches is not imputed until he is released from the position in which he is placed by these circumstances (f). Poverty, added to other circumstances, is a material ingredient in deciding whether laches is to be imputed to a vendor who seeks to avoid a sale; but by itself it does not prevent a waiver of a right (g). A remainderman may assent to a breach of trust while his interest is still future, and he will then be debarred from complaining of it; but ordinarily he is not bound to enforce his rights, and delay does not prejudice him till after his interest has fallen into possession (h). Moreover, there is no laches until the person entitled is ascertained (i).

(b) *Marker v. Marker* (1851), 9 Hare, 1, 16; see *Burrows v. Walls* (1855), 5 De G. M. & G. 233; *Beauchamp (Earl) v. Winn* (1873), L. R. 6 H. L. 223, 249; *La Banque Jacques-Cartier v. La Banque d'Epargne de la Cité et du District de Montreal* (1887), 13 App. Cas. 111, 118, P. C.; *Rees v. De Bernardy*, [1896] 2 Ch. 437, 445. Under the Statutes of Limitation ignorance does not prevent the running of the statute (*Rains v. Buxton* (1880), 14 Ch. D. 637, compare *Adnam v. Sandwich (Earl)* (1877), 2 Q. B. D. 485, 490; *Irish Land Commission v. White*, [1896] 2 I. R. 410); save in case of fraud (*Gibbs v. Guild* (1882), 9 Q. B. D. 59, C. A.).

(c) See *Lindsay Petroleum Co. v. Hurd* (1874), L. R. 5 P. C. 221, at p. 241; but ordinarily a man is not held to confirm a title unless he was fully aware at the time, not only of the fact upon which the defect of title depends, but of the consequence in point of law (*Cockerell v. Cholmeley* (1830), 1 Russ. & M. 418, 423); though, in general, when the facts are known from which a right arises, the right is presumed to be known (*Stafford v. Stafford* (1857), 1 De G. & J. 193, 202, C. A.). If he has been mistaken as to his rights, he is not guilty of laches until he has discovered the mistake, or has had reasonable means of doing so (*Brooksbank v. Smith* (1836), 2 Y. & C. (ex.) 58; *Baker v. Courage & Co.*, [1910] 1 K. B. 56; see *Stone v. Godfrey* (1854), 5 De G. M. & G. 76).

(d) *March v. Russell* (1837), 3 My. & Cr. 31; *Young v. Harris* (1891), 65 L. T. 45; see *Watson v. Toone* (1820), Madd. & G. 153.

(e) *Derbshire v. Homs* (1853), 3 De G. M. & G. 80, 102, C. A.; compare *Sprange v. Lee*, [1908] 1 Ch. 424, 431; and see *Heath v. Wickham* (1880), 5 L. R. Ir. 285. And now under the Married Women's Property Act, 1882 (45 & 46 Vict. c. 75), a married woman is for this purpose in the position of a *feme sole*.

(f) *Aylward v. Kearney* (1814), 2 Ball & B. 463, 477; *Gregory v. Gregory* (1815), Coop. G. 201; *Roberts v. Tunstall* (1844), 4 Hare, 257; *Allcard v. Skinner* (1887), 36 Ch. D. 145, 163, C. A.; see *Purcell v. M'Namara* (1806), 14 Ves. 91; and compare *Dunbar v. Tredennick* (1813), 2 Ball & B. 304, 317; *Gowland v. De Faria* (1811), 17 Ves. 20.

(g) *Roberts v. Tunstall*, *supra*.

(h) *Life Association of Scotland v. Siddal, Cooper v. Greene* (1861), 3 De G. F. & J. 58, 73, C. A.; *Price v. Blakemore* (1843), 6 Beav. 507; *Kirwan v. Kennedy* (1869), 3 I. R. Eq. 472, 484; *Bennett v. Colley* (1833), 2 My. & K. 225; *Mehrtens v. Andrews* (1839), 3 Beav. 72; see *Buller v. Carter* (1868), L. R. 5 Eq. 276. But the omission of the remainderman to take steps to have the fund secured may bar him (*Re Taylor, Atkinson v. Lord* (1900), 81 L. T. 812).

(i) *Cator v. Croydon Canal Co.* (1841), 4 Y. & C. (ex.) 405.

SECT. 4.
Laches.In case of
fraud.

When the remedy is in respect of fraud, there is no laches so long as the party defrauded remains, without any fault of his own, in ignorance of the fraud (*k*); and a person who is entitled to rely on the fidelity of another is not bound to inquire as to the conduct of the other until he has reason for suspicion (*l*). Fraud is not condoned unless the injured party has full knowledge of all the facts, and of the equitable rights arising out of those facts (*m*). But when the fraud has been discovered relief must be sought promptly (*n*); and even in cases of gross fraud it may not be granted after a great lapse of time against innocent persons claiming under the fraudulent person (*o*).

206. Regard must be had to any change in the position of the defendant which has resulted from the plaintiff's delay in bringing his action. This may be, for instance, because by the lapse of time he has lost the evidence necessary for meeting the claim. A court of equity will not allow a dormant claim to be set up when the means of resisting it, if unfounded, have perished (*p*). And where the claim is to set aside a conveyance of property, the defendant may have settled his mode of living upon the assumption that the conveyance was valid (*q*). The fact that property has passed through various hands, and that money has been expended on it, is a strong reason for not setting aside an improper sale by a trustee (*r*). Any change in the position of the defendant tells more strongly against the plaintiff, if the latter has been acquainted with the circumstances so as to make it inequitable for him to lie by (*s*). And laches will be imputed where the plaintiff, with knowledge of his rights, has allowed the defendant to expend money in the belief that no claim will be made (*t*).

Change in
defendant's
position.

207. Apart from considerations as to the acquiescence of the plaintiff or the change of position of the defendant, the delay may be so great as in itself to constitute laches and render the claim

Delay so great
as to be in
itself a bar.

(*k*) *Holfe v. Gregory* (1864), 4 De G. J. & Sm. 576, 579; *Rocha v. O'Brien* (1810), 1 Ball & B. 330; see *Clanricarde (Marquis) v. Henning* (1860), 30 Beav. 175, per ROMILLY, M.R., at p. 180: "The fraud is considered to be discovered at the time when such reasonable notice of what has happened has been given to the person injured as to make it his duty, if he intends to seek redress, to make inquiry and to ascertain the circumstances of the case"; *Browne v. McClintock* (1873), L. R. 6 H. L. 456. As to secret working of mines, see *Bulli Coal Mining Co. v. Osborne*, [1899] A. C. 351, P. C.; *Ecclesiastical Commissioners for England v. North Eastern Rail. Co.* (1877), 4 Ch. D. 845. As to reopening accounts on the ground of fraud recently discovered, see *Vernon v. Vawdrey* (1740), 2 Atk. 119; *Alfrey v. Alfrey* (1849), 1 Mac. & G. 87.

(*l*) *Rawlins v. Wickham* (1858), 3 De G. & J. 304, C. A.; *Botjemann v. Botjemann*, [1895] 2 Ch. 474, C. A.

(*m*) *Moxon v. Payne* (1873), 8 Ch. App. 881, 885.

(*n*) See *Byrne v. Frere* (1828), 2 Moll. 157.

(*o*) *Hercy v. Dinwoody* (1793), 2 Ves. 87, 92.

(*p*) *Bright v. Legerton* (1861), 2 De G. F. & J. 606, per Lord CAMPBELL, L.O., at p. 617; see *Mathew v. Brise* (1851), 14 Beav. 341, 346; *Watt v. Assets Co.*, [1905] A. C. 317, 329, 338; and as to cases of fraud, see *Charter v. Trevelyan* (1844), 11 Cl. & Fin. 714, 740, H. L.

(*q*) *Turner v. Collins* (1871), 7 Ch. App. 329; *Allcard v. Skinner* (1887), 36 Ch. D. 145, 192, C. A.

(*r*) *Bonney v. Ridgard* (1784), 1 Cox, Eq. Cas. 145.

(*s*) *Erlanger v. New Sombbrero Phosphate Co.* (1878), 3 App. Cas. 1218, 1279.

(*t*) See *Evans v. Smallcombe* (1868), L. R. 3 H. L. 249, 255.

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stale, so that a court of equity will decline to enforce it (*u*). Here the laches depends on the mere negligence of the plaintiff to enforce his rights (*v*). And, in the absence of infancy or some circumstance preventing an action, twenty years may be taken as the period which in practice will bar a claim on the ground of delay (*x*). But this is not so in the case of an express trust, and time alone—apart from the statute (*y*)—is no bar to an action for breach of trust (*a*), though, like any other equitable claim, it may be barred by acquiescence, whether this consists in assent to the breach of trust, or in subsequent condonation (*b*), or by other circumstances which, combined with delay, make it inequitable to allow the action (*c*).

**Application
of doctrine of
laches.**

208. The practical application of the doctrine of laches depends upon the nature of the claim which it is sought to enforce. In ordinary cases of claims to enforce equitable rights (*d*), where

(*u*) In the case of a claim by a company against a director in respect of a matter *ultra vires* the company, acquiescence must be by all the shareholders and may be practically impossible, so that, apart from the Trustee Act, 1888 (51 & 52 Vict. c. 59), no bar is available unless mere lapse of time constitutes laches (*Re Sharpe, Re Bennett, Masonic and General Life Assurance Co. v. Sharpe*, [1892] 1 Ch. 154, C.A.).

(*v*) *Harcourt v. White* (1860), 28 Beav. 303, *per* ROMILLY, M.R., at p. 310; *Williams v. Thomas*, [1909] 1 Ch. 713, 722 (equitable action for dower); *Brooke v. Muckleston*, [1909] 2 Ch. 519, 523 (equitable mortgage of advowson); compare *Blake v. Gale* (1885), 31 Ch. D. 196, 210.

(*x*) *Byrne v. Frere* (1828), 2 Mol. 157, *per* HART, L.C., at p. 176; see *Hercy v. Dinwoody* (1793), 2 Ves. 87, where a creditor's bill was dismissed after thirty-three years. But the view that time in itself is a bar has not always been accepted (see *Pickering v. Stamford (Lord)* (1795), 2 Ves. 581, where ARDEN, M.R., at p. 582, said there was no such thing as setting up length of time against an equitable demand as a complete bar, and, at the instance of a next of kin, declared a charitable bequest void after thirty-five years). In certain cases referred to later special promptitude is required, and a much shorter period than twenty years will be a bar. And in claims affecting land twelve years may be a bar (*Williams v. Thomas*, [1909] 1 Ch. 713, 722, though this seems a case of applying the analogy of the Statute of Limitations; see p. 175, *post*). As to a claim by a ward against his guardian, see *Sleeman v. Wilson* (1871), L. R. 13 Eq. 36.

(*y*) Trustee Act, 1888 (51 & 52 Vict. c. 59), s. 8; see title LIMITATION OF ACTIONS.

(*a*) *McDonnell v. White* (1865), 11 H. L. Cas. 570, *per* Lord WESTBURY, L.C., at p. 579; *Re Cross, Harston v. Tenison* (1882), 20 Ch. D. 109, C. A.; *Rochefoucauld v. Boustead*, [1897] 1 Ch. 196, 212, C. A. Charities are subject to the Real Property Limitation Acts (*Magdalen College, Oxford (President etc.) v. A.-G.* (1857), 6 H. L. Cas. 189, 207).

(*b*) As to acquiescence being a bar to a *cestui que trust*, see *Brice v. Stokes* (1805), 11 Ves. 319; *Walker v. Symonds* (1818), 3 Swan. 1, 64; *Maitlands' Case* (1853), 4 De G. M. & G. 769, 779, C. A.; *Burrows v. Walls* (1855), 5 De G. M. & G. 233, 251; *Farrant v. Blanchford* (1863), 1 De G. J. & Sm. 107; *Fletcher v. Collis*, [1905] 2 Ch. 24.

(*c*) *Harcourt v. White* (1860), 28 Beav. 303, 310; *McDonnell v. White*, *supra*; *Carey v. Cuthbert* (1873), 7 I. R. Eq. 542; (1875), 9 I. R. Eq. 330; *Re Cross, Harston v. Tenison*, *supra*; *Re Taylor* (1900), 81 L. T. 812.

(*d*) In connection with a claim to enforce an interest in a partnership Lord CHELMSFORD, L.C., in *Clarke and Chapman v. Hart* (1858), 6 H. L. Cas. 633, divided equitable interests into "executed" and "executory," and he treated the doctrine of laches as being confined to the latter class; executed interests, he said, could only be lost by conduct amounting to waiver. But it is well settled that the doctrine of laches applies to all equitable claims, including claims for breaches of trust, which are the most important class of claims in respect of executed interests, and Lord CHELMSFORD's restriction of the doctrine of laches has not been adopted. The distinction which he really intended, perhaps, was

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the delay is not so excessive as to be a bar in itself, the court looks for evidence of the circumstances which constitute laches, namely, acquiescence by the plaintiff or change of position on the part of the defendant; and the plaintiff is not barred unless such evidence is given (*e*). This applies to claims against trustees and others in a fiduciary position to set aside sales (*f*), to claims to set aside a sale of a reversion (*g*), or a sale by a mortgagee (*h*); to claims by mortgagees (*i*), or a beneficiary (*k*), to follow assets; and to claims in respect of partnership interests (*l*). And it applies generally to claims in respect of breach of trust, subject, however, to the rule that time itself is no bar—that is, is not evidence of acquiescence (*m*).

209. In certain classes of claims a stricter rule prevails, and the claim to relief in equity must be made with special promptitude. These are claims to establish constructive trusts, to set aside gifts made under undue influence, and to obtain specific performance or rescission of contracts. In cases of constructive trust, relief which

Cases where special promptitude required.

between claims of the nature considered in this section, in which, in the absence of actual acquiescence, the plaintiff may not be barred for a considerable time, and claims of the nature considered in the following section, where the claim must be made promptly and even a slight delay may be treated as laches.

(*e*) See *Pomfret v. Windsor* (1752), 2 Ves. Sen. 472, 482; *Stone v. Godfrey* (1854), 5 De G. M. & G. 76.

(*f*) As to purchases by trustees, see *Hall v. Noyes* (1796), cited 3 Ves. 748; *Morse v. Royal* (1806), 12 Ves. 355; *Gregory v. Gregory* (1815), Coop. G. 201; *Watson v. Toone* (1820), Madd. & G. 153; *Roberts v. Tunstall* (1845), 4 Hare, 257; *Baker v. Read* (1854), 18 Beav. 398; *Beningfield v. Baxter* (1886), 12 App. Cas. 167, P. C.; as to purchase by a solicitor from his client, *Champion v. Rigby* (1830), 1 Russ. & M. 539; *Gresley v. Mousley* (1858), 1 Giff. 450.

(*g*) *Moth v. Atwood* (1801), 5 Ves. 845; *Sibbering v. Balcarras (Earl)* (1850), 3 De G. & Sm. 735. Where, upon a sale of a reversion, the circumstances are such as to entitle the vendor to set it aside, it has been held that there is no laches until the reversion falls into possession (*Salter v. Bradshaw, Bradshaw v. Salter* (1858), 26 Beav. 161; *Beynon v. Cook* (1875), 10 Ch. App. 389, 393, n.). But it is apprehended that if this were many years after the sale, the vendor could not rely on further time, but would then have to apply for relief promptly (see *Salter v. Bradshaw, Bradshaw v. Salter, supra*).

(*h*) *Robertson v. Norris* (1858), 1 Giff. 421; *Pooley's Trustee v. Whetham* (1886), 33 Ch. D. 111, 123, C. A.; *Nutt v. Easton*, [1899] 1 Ch. 873; [1900] 1 Ch. 29, C. A.; see *Murlinson v. Clowes* (1882), 21 Ch. D. 857.

(*i*) *Ridgway v. Newstead* (1861), 3 De G. F. & J. 474; *Blake v. Gale* (1886), 32 Ch. D. 571, 580, C. A.; compare *Leahy v. De Moleyns*, [1896] 1 I. R. 206, C. A.; *Re Lacey, Howard v. Lightfoot*, [1907] 1 Ch. 330, C. A.

(*k*) *Harris v. Harris* (No. 2) (1861), 29 Beav. 110; see *Bate v. Hooper* (1855), 5 De G. M. & G. 338.

(*l*) Claims in respect of partnership interests are subject to the consideration that the plaintiff must not wait to see whether the partnership business will result in a profit or a loss. Hence if a partner has received notice of forfeiture of his interest and does not object, he will be held to have acquiesced after the lapse of a short time (*Prendergast v. Turton* (1841), 1 Y. & C. Ch. Cas. 98, on appeal (1843), 13 L. J. (Ch.) 268; *Rule v. Jewell* (1881), 18 Ch. D. 660; *Palmer v. Moore*, [1900] A. C. 293, P. C.); but otherwise, where he objects and the delay is not excessive (*Clarke and Chapman v. Hart* (1858), 6 H. L. Cas. 633; *Garden Gully United Quartz Mining Co. v. McLister* (1875), 1 App. Cas. 39, P. C.)

(*m*) *Life Association of Scotland v. Siddal, Cooper v. Greene* (1861), 3 De G. F. & J. 58, 72, C. A.; *Harcourt v. White* (1860), 28 Beav. 303, 310; *McDonnell v. White* (1865), 11 H. L. Cas. 570, 579; *Jones v. Higgins* (1866), L. R. 2 Eq. 538; *Re Taylor, Atkinson v. Lord* (1900), 81 L. T. 812. A tenant for life is not necessarily prejudiced by delay in asserting her right to recoupment of deficiency of income out of an existing fund (*Mills v. Drewitt* (1855), 20 Beav. 632).

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would have been given originally will be refused after long acquiescence (*n*); the equity must be pursued within some reasonable time (*o*). Especially is this the case where the claim is to establish a trust in respect of property of a speculative nature (*p*). In the case of gifts made under undue influence, there is no laches in the donor until he is acquainted with his rights and the influence is at an end (*q*); but, so soon as he is in this position, he must assert his equitable claim to have the gift set aside promptly, in order that the persons affected may know what line of conduct they are to adopt with regard to the transaction (*r*). In claims, too, for specific performance and for rescission of contracts, the special relief in equity is only given on condition of the plaintiff coming with great promptitude. Specific performance is relief which the court will not give, unless in cases where the parties seeking it come promptly, and as soon as the nature of the case will admit (*s*). Any substantial delay after the negotiations have terminated—such as a year or probably less—will be a bar (*t*). And in cases of rescission the defendant may be altering his position on the faith of the contract standing, and the claim to rescind must be made promptly (*a*); especially in the case of a contract to take shares (*b*).

(*n*) *Beckford v. Wade* (1805), 17 Ves. 87, 97, P. C.

(*o*) *Townshend v. Townshend* (1783), 1 Bro. C. C. 550, 554.

(*p*) *Clegg v. Edmondson* (1857), 8 De G. M. & G. 787, C. A.; *Clements v. Hall* (1858), 2 De G. & J. 173, C. A.; *Senhouse v. Christian* (undated), cited 19 Ves. at p. 159; *Norway v. Rowe* (1812), 19 Ves. 144; see, however, *Turner v. Trelawney* (1841), 12 Sim. 49, where a trust of mining property was established notwithstanding the lapse of fifteen years and large expenditure on the mines.

(*q*) *Allcard v. Skinner* (1887), 36 Ch. D. 145, per KEKEWICH, J., at p. 163.

(*r*) *Turner v. Collins* (1871), 7 Ch. App. 329. For instances, see *Wright v. Vanderplank* (1866), 8 De G. M. & G. 133, C. A.; *Mitchell v. Homfray* (1881), 8 Q. B. D. 587, C. A.; *Allcard v. Skinner* (1887), 36 Ch. D. 145, C. A. In *Hatch v. Hatch* (1804), 9 Ves. 292, a gift was set aside after twenty years, but the circumstances were special, and the decision was an extreme one; see *Turner v. Collins*, *supra*; *Byrne v. Frere* (1828), 2 Mol. 157.

(*s*) *Eads v. Williams* (1854), 4 De G. M. & G. 874; *Re Oriental Steam Navigation Co.*, *Ex parte Briggs* (1861), 4 De G. F. & J. 191; *Barclay v. Messenger* (1874), 43 L. J. (CH.) 449, 456; see *Moore v. Marrable* (1866), 1 Ch. App. 217; but the rule was not applied in a case where the plaintiff had been in possession under an agreement for a lease, and then called for a lease (*Shepherd v. Walker* (1875), L. R. 20 Eq. 659; *Clarke v. Moore* (1844), 1 Jo. & Lat. 723, 727); *contra*, if the possession is not claimed under the agreement with the vendor's knowledge (*Mills v. Haywood* (1877), 6 Ch. D. 196, C. A.); see also title SPECIFIC PERFORMANCE.

(*t*) *Watson v. Reid* (1830), 1 Russ. & M. 236; *Southcomb v. Exeter (Bishop)* (1847), 6 Hare, 213; and see *Hertford (Marquis) v. Boore* (1801), 5 Ves. 719 (fourteen months not a bar); *Harrington v. Wheeler* (1789), 4 Ves. 686 (six years a bar); *Milward v. Thanet (Earl)* (1801), 5 Ves. 720, n. (seven years a bar). The purchaser of a reversion cannot wait till the reversion falls in before enforcing his contract (*Levy v. Stogdon*, [1899] 1 Ch. 5, C. A.).

(*a*) See *Lindsay Petroleum Co. v. Hurd* (1874), L. R. 5 P. O. 221, 239; *Seddon and London Salt Co., Ltd. v. North-Eastern Salt Co.* (1905), 53 W. R. 232; compare *Mutual Reserve Life Insurance Co. v. Foster* (1902), 20 T. L. R. 715, H. L. (two years allowed); *Molloy v. Mutual Reserve Life Insurance Co.* (1906), 94 L. T. 756, C. A. (six years' limit suggested in case of misrepresentation).

(*b*) Such a claim must be made immediately on the facts being known (*Sharpley v. Louth and East Coast Rail. Co.* (1876), 2 Ch. D. 663, 685, C. A.); compare *Venezuela Central Rail. Co. (Directors etc.) v. Kisch* (1867), L. R. 2 H. L. 99; and see *Tait's Case* (1867), L. R. 3 Eq. 795; *Re Scottish Petroleum Co.* (1883),

SECT. 5.—*Analogy of the Statutes of Limitation.*

210. In certain cases the Statutes of Limitation apply expressly to equitable claims, as in the case of equitable claims to land or rentcharges (c); and a court of equity, of course, acts in obedience to the statutes, and applies, in regard to such claims, the express bar of the statute. Moreover, when claims are made in equity which are not, as regards equitable proceedings, the subject of any express statutory bar, but the equitable proceedings correspond to a remedy at law in respect of the same matter which is subject to a statutory bar, a court of equity, in the absence of fraud or other special circumstances, adopts, by way of analogy, the same limitation for the equitable claim (d). Thus proceedings in equity to recover a simple contract debt are subject to the six-years' limit imposed by the Limitation Act, 1623 (e); and the same limit applies, perhaps, to equitable remedies which assume the existence of a contract, such as specific performance (f). But where a claim in respect of personal estate is not subject to any limitation, equity does not impose a limitation in analogy to the limitation on claims to real estate (g).

SECT. 5.
Analogy of
the Statutes
of Limita-
tion.

Equity acts
on the analogy
of the
Statutes of
Limitation.

23 Ch. D. 413, 434, C. A.; *Re Snyder Dynamite Projectile Co., Ltd., Skellon's Case* (1893), 68 L. T. 210.

(c) Real Property Limitation Act, 1833 (3 & 4 Will. 4. c. 27), s. 24; see title LIMITATION OF ACTIONS.

(d) *Hovenden v. Annesley* (Lord) (1806), 2 Sch. & Lef. 607, per Lord REDESDALE, at p. 632; see *Smith v. Clay* (1767), 3 Bro. C. C. 639, n.; *Bond v. Hopkins* (1802), 1 Sch. & Lef. 413, 429; *Beckford v. Waide* (1805), 17 Ves. 87, P. C.; *Cholmondeley (Marquis) v. Clinton* (Lord) (1820), 2 Jac. & W. 1, 121. It has been suggested that in such cases courts of equity act in obedience to, and not merely in analogy to the statute (*Cholmondeley (Marquis) v. Clinton* (Lord) (1821), 4 Bli. 1, 119, H. L.). But the true principle is that "where the remedy in equity is correspondent to the remedy at law, and the latter is subject to a limit in point of time by the Statute of Limitations, a court of equity acts by analogy to the statute, and imposes on the remedy it affords the same limitation. But if any proceeding in equity be included in the words of the statute, there a court of equity, like a court of law, acts in obedience to the statute" (*Knox v. Gye* (1872), L. R. 5 H. L. 656, per Lord WESTBURY, at p. 674). In cases of fraud, such as fraud committed by the secret working of underground coal, the period of limitation is not reckoned in equity till the fraud is, or could with reasonable diligence be, discovered (*Ecclesiastical Commissioners for England v. North-Eastern Rail. Co.* (1877), 4 Ch. D. 845, 860; *Gibbs v. Guild* (1882), 9 Q. B. D. 59, C. A.; and similarly in cases of mistake (*Brooksbank v. Smith* (1836), 2 Y. & C. (ex.) 58; *Baker v. Courage & Co.*, [1910] 1 K. B. 56, 63).

(e) 21 Jac. 1, c. 16; *Re Greaves, Bray v. Tofield* (1881), 18 Ch. D. 551, 554; *Re Hollingshead, Hollingshead v. Webster* (1888), 37 Ch. D. 651; *Re Chant, Bird v. Godfrey*, [1905] 2 Ch. 225. As to claims for misrepresentation, see *Peck v. Gurney* (1873), L. R. 6 H. L. 377, 384, 402. The analogy extends to debts of a married woman in respect of her separate estate, (*Re Hastings (Lady), Hallett v. Hastings* (1887), 35 Ch. D. 94, 105, C. A.). Secret profit made by an agent or other person in a fiduciary position is recoverable as an equitable debt, and the period, in analogy to the statute, is six years; but it does not run till the facts are discovered (*Metropolitan Bank v. Heiron* (1880), 5 Ex. D. 319, C. A.; compare *Lister & Co. v. Stubbs* (1890), 45 Ch. D. 1, C. A.); and as to secret profit by a director or promoter, see *Re Fitzroy Bessemer Steel etc. Co.* (1884), 50 L. T. 144.

(f) See *Firth v. Slingsby* (1888), 58 L. T. 481, 483; though in *Talmash v. Mugleston* (1826), 4 L. J. (o. s.) (OH.) 200, it was held that specific performance was not subject to the six years' limitation. In practice, as stated at p. 174, *ante*, it is subject to a shorter limitation.

(g) *Mellersh v. Brown* (1890), 45 Ch. D. 225.

EQUITY OF REDEMPTION.

See EQUITY; MORTGAGE.

EQUITY TO A SETTLEMENT.

See EQUITY; HUSBAND AND WIFE.

ESCAPE.

See CRIMINAL LAW AND PROCEDURE.

ESCHEAT.

See CONSTITUTIONAL LAW; COPYHOLDS; CROWN PRACTICE; DESCENT AND DISTRIBUTION; REAL PROPERTY AND CHATTELS REAL.

ESCROW.

See DEEDS AND OTHER INSTRUMENTS.

ESTATE.

See REAL PROPERTY AND CHATTELS REAL.

ESTATE AGENT.

See AGENCY,

ESTATE AND OTHER DEATH DUTIES.

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<i>Corporation Duty</i> - - -	"	CORPORATIONS; REVENUE.
<i>Executors</i> - - - - -	"	EXECUTORS AND ADMINISTRATORS.
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<i>Settlements</i> - - - - -	"	SETTLEMENTS.

Part I.—Introduction.

SECT. 1.—Incidence of the various Death Duties.

Names of the death duties.

211. The Death Duties (a) are seven in number, namely, the Estate Duty, the Settlement Estate Duty, the Legacy Duty, the Succession Duty, the Probate Duty (b), the Account Duty, and the Temporary Estate Duty.

Incidence of the duties.

The incidence of the various duties is shortly as follows:—

The estate duty (c) is leviable in respect of property passing on death. The settlement estate duty (d) is a further estate duty leviable where property is settled. The legacy duty (e) and the

(a) Compare Finance Act, 1894 (57 & 58 Vict. c. 30), s. 13 (3). It has been said that, in dealing with questions under the Finance Act, 1894 (57 & 58 Vict. c. 30), and the Succession Duty Acts, regard should be had to the substance of the transactions on which these questions turn, rather than to the forms of conveyancing which the parties to them may have adopted to carry out their objects (*Lethbridge v. A.-G.*, [1907] A. C. 19, *per* Lord ATKINSON, at pp. 26, 27). See title DESCENT AND DISTRIBUTION, Vol. XI., pp. 1—31.

(b) In Scotland, called Inventory Duty.

(c) See p. 183, *post*.

(d) See p. 228, *post*.

(e) See p. 232, *post*.

succession duty (*f*) are additional duties, alternatively leviable, in respect of beneficial interests acquired on death.

The remaining three duties are leviable in connection with deaths which occurred before the 2nd August, 1894 (*g*), before which date estate duty and settlement estate duty were not leviable. The probate duty (*h*) is leviable in respect of personal property passing under will or intestacy. The account duty (*i*) is leviable in connection with deaths which occurred after the 31st May, 1881, in respect of certain dispositions of personal property which may be regarded as substitutes for wills (*k*). The temporary estate duty (*l*) is leviable in connection with deaths which occurred within seven years after the 31st May, 1889, as an addition to the probate duty or account duty, and, in certain cases, to the succession duty, where the property exceeds £10,000 in value.

SECT. 1.
Incidence of
the various
Death
Duties.

SECT. 2.—*Management of the Duties.*

212. The death duties are under the management of the Commissioners of Inland Revenue (*m*), who have all necessary powers for carrying into execution the various Acts of Parliament by which they are imposed (*n*).

Managed by
the Commis-
sioners of
Inland
Revenue.

SECT. 3.—*Composition of Claims.*

213. Where, by reason of the number of deaths on which property has passed, or of the complicated nature of the interests of different persons, or from any other cause, it is difficult, without undue expense, to ascertain exactly the amount of the death duties payable in respect of any property or any interest therein, the Commissioners may, on the application of any person accountable for the duty, accept an appropriate sum by way of composition for all the death duties payable in respect of such property or interest (*o*).

Power to
compound.

(*f*) See p. 262, *post*.

(*g*) Finance Act, 1894 (57 & 58 Vict. c. 30), ss. 21 (2), 24.

(*h*) See p. 305, *post*.

(*i*) See note (*a*), p. 185, note (*h*), p. 187, notes (*k*), (*s*), p. 188, note (*c*), p. 189, note (*n*), p. 190, notes (*r*), (*l*), p. 191, note (*e*), p. 192, note (*i*), p. 199, note (*l*), p. 206, note (*q*), p. 220, and note (*i*), p. 222, *post*.

(*k*) *A.-G. v. Gosling*, [1892] 1 Q. B. 545, *per cur.*, at p. 550.

(*l*) See note (*l*), p. 206, note (*t*), p. 283, and note (*b*), p. 312, *post*.

(*m*) See pp. 212, 231, 249, 292, 314, *post*. All communications in regard to death duties should be addressed to the Secretary, Estate Duty Office, Somerset House, London, W.C. A list of the forms of affidavit and account used in accounting for death duties will be found in the official form No. 18.

(*n*) Succession Duty Act, 1853 (16 & 17 Vict. c. 51), s. 9; Customs and Inland Revenue Act, 1881 (44 & 45 Vict. c. 12), s. 26 (1); Customs and Inland Revenue Act, 1889 (52 & 53 Vict. c. 7), s. 9 (1); Inland Revenue Regulation Act, 1890 (53 & 54 Vict. c. 21), s. 1 (2). See Agreement with France, dated 15th November, 1907, for the prevention of frauds in connection with death duties (Treaty Series, No. 10, 1908, Cd. 3965). See also Declaration, dated 27th August, 1872, as to succession or legacy duties on property of British subjects dying in the Canton of Vaud, or of citizens of that Canton dying in the British dominions (1873, C. 685); compare Domicile Act, 1861 (24 & 25 Vict. c. 121), and Naturalization Act, 1870 (33 & 34 Vict. c. 14), s. 6.

(*o*) Finance Act, 1894 (57 & 58 Vict. c. 30), s. 13 (1).

SECT. 3.
Composition
of Claims.

Particulars to
be furnished.
Certificate of
discharge.

In order to arrive at the amount to be accepted, the accountable person is to furnish the Commissioners with all the information in his power respecting the property and the several interests therein, and other circumstances of the case (*p*).

When the duty agreed to be accepted by the Commissioners has been paid, they are to give a certificate (*q*) in full discharge of all claims for death duties in respect of such property or interest (*r*).

The certificate does not discharge any person from any duty in case of fraud or failure to disclose material facts (*s*).

SECT. 4.—Remission of Duty and Interest.

After lapse
of twenty
years.

214. If, after the expiration of twenty years from a death upon which any death duty became leviable, any such duty remains unpaid, the Commissioners may, if they think fit, on the application of any person accountable or liable for such duty, or interested in the property, remit the payment of the duty, or any part of it, or any interest upon it (*t*).

The Commissioners may also remit interest where the amount appears to them to be so small as not to repay the expense and trouble of calculation and account (*a*).

Where
amount
of interest
small.
Objects of
national etc.
interest
given etc.
for public
purposes.
Persons killed
in war.

The Treasury may remit any duty leviable in respect of any such pictures, prints, books, manuscripts, works of art or scientific collections as appear to the Treasury to be of national, scientific, or historic interest, and to be given or bequeathed for national purposes, or to any university, county council, or municipal corporation (*b*).

Where any person dies from wounds inflicted, accident occurring, or disease contracted, within twelve months before death, while on active service against an enemy, whether on sea or land, and was at the time either subject to the Naval Discipline Act (*c*), or to military law, whether as an officer, non-commissioned officer, or soldier, under Part V. of the Army Act (*d*), the Treasury may, on the recommendation of the Secretary of State or of the Admiralty, as the case requires, remit or repay up to £150 in any one case, the whole or any part of the death duties leviable in respect of property passing upon the death of the deceased to his widow or lineal descendants, if the total value for the purpose of estate duty of the property so passing does not exceed £5,000 (*e*).

(*p*) Finance Act, 1894 (57 & 58 Vict. c. 30), s. 13 (1).

(*q*) See note (*b*), p. 218, *post*.

(*r*) Finance Act, 1894 (57 & 58 Vict. c. 30), s. 13 (1).

(*s*) *Ibid.*, s. 13 (2).

(*t*) *Ibid.*, s. 8 (11); Finance Act, 1907 (7 Edw. 7, c. 13), s. 13.

(*a*) Finance Act, 1896 (59 & 60 Vict. c. 28), s. 18 (3).

(*b*) Finance Act, 1894 (57 & 58 Vict. c. 30), s. 15 (2). See also p. 202, *post*; Finance (1909-10) Act, 1910 (10 Edw. 7, c. 8), s. 63. See title CORPORATIONS, Vol. VIII., p. 378.

(*c*) 29 & 30 Vict. c. 109, printed as amended, in accordance with the Naval Discipline Act, 1884 (47 & 48 Vict. c. 39), s. 7 (2).

(*d*) Army Act, 1881 (44 & 45 Vict. c. 58), printed as amended, in accordance with the Army (Annual) Act, 1885 (48 & 49 Vict. c. 8), s. 8 (2); see title ROYAL FORCES.

(*e*) Finance Act, 1900 (63 & 64 Vict. c. 7), s. 14 (1). The death must be after the 11th October, 1899 (*ibid.*, s. 14 (2)).

Part II.—Estate Duty.

SECT. 1.—*The Imposition of the Duty.*

SECT. 1.

The Imposition of the Duty.

215. Estate duty (*f*) is leviable, save as expressly provided (*g*), upon the principal value of all property, settled or not, which passes, or is deemed to pass, on death (*h*), but only once on the same death (*i*).

The death must be after the 1st August, 1894 (*k*).

The extent of the charge.

SECT. 2.—*Property which passes.*

SUB-SECT. 1.—*Property.*

216. "Property" includes real and personal property, and the proceeds of sale thereof, respectively, and any money or investment for the time being representing such proceeds (*l*).

Meaning of "property."

"Property passing on the death" includes property passing either immediately on the death or after any interval, either

"Property passing on the death."

(*f*) Finance Act, 1894 (57 & 58 Vict. c. 30), ss. 1—4, 5 (2), (3), (5), 6—15, 16 (1), (3), (5), 17, 20—22, 24, 42, Scheds. I., II.; Finance Act, 1896 (59 & 60 Vict. c. 28), ss. 14—17, 18 (1), (3), 20—22, 24, 39—40, Sched., Part III.; Finance Act, 1898 (61 & 62 Vict. c. 10), s. 13; Finance Act, 1900 (63 & 64 Vict. c. 7), ss. 11 (1), 12—14, 18, Sched. II.; Revenue Act, 1903 (3 Edw. 7, c. 46), ss. 14, 17 (2); Finance Act, 1907 (7 Edw. 7, c. 13), ss. 12, 14—16, 30, Scheds. I., III.; Finance (1909-10) Act, 1910 (10 Edw. 7, c. 8), ss. 54—56 (1), 57, 59—61 (1), (2), (5), 62—64, 95, 96 (1), (3), Scheds. II., VI. The Finance Act, 1894 (57 & 58 Vict. c. 30), s. 23, and the Finance Act, 1900 (63 & 64 Vict. c. 7), s. 11 (2), contain provisions affecting Scotland exclusively. The Finance (1909-10) Act, 1910 (10 Edw. 7, c. 8), s. 61 (1), (3), (4), contains provisions affecting Ireland exclusively. The Finance Act, 1894 (57 & 58 Vict. c. 30), ss. 1—24, is referred to as the "Principal Act" (Finance Act, 1896 (59 & 60 Vict. c. 28), s. 24 (2); Finance Act, 1907 (7 Edw. 7, c. 13), s. 12; Finance (1909-10) Act, 1910 (10 Edw. 7, c. 8), s. 54; and the Finance Act, 1896 (59 & 60 Vict. c. 28), ss. 14—24, the Finance Act, 1907 (7 Edw. 7, c. 13), ss. 12—16, and the Finance (1909-10) Act, 1910 (10 Edw. 7, c. 8), ss. 54—64, are to be construed with it (Finance Act, 1896 (59 & 60 Vict. c. 28), s. 39; Finance Act, 1907 (7 Edw. 7, c. 13), s. 30 (2); Finance (1909-10) Act, 1910 (10 Edw. 7, c. 8), s. 96 (3)). "Estate duty" means estate duty under the Principal Act (Finance Act, 1894 (57 & 58 Vict. c. 30), s. 22 (1) (e)), as distinguished from the temporary estate duty under the Customs and Inland Revenue Act, 1889 (52 & 53 Vict. c. 7), ss. 5, 6.

(*g*) See pp. 192 *et seq.*, *post*.

(*h*) Finance Act, 1894 (57 & 58 Vict. c. 30), ss. 1, 2. It has been said that property only passes on death when it then changes hands (*Cowley (Earl) v. Inland Revenue Commissioners*, [1899] A. C. 198, *per* Lord MACNAGHTEN, at pp. 210, 211; *Inland Revenue Commissioners v. Priestley*, [1901] A. C. 208, *per* Lord MACNAGHTEN, at p. 213).

(*i*) Finance Act, 1894 (57 & 58 Vict. c. 30), s. 7 (10).

(*k*) *Ibid.*, s. 24. In the Finance Act, 1894 (57 & 58 Vict. c. 30), unless the context otherwise requires, the expressions "deceased" and "deceased person" mean a person dying after the 1st August, 1894 (*ibid.*, s. 22 (1) (a)). In the Finance Act, 1896 (59 & 60 Vict. c. 28), unless the context otherwise requires, those expressions mean a person dying after the 30th June, 1896 (*ibid.*, s. 24 (1) (b)); *Re Gibbs, Thorne v. Gibbs*, [1898] 1 Ch. 625).

(*l*) Finance Act, 1894 (57 & 58 Vict. c. 30), s. 22 (1) (f).

SECT. 2.
Property
which
passes.

certainly or contingently, and either originally or by way of substitutive limitation, and "on the death" includes "at a period ascertainable only by reference to the death" (*m*).

Every estate includes all income accrued upon the property comprised therein down to and outstanding at the date of the death (*n*).

SUB-SECT. 2.—Settled Property.

Meaning of
"settlement"
and "settled
property."

217. "Settled property" means property comprised in a settlement (*o*), and "settlement" means any "instrument," whether relating to real or personal property, which is a settlement within the meaning of s. 2 of the Settled Land Act, 1882 (*p*), or if it related to real property would be a settlement within the meaning of that section, and includes a settlement effected by a parol trust (*q*).

Estates in
dower or by
curtesy.

Property in which the wife or husband of a person, dying after the 1st August, 1894, takes an estate in dower or by the curtesy, or any other like estate, is regarded, for the purpose of estate duty, as if it were settled by the will of the deceased (*r*).

Lands or
chattels
inalienably
settled by Act
of Parliament
or royal grant.

Lands or chattels which are so settled, whether by Act of Parliament or royal grant, that no one of the persons successively in possession is capable of alienating them (otherwise than under the powers of sale or exchange in the Settled Land Act, 1882 (*s*)) are not, for the purpose of estate duty, regarded as settled property, even where the possessor's interest is, in law, a tenancy for life (*t*).

(*m*) Finance Act, 1894 (57 & 58 Vict. c. 30), s. 22 (1) (l); compare *A.-G. v. Gell* (1865), 3 H. & C. 615, and *Ring v. Jarman* (1872), L. R. 14 Eq. 357.

(*n*) Finance Act, 1894 (57 & 58 Vict. c. 30), s. 6 (5).

(*o*) *Ibid.*, s. 22 (1) (h).

(*p*) Settled Land Act, 1882 (45 & 46 Vict. c. 38), s. 2. A settlement within the meaning of this section is any "instrument or instruments," under or by virtue of which any land, or any estate or interest therein, stands for the time being limited to or in trust for any persons by way of succession—*i.e.*, successively upon death (*A.-G. v. Owen*, *A.-G. v. Coulson*, [1899] 2 Q. B. 253, *per* KENNEDY, J., at pp. 265, 266)—and, it has been said, includes every device known to conveyancers by which the enjoyment of estate "under the same deed or will" may be had by different persons succeeding to the estate in their order (*Lord Advocate v. Stewart's Trustees* (1899), 36 Sc. L. R. 297, *per* Lord McLAREN, at p. 300). In ascertaining the meaning of the expression "settlement" for the purpose of the estate duty, regard, it has been said, is to be had to the decisions under the Settled Land Act, 1882 (45 & 46 Vict. c. 38) (*Re Campbell*, [1902] 1 K. B. 113, C. A., *per* STIRLING, L.J., at p. 121); see title SETTLEMENTS. An estate or interest in remainder or reversion not disposed of by a settlement, and reverting to the settlor or descending to the testator's heir, is, for purposes of the Settled Land Act, 1882 (45 & 46 Vict. c. 38), an estate or interest coming to the settlor or heir under or by virtue of the settlement, and comprised in the subject of the settlement (Settled Land Act, 1882 (45 & 46 Vict. c. 38), s. 2 (2)). But, for certain purposes of the Finance Act, 1894 (57 & 58 Vict. c. 30), compare *Re Cochrane*, [1906] 2 I. R. 200, C. A., *per* HOLMES, L.J., at p. 204.

(*q*) Finance Act, 1894 (57 & 58 Vict. c. 30), s. 22 (1) (i).

(*r*) *Ibid.*, ss. 22 (1) (a), 22 (3), 24.

(*s*) Settled Land Act, 1882 (45 & 46 Vict. c. 38).

(*t*) Finance Act, 1894 (57 & 58 Vict. c. 30), s. 5 (5).

SECT. 8.—*Property which is deemed to pass.*SUB-SECT. 1.—*Meaning of "deemed to pass."*

SECT. 8.
Property
which is
deemed to
pass.

218. Certain specific descriptions of property are deemed to pass (a) on death (b). It has been said that property passing on death, and property deemed to pass, are mutually exclusive classes (c), but that property deemed to pass is to be regarded as if it in fact passed (d).

Property
"deemed to
pass."

SUB-SECT. 2.—*Property of which the Deceased was competent to dispose at his Death.*

219. Property of which the deceased was, at the time of his death, competent to dispose is deemed to pass on his death (e).

Meaning of
"competent
to dispose."

A person is deemed competent to dispose of property if he has such an estate or interest in it, or such a power or authority, as would, if he were *enr juris*, enable him to appoint or dispose of it as he thinks fit, including a tenant in tail, whether in possession or not (f). The power may be exercisable by instrument *inter vivos* or testamentary (g), or both (h).

(a) Property deemed to be included as property passing (the language of the Finance Act, 1894 (57 & 58 Vict. c. 30), s. 2 (1)), and property deemed to pass, are synonymous terms (*Inland Revenue v. Heywood-Lonsdale's Trustees* (1906), 43 Sc. L. R. 589, *per* the Lord Ordinary (JOHNSTON), at p. 591; and compare Finance Act, 1896 (59 & 60 Vict. c. 28), ss. 14, 15 (1), (4), and Finance Act, 1900 (63 & 64 Vict. c. 7), ss. 11 (1), 12 (2), where the term "deemed to pass" is used).

Property passing on death is to be deemed to include, *inter alia*, property which, in effect, would, under the law in force prior to the imposition of the estate duty, have been liable to account duty on the deceased's death, if the charge to that duty had extended to real as well as personal property, and the words "voluntary" and "voluntarily," and a reference to a "volunteer," were omitted from the charging sections (Finance Act, 1894 (57 & 58 Vict. c. 30), s. 2 (1) (c); Customs and Inland Revenue Act, 1881 (44 & 45 Vict. c. 12), s. 38 (1), (2); Customs and Inland Revenue Act, 1889 (52 & 53 Vict. c. 7), s. 11 (1)); see pp. 187—191, *post*.

The word "voluntarily" in this connection means "without consideration" (*A.-G. v. Smyth*, [1905] 2 I. R. 553, *per* PALLES, C.B., at p. 564). Dispositions of property made in consideration of marriage were, therefore, brought within the charge of estate duty, although they were not within the charge of account duty (*ibid.*, at p. 569). *Secus*, where the consideration was in money or money's worth paid to the disponent for his own use or benefit (see p. 195, *post*). By the Finance (1909-10) Act, 1910 (10 Edw. 7, c. 8), s. 59 (2), however, gifts *inter vivos* made in consideration of marriage are not property which is deemed to pass on the donor's death, at any rate where the donor died after the 29th April, 1909.

(b) Finance Act, 1894 (57 & 58 Vict. c. 30), s. 2 (1).

(c) *Cowley (Earl) v. Inland Revenue Commissioners*, [1899] A. C. 198, *per* Lord MACNAGHTEN, at p. 212.

(d) *A.-G. v. Jameson*, [1904] 2 I. R. 644, *per* PALLES, C.B., at p. 688; compare also, *A.-G. v. Robinson*, [1901] 2 I. R. 67, *per* PALLES, C.B., at p. 88.

(e) Finance Act, 1894 (57 & 58 Vict. c. 30), s. 2 (1) (a).

(f) *Ibid.*, s. 22 (2) (a); and compare *A.-G. v. Hallett* (1857), 2 H. & N. 368. It has been doubted whether a person, not a tenant in tail, can be considered as competent to dispose of property where, by going through certain forms, he might come into the position of being able to dispose of it (*Lord Advocate v. Moray's (Earl) Trustees* (1904), 41 Sc. L. R. 267, *per* Lord M'LAREN, at p. 273; see also *Inland Revenue v. Gunning's Trustees* (1907), 44 Sc. L. R. 514).

(g) Finance Act, 1894 (57 & 58 Vict. c. 30), s. 22 (1) (b).

(h) *Ibid.*, s. 22 (3) (a).

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Property
which is
deemed to
pass.

Money which a person, under such a power or authority, can charge on property of another person (*i*), is deemed to be property of which he has power to dispose (*k*).

A power exercisable in a fiduciary capacity under a disposition not made by the deceased himself, or exercisable by him as tenant for life under the Settled Land Act, 1882 (*l*), or as mortgagee, does not confer competency to dispose (*m*).

A disposition taking effect out of the interest of a deceased person is deemed to have been made by him, whether the concurrence of any other person was or was not required (*n*).

An interest in expectancy of which the deceased was competent to dispose is deemed to pass on his death (*o*).

The expression "interest in expectancy" includes an estate in remainder or reversion, and every other future interest, whether vested or contingent (*p*). It does not, however, include reversions expectant upon the determination of leases (*p*).

Property which accrues to a deceased person's estate under a gift in the will of an ancestor who survived him, but which gift, by reason of such person having left issue, one at least of whom survives such ancestor, does not fail (*q*), is property of which the deceased was, at the time of his death, competent to dispose (*r*).

SUB-SECT. 3.—Property in which an Interest was limited to cease on the Deceased's Death.

Release of life
interest to
remainder-
man.

220. Property in which the deceased or any other person had an interest (*s*), of definite amount (*t*), ceasing on the deceased's death, is deemed to pass on the death to the extent to which the interest extended to the income of the property (*a*).

Property in which the deceased person or any other person had an estate or interest limited to cease on the death of the deceased is also deemed to pass on that death, notwithstanding that the estate etc. has been surrendered, assured, divested, or

(*i*) *Lord Advocate v. Moray's (Earl) Trustees* (1904), 41 Sc. L. R. 267, *per* the Lord Ordinary (STORMONTH DARLING), at p. 271.

(*k*) Finance Act, 1894 (57 & 58 Vict. c. 30), s. 22 (2) (*c*).

(*l*) 45 & 46 Vict. c. 38.

(*m*) Finance Act, 1894 (57 & 58 Vict. c. 30), s. 22 (2) (*a*).

(*n*) *Ibid.*, s. 22 (2) (*b*).

(*o*) Compare *ibid.*, ss. 5 (3), 7 (6); *Inland Revenue Commissioners v. Priestley*, [1901] A. C. 208, *per* Lord MACNAGHTEN, at p. 213.

(*p*) Finance Act, 1894 (57 & 58 Vict. c. 30), s. 22 (1) (*j*).

(*q*) Wills Act, 1837 (7 Will. 4 & 1 Vict. c. 26), s. 33.

(*r*) *Re Scott*, [1901] 1 K. B. 228, O. A. Seemingly such property, although in truth a mere *spes successionis*, is to be regarded as an interest in expectancy (S. C., [1900] 1 Q. B. 372, *per* CHANNELL, J., at p. 388).

(*s*) It has been said that the interest may be that of a trustee (*H. M. Advocate v. McTaggart Stewart* (1906), 43 Sc. L. R. 466, *per* the Lord President (Lord DUNEDIN), at p. 473 (an accumulated fund under the will of a testator dying before the Finance Act, 1894 (57 & 58 Vict. c. 30))).

(*t*) *A.-G. v. Power*, [1906] 2 I. R. 272, 280 (a discretionary trust).

(*a*) Finance Act, 1894 (57 & 58 Vict. c. 30), ss. 2 (1) (*b*), 7 (7); *Inland Revenue v. Macdonald* (1899), 38 Sc. L. R. 727; *Lord Advocate v. Henderson's Trustees* (1905), 42 Sc. L. R. 720.

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Property
which is
deemed to
pass.

otherwise disposed of, whether for value or not, to or for the benefit of any person entitled to an estate or interest in remainder or reversion in the property, unless the surrender etc. was *bonâ fide* (b) made or effected three years before the death of the deceased, and *bonâ fide* possession and enjoyment of the property was assumed thereunder immediately upon the surrender etc., and thenceforward retained to the entire exclusion of the person who had the estate etc. so limited to cease, and of any benefit to him by contract or otherwise (c).

In the case of surrenders etc. effected for public or charitable purposes, the period, however, is twelve calendar (d) months, and not three years (e).

In order that the property may be deemed to pass on the deceased's death, it seems that there must be an enforceable right in the surrenderor etc. to non-exclusion or to a benefit (f), and that where the property surrendered etc. can properly be regarded as indivisible, any retainer, or enjoyment, or any benefit, provided that, in either case, it is enforceable, will avoid the whole claim for exception (g).

SUB-SECT. 4.—*Gifts Mortis causâ and Inter vivos.*

221. Property taken as a donation *mortis causâ* is deemed to pass on the donor's death (h). Donationes
mortis causâ.

(b) See p. 188, and note (f), p. 210, *post*, as to the meaning of *bonâ fide*.

(c) Finance Act, 1900 (63 & 64 Vict. c. 7), s. 11 (1); Finance (1909-10) Act, 1910 (10 Edw. 7, c. 8), s. 59 (1). The death must be after the 31st March, 1900 (Finance Act, 1900 (63 & 64 Vict. c. 7), s. 11 (1)). If the death is before the 30th April, 1909, the period is twelve months, and not three years (*ibid*); and it is so also where the surrender etc. was effected before the 30th April, 1908 (Finance (1909-10) Act, 1910 (10 Edw. 7, c. 8), s. 59 (1)). Prior to the Finance Act, 1900 (63 & 64 Vict. c. 7), s. 11 (1), where a life interest was surrendered, to the entire exclusion of the surrenderor, the duty was not chargeable (*A.-G. v. Beech*, [1899] A. C. 53), even where the surrender was effected within a year of the surrenderor's death (*A.-G. v. De Préville*, [1900] 1 Q. B. 223, C. A.).

(d) Interpretation Act, 1889 (52 & 53 Vict. c. 63), s. 3.

(e) Finance (1909-10) Act, 1910 (10 Edw. 7, c. 8), s. 59 (1), even where the death is after the 29th April, 1909 (*ibid*).

(f) *H. M. Advocate v. M'Taggart Stewart* (1906), 43 Sc. L. R. 465. The question is, was the deceased the old proprietor retaining a benefit of his old estate, or was he a guest getting as a guest what the new proprietor chose to give him (*per* the Lord President (Lord DUNEDIN), at p. 474). This case, however, was argued and decided upon certain admissions, and was prior to the Revenue Act, 1906 (6 Edw. 7, c. 20), s. 12, which repealed the Exchequer Court (Scotland) Act, 1856 (19 & 20 Vict. c. 56), s. 43, by which the defendant in a Scottish case of Inland Revenue was precluded from giving evidence, and could not, therefore, be interrogated. The question whether, to involve the payment of duty, the non-exclusion or benefit is of necessity enforceable is perhaps, therefore, still in doubt.

(g) *H. M. Advocate v. M'Taggart Stewart* (1906), 43 Sc. L. R. 465, *per* the Lord Ordinary (PEARSON), at p. 471. See also p. 189, *post*, and the cases there cited, as to *inter vivos* gifts not to the entire exclusion of the donor.

(h) Finance Act, 1894 (57 & 58 Vict. c. 30), s. 2 (1) (o); Customs and Inland Revenue Act, 1881 (44 & 45 Vict. c. 12), s. 38 (2) (a). There can be no such gift of real or leasehold property (compare *Richards v. Syme* (1740), Barn. (OH.) 90, *per* Lord HARDWICKE, L.C., at p. 93; discussed in *Duffield v. Elwes* (1827), 1 Blf. (N. S.) 497, *per* Lord ELDON, L.C., at p. 539). Where the donor died after the

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Property
which is
deemed to
pass.

Immediate
gifts *inter*
vivos.

222. Property taken under a disposition purporting to operate as an immediate gift *inter vivos*, if it was not *bonâ fide* made, that is, as a real transaction intended to have operative effect (i), three years before the donor's death, is also deemed to pass on the death (k).

In the case of gifts made for public or charitable purposes, the period, however, is twelve months, and not three years (l).

A gift may be *bonâ fide* although it is made to avoid death duties (m). It need not be made in contemplation of death at all (n), but it must, seemingly, be of property which, if it had not been given, would have been chargeable with estate duty as part of the donor's estate (o).

The disposition may be by way of transfer, delivery, declaration of trust, settlement upon persons in succession (p), or otherwise (q).

A gift may be liable to duty although made in pursuance of an antecedent moral (r) or enforceable voluntary (s) obligation, and, in

31st May, 1881, but before the 2nd August, 1894, account duty is chargeable (Customs and Inland Revenue Act, 1881 (44 & 45 Vict. c. 12), s. 38 (2) (a)).

(i) See note (f), p. 210, *post*.

(k) Finance Act, 1894 (57 & 58 Vict. c. 30), s. 2 (1) (c); Customs and Inland Revenue Act, 1881 (44 & 45 Vict. c. 12), s. 38 (2) (n); Customs and Inland Revenue Act, 1889 (52 & 53 Vict. c. 7), s. 11 (1) (first branch); Finance (1909-10) Act, 1910 (10 Edw. 7, c. 8), s. 59 (1). If the donor's death was before the 30th April, 1909, the period is twelve months, and not three years (Finance Act, 1894 (57 & 58 Vict. c. 30), s. 2 (1) (c)); and it is so also where the gift was effected before the 30th April, 1908 (Finance (1909-10) Act, 1910 (10 Edw. 7, c. 8), s. 59 (1)). It has been said that "gift" is to be construed in the broad sense of *res data*, and not in the narrower and stricter sense of *res donata* (*H. M. Advocate v. Heywood-Lonsdale's Trustees* (1906), 43 Sc. L. R. 529, *per* the Lord President (Lord DUNEDIN), at p. 533; see also *A.-G. v. Smyth*, [1905] 2 I. R. 553, *per* PALLES, C.B., at p. 571). Personal property taken as an immediate gift *inter vivos*, within three months of the death (extended to twelve months by the Customs and Inland Revenue Act, 1889 (52 & 53 Vict. c. 7), s. 11 (1)), where the donor died after the 31st May, 1881, but before the 2nd August, 1894, is chargeable with account duty (Customs and Inland Revenue Act, 1881 (44 & 45 Vict. c. 12), s. 38 (2) (a)).

(l) Finance (1909-10) Act, 1910 (10 Edw. 7, c. 8), s. 59 (1), even where the death is after the 29th April, 1909 (*ibid.*).

(m) *A.-G. v. Richmond and Gordon (Duke)*, [1909] A. C. 466.

(n) *A.-G. v. Booth* (1894), 63 L. J. (Q. B.) 356; *A.-G. v. Richmond and Gordon (Duke)*, [1909] A. C. 466, *per* Lord ATKINSON, at p. 475.

(o) *A.-G. v. De Preville*, [1900] 1 Q. B. 223, C. A. (release of a life interest).

(p) *Miles v. R.* (1897), 41st Report of the Commissioners of Inland Revenue, 167, following *A.-G. v. Jacobs Smith*, [1895] 2 Q. B. 341, 353, O. A.; *A.-G. v. Smyth*, [1905] 2 I. R. 553; *H. M. Advocate v. Heywood-Lonsdale's Trustees*, *supra*; *Inland Revenue v. Heywood-Lonsdale's Trustees* (1906), 43 Sc. L. R. 589. See also *Wheeler v. Humphreys*, [1898] A. C. 506, *per* Lord MACNAGHTEN, at p. 509.

(q) Finance Act, 1894 (57 & 58 Vict. c. 30), s. 2 (1) (c); Customs and Inland Revenue Act, 1881 (44 & 45 Vict. c. 12), s. 38 (2) (a); Customs and Inland Revenue Act, 1889 (52 & 53 Vict. c. 7), s. 11 (1) (first branch).

(r) *A.-G. v. Chamberlain* (1904), 90 L. T. 581.

(s) *A.-G. v. Cobham (Viscount)* (1904), 90 L. T. 816; *H. M. Advocate v. Heywood-Lonsdale's Trustees* (1906), 43 Sc. L. R. 529. Gifts in consideration of marriage were made chargeable with estate duty by the Finance Act, 1894 (57 & 58 Vict. c. 30), s. 2 (1) (c); see *A.-G. v. Holden*, [1903] 1 K. B. 832; *A.-G. v. Smyth*, [1905] 2 I. R. 553. It was otherwise in the case of account duty,

the latter case, not the less so by reason of its purporting to be made in consideration of the release of the prior obligation (*t*).

The donee may be a member of a restricted class in whose favour the donor has acquired the right to make gifts out of another's property (*u*), and, seemingly, whether such right was acquired by purchase or gratuitously (*a*).

SECT. 3.
Property
which is
deemed to
pass.

223. Property taken under any gift, whenever made, is deemed to pass on the donor's death, if *bonâ fide* (*b*) possession and enjoyment of it was not immediately assumed by the donee, and thenceforward retained to the entire exclusion of the donor, or of any benefit to him by contract or otherwise (*c*).

Gifts, when-
ever made,
where donor
not entirely
excluded.

The right to possess under the terms of a gift is not possession (*d*); and it is payment, and not the obligation to pay, which confers enjoyment (*e*).

The possession and enjoyment, seemingly, may be assumed by the donee in the ordinary course of business, provided that the donor does not by any collusion, trick, or undue delay continue to enjoy the use of or take any benefit from the property (*f*).

If the non-exclusion of, or benefit to, the donor extends to, or overrides, the whole subject-matter of the gift, the whole is chargeable with estate duty (*g*). But where the reservation can be

where the donor died after the 31st May, 1881, but before the 2nd August, 1894; and by the Finance (1909-10) Act, 1910 (10 Edw. 7, c. 8), s. 59 (2), such gifts are not deemed to pass on the donor's death, at any rate where the death was after the 29th April, 1909.

(*t*) *A.-G. v. Cobham (Viscount)* (1904), 90 L. T. 816.

(*u*) *Inland Revenue v. Heywood-Lonsdale's Trustees* (1906), 43 Sc. L. R. 589.

(*a*) *Ibid.*, per the Lord Ordinary (JOUNSTON), at p. 591.

(*b*) See note (*f*), p. 210, *post*.

(*c*) Finance Act, 1894 (57 & 58 Vict. c. 30), s. 2 (1) (*c*); Customs and Inland Revenue Act, 1881 (44 & 45 Vict. c. 12), s. 38 (2) (*a*); Customs and Inland Revenue Act, 1889 (52 & 53 Vict. c. 7), s. 11 (1) (first branch). To escape the duty, the deceased must be excluded both from the possession and enjoyment of the property and from any benefit (*A.-G. v. Grey (Earl)*, [1898] 2 Q. B. 534, C. A., per A. L. SMITH, L.J., at p. 541). As to what is not possession and enjoyment, see *A.-G. v. Waghorn* (1909), *Times*, 6th February. Where the donor died after the 31st May, 1889, but before the 2nd August, 1894, and the gift was of personal property, account duty is chargeable (Customs and Inland Revenue Act, 1889 (52 & 53 Vict. c. 7), s. 11 (1)).

(*d*) *H. M. Advocate v. M'Taggart Stewart* (1906), 43 Sc. L. R. 465, per the Lord President (Lord DUNEDIN), at p. 474.

(*e*) *H. M. Advocate v. Heywood-Lonsdale's Trustees* (1906), 43 Sc. L. R. 529, per the Lord Ordinary (PEARSON), at p. 532.

(*f*) *Matheson v. Inland Revenue Commissioners* (1898), 14 Sheriff Court Reports, 156 (payment made when donor called on her agent to settle money matters with him, three months after the date when the gift purported to be made).

(*g*) *Grey (Earl) v. A.-G.*, [1900] A. C. 124 (reservation to the donor of an annuity less than the income of the property given, and a power of revocation of the gift in certain events, namely, the donee's death in the donor's lifetime, or failure by the donee to perform certain covenants, including a covenant to pay the donor's debts out of the property; the power of revocation was released within a year of the donor's death). Where what was reserved is released outside the period preceding the donor's death within which enjoyment by the donor involves payment of duty, the gift is not deemed to pass on the donor's death (Finance (1909-10) Act, 1910 (10 Edw. 7, c. 8), s. 59 (3)), at any rate where he died after the 29th April, 1909.

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Property
which is
deemed to
pass.

considered as extending to a part only of the subject-matter, then, seemingly, only that part is chargeable with the duty (*h*).

The benefit need not be reserved out of the subject-matter of the gift, but may be secured only by the donee's personal covenant (*i*).

A transaction does not cease to be a gift merely because the annual benefit secured to the donor is greater than the interest on the property comprised in the gift at the rate obtainable on trust investments, or because the annual payment to the donor is to be continued by the donee to a third person after the donor's death (*k*).

A contingent reversion, reserved to the donor, in the *corpus* of property given upon trusts is not reserved out of the gift, but is something not comprised in the gift (*l*).

Policy
moneys.

224. Money received under a policy of assurance effected by any person on his life, where the policy is wholly kept up by him for the benefit of a designated (*m*) donee, whether nominee or assignee, or a part of such money in proportion to the premiums paid by him, where the policy is partially kept up by him for such benefit, is deemed to pass on the assured's death (*n*).

The liability to duty is independent of the existence of any obligation upon the assured to keep up the policy, or of any arrangement between him and any other person in relation thereto (*o*).

SUB-SECT. 5.—Settlements with Reservation.

Reservations
to settlor.

225. Property passing under (*p*) any settlement effected by any instrument not taking effect as a will, whereby an interest in the property, or the proceeds of the sale of it, for life or any other period determinable by reference to death (*q*), is reserved either expressly or by implication to the settlor, or whereby the settlor may have reserved to himself the right, by the exercise of any power, to restore to himself, or to reclaim the absolute interest in

(*h*) *A.-G. v. Grey (Earl)*, [1898] 1 Q. B. 318, *per* CHANNELL, J., at p. 325; see also *Re Cochrane*, [1905] 2 I. R. 626, *per* KENNY, J., at p. 643.

(*i*) *A.-G. v. Worrall*, [1895] 1 Q. B. 99, C. A.

(*k*) *A.-G. v. Johnson*, [1903] 1 K. B. 617, C. A.; and compare *Lord Advocate v. M'Kersies* (1881), 19 Sc. L. R. 438; *Crossman v. R.* (1886), 18 Q. B. D. 256; *Lord Advocate v. Wilsons* (1894), 31 Sc. L. R. 819.

(*l*) *Re Cochrane*, [1906] 2 I. R. 200, C. A.

(*m*) *Lord Advocate v. Fleming*, [1897] A. C. 145.

(*n*) Finance Act, 1894 (57 & 58 Vict. c. 30), s. 2 (1) (*c*); Customs and Inland Revenue Act, 1889 (52 & 53 Vict. c. 7), s. 11 (1) (fourth branch); see also p. 192, *post*. Where the assured died after the 31st May, 1889, but before the 2nd August, 1894, account duty is chargeable (Customs and Inland Revenue Act, 1889 (52 & 53 Vict. c. 7), s. 11 (1)).

(*o*) *A.-G. v. Robinson*, [1901] 2 I. R. 67, *per* PALLES, C.B., at p. 90.

(*p*) It has been said that the expression "passing under," in this connection, is not a phrase of art, but is of a comprehensive nature (*A.-G. v. Chapman*, [1891] 2 Q. B. 526, *per cur.*, at p. 532; approved *A.-G. v. Wendt* (1895), 43 W. R. 701, *per cur.*, at p. 703); and that the word "passing" is at least equivalent to and co-extensive with "disposition" (*A.-G. v. Riall*, [1906] 2 I. R. 122, *per* PALLES, C.B., at p. 133).

(*q*) *I.e.*, the "life" and "death" of the settlor (*Re Cochrane*, [1905] 2 I. R. 626, *per* PALLES, C.B., at p. 634).

the property, or the proceeds of the sale of it, is deemed to pass on the settlor's death (r).

The expression "settlement," in this connection, includes any trust, whether expressed in writing or otherwise, in favour of any person, and, if contained in an instrument effecting the settlement, whether the instrument was made for valuable consideration(s) or not as between the settlor and any other person (t).

Where a person has reserved a general power of appointment, as well as a life interest, and the power is exercised, the appointment is, by the general rule of law, to be read into the settlement creating the power, with the result that the appointed property "passes under" the settlement (a).

It is enough for an interest of some sort to be reserved (b), and it may be kept, provided for, or secured to the settlor in any way (c).

SUB-SECT. 6.—*Joint Investments.*

226. Property which a person, having been absolutely entitled thereto, has caused to be transferred to or vested in himself and any other person jointly, whether by disposition or otherwise, including any purchase or investment effected by the person who was absolutely entitled to the property, either by himself alone, or in concert, or by arrangement (d), with any other person, so that the beneficial interest in the property, or in some part of it, passes

SECT. 3.
Property
which is
deemed to
pass.

Investments
in joint
names.

(r) Finance Act, 1894 (57 & 58 Vict. c. 30), s. 2 (1) (c); Customs and Inland Revenue Act, 1881 (44 & 45 Vict. c. 12), s. 38 (2) (c); *Grey (Earl) v. A.-G.*, [1900] A. C. 124. Where the settlor died after the 31st May, 1881, but before the 2nd August, 1894, and the settlement was voluntary, and of personal property, account duty is chargeable (Customs and Inland Revenue Act, 1881 (44 & 45 Vict. c. 12), s. 38 (2) (c)). As to what constitutes a voluntary settlement in this connection, see *Crosseman v. R.* (1886), 18 Q. B. D. 256.

(s) Compare *A.-G. v. Jacobs Smith*, [1895] 2 Q. B. 341, C. A.; and *A.-G. v. Rathdonnell (Lord)* (1893), 32 L. R. Ir. 574.

(t) Customs and Inland Revenue Act, 1889 (52 & 53 Vict. c. 7), s. 11 (1) (third branch). A similar extension of the meaning of "voluntary settlement" to trusts, in general, in favour of volunteers was enacted, in the case of account duty, by the Customs and Inland Revenue Act, 1889 (52 & 53 Vict. c. 7), s. 11 (1); see *A.-G. v. Jacobs Smith*, *supra*; *A.-G. v. Chapman*, [1891] 2 Q. B. 526; *De Mestre v. West*, [1891] A. C. 264, P. C.; *A.-G. v. Rathdonnell (Lord)*, *supra*.

(a) *A.-G. v. Chapman*, *supra*.

(b) *Crosseman v. R.*, *supra* (transfer of shares in partnership in consideration of an annuity equal to 4 per cent. upon the value of the shares to transferor for his life, and secured by the personal covenant of transferee); *Lord Advocate v. Wilsons* (1894), 31 Sc. L. R. 819 (ditto 5 per cent.); *A.-G. v. Gosling*, [1892] 1 Q. B. 545 (appointment, to one of a limited class, of share in partnership, at appointor's death); *A.-G. v. Wendt* (1895), 43 W. R. 701 (annuity, out of gross profits, to be paid to widow of deceased partner, by surviving partner, who acquired the deceased's share on his death, under the partnership deed); *A.-G. v. Heywood* (1887), 19 Q. B. D. 326, 332 (discretionary trust of income in favour of settlor and others during his life).

(c) *A.-G. v. Gosling*, *supra*, *per cur.*, at p. 549.

(d) The words "in concert" etc. would appear to point to the existence of some contractual obligation (*A.-G. v. Ellis*, [1895] 2 Q. B. 466, *per cur.*, at p. 470). It has, however, been said that *Savoy Overseers v. Art Union of London*, [1896] A. C. 296 (a case on the Scientific Societies Act, 1843 (6 & 7 Vict. c. 36), s. 1) has deprived *A.-G. v. Ellis*, *supra*, of all authority (*A.-G. v. Smyth*, [1905] 2 I. R. 553, *per PALLES*, C.B., at p. 564).

SECT. 3.

**Property
which is
deemed to
pass.**

Annuity or
other interest
purchased or
provided by
the deceased.

or accrues by survivorship on his death to the other person, is deemed to pass on the death (e).

SUB-SECT. 7.—Interests arising on Death.

227. Any annuity or other interest in property (f), including moneys payable under a policy of life insurance (g), purchased or provided by the deceased (h), either by himself alone (i), or in concert or by arrangement (k) with any other person (l), to the extent of the beneficial interest accruing or arising (m), by survivorship or otherwise, on the deceased's death, is deemed to pass on his death (n).

SECT. 4.—Exceptions from the Charge of Duty.**SUB-SECT. 1.—Foreign Property.**

Test of
liability.

228. Property passing on the death of the deceased, when situate out of the United Kingdom, is included within the charge of duty only if, under the law in force before the imposition of the estate

(e) Finance Act, 1894 (57 & 58 Vict. c. 30), s. 2 (1) (c); Customs and Inland Revenue Act, 1881 (44 & 45 Vict. c. 12), s. 38 (2) (b); Customs and Inland Revenue Act, 1889 (52 & 53 Vict. c. 7), s. 11 (1) (second branch). Where the deceased person, who made such an investment of personal property, died after the 31st May, 1881, but before the 2nd August, 1894, account duty is chargeable (Customs and Inland Revenue Act, 1881 (44 & 45 Vict. c. 12), s. 38 (2) (b); extended to such investments made in concert or by arrangement with any other person by the Customs and Inland Revenue Act, 1889 (52 & 53 Vict. c. 7), s. 11 (1)).

(f) *A.-G. v. Robinson*, [1901] 2 I. R. 67, per PALLIS, C.B., at p. 89.

(g) *Ibid.*, at p. 90; *A.-G. v. Hawkins*, [1901] 1 K. B. 285, per KENNEDY, J., at p. 292; *A.-G. v. Murray*, [1904] 1 K. B. 165, O. A., per cur., at p. 172; *A.-G. v. Lethbridge*, [1905] 2 K. B. 323, O. A., per cur., at p. 332. Compensation for death payable either under the Employers' Liability Act, 1880 (43 & 44 Vict. c. 42), or under the Workmen's Compensation Act, 1906 (6 Edw. 7, c. 58), would not appear to involve the payment of estate duty in connection with the death.

(h) It has been said that the provision must be the deceased's gift, or at his cost (*Lethbridge v. A.-G.*, [1907] A. C. 19, per Lord MACNAGHTEN, at p. 25), by a subtraction from his means during life (*ibid.*, per Lord LOREBURN, L.C., at p. 23). An interest provided at the cost of a third person is, therefore, outside the enactment (*A.-G. v. Murray*, *supra*), although, in the case of policy moneys, the fact that the insurer had no insurable interest in the assured's life (compare Life Assurance Act, 1774 (14 Geo. 3, c. 48)), would not, of itself, if the insurance company in fact paid the moneys, be an objection to the claim (*A.-G. v. Murray*, *supra*, per cur., at p. 172).

(i) *A.-G. v. Dobree*, [1900] 1 Q. B. 442 (deceased settled a policy and paid the premiums).

(k) See note (d), p. 191, *ante*.

(l) *A.-G. v. Robinson*, [1901] 2 I. R. 67; explained, *Richardson v. Inland Revenue Commissioners*, [1909] 2 I. R. 597, per PALLIS, C.B., at p. 624 (deceased, on his marriage, settled a policy, and the premiums, by arrangement with his wife, were paid out of the income of property settled by her on him for life, and to which, apart from the settlement, he would have been entitled in his marital right). See also *A.-G. v. Murray*, *supra*, as to distinction between "provided by the deceased in concert with any other person" and "provided by any other person in concert with the deceased."

(m) It has been said that this enactment aims at property which springs up upon the death, and then vests in another, although previously it had not been existing in anyone (*A.-G. v. Robinson*, *supra*, per PALLIS, C.B., at p. 90).

(n) Finance Act, 1894 (57 & 58 Vict. c. 30), s. 2 (1) (d).

duty, legacy duty (*o*) or succession duty (*p*) is payable in respect of it, or would be so payable but for the relationship of the person to whom it passes (*q*).

Foreign bonds to bearer, locally situate in England, are personal property in England, notwithstanding that they contain a charge upon foreign real property (*r*).

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Exceptions
from the
Charge of
Duty.

SUB-SECT. 2.—*Trust Property.*

229. Property passing on the death of the deceased is not deemed to include property held by him as trustee for another person, under a disposition not made by the deceased, or under a disposition made by him more than three years before his death, where possession and enjoyment of the property was *bonâ fide* (*s*) assumed by the beneficiary immediately upon the creation of the trust, and thenceforward retained to the entire exclusion of the deceased, or of any benefit to him by contract or otherwise (*a*).

Property
held by the
deceased as
trustee.

SUB-SECT. 3.—*Settled Property in which the Interest failed before Possession.*

230. In the case of settled property, where the interest of any person under the settlement fails or determines by reason of his death before it becomes an interest in possession, as distinguished from remainder or reversion (*b*), and one or more (*c*) subsequent limitations under the settlement continue to subsist (*d*), the property is not deemed to pass on his death (*e*).

Failure of
interest where
subsequent
limitations
under the
settlement
continue to
subsist.

(*o*) See p. 238, *post*.

(*p*) See p. 273, *post*.

(*q*) Finance Act, 1894 (57 & 58 Vict. c. 30), s. 2 (2); see also *Winans v. A.-G.*, [1910] A. C. 27, 45.

(*r*) *A.-G. v. Glendining* (1904), 92 L. T. 87; *Winans v. A.-G.*, *supra*. As to a mortgage debt on immovable property out of the United Kingdom, see *Lawson v. Inland Revenue Commissioners*, [1896] 2 I. R. 418; compare also *Payne v. R.*, [1902] A. C. 552, P. C.

(*s*) See note (*f*), p. 210, *post*.

(*a*) Finance Act, 1894 (57 & 58 Vict. c. 30), s. 2 (3); Finance (1909-10) Act, 1910 (10 Edw. 7, c. 8), s. 59 (1). In the case of deaths before the 30th April, 1909, the period is twelve months (*ibid.*). See also *H. M. Advocate v. Gunning's Trustees* (1902), 39 Sc. L. R. 534 (a donor granted interest-bearing bonds by way of gift, and the bonds remained unpaid at the donor's death; they were held not to be property held by the debtor as trustee for his creditor).

(*b*) *A.-G. v. Power*, [1906] 2 I. R. 272 (a vested interest in the deceased in fee, divested by his death under a specified age, where he was not entitled to the income, the trustees having a discretionary power as to its application, was not a beneficial interest in possession: *sed qu.*, per PALLES, C.B., at p. 280, whether estate duty is not payable on the cesser of the actual income applied).

(*c*) *A.-G. v. Wood*, [1897] 2 Q. B. 102.

(*d*) *I.e.*, at the time of the death of the person whose interest fails (*A.-G. v. Glossop*, [1907] 1 K. B. 163, C. A., per COZENS-HARDY, L.J., at p. 177, and per FARWELL, L.J., at p. 180). A limitation to a person absolutely is a limitation which continues to subsist (*A.-G. v. Wood*, *supra*, per VAUGHAN WILLIAMS, J., at p. 109; *A.-G. v. Glossop*, *supra*, per FARWELL, L.J., at p. 180; see also *Re Finance Act, 1894, and Studdert*, [1900] 2 I. R. 281, per GIBSON, J., at p. 296). It has, however, been said, although not on the construction of this sub-section, that a settlement is at an end when the settled property is absolutely vested in possession (*Re Mundy and Roper's Contract*, [1899] 1 Ch. 275, C. A., per LINDLEY, M.R., and CHITTY, L.J., at p. 297; *A.-G. v. Beech*, [1899] A. C. 53, per Lord DAVEY, at p. 60).

(*e*) Finance Act, 1894 (57 & 58 Vict. c. 30), s. 5 (3).

SECT. 4.

Exceptions from the Charge of Duty.

Enlargement of life interest into an absolute interest.

231. Where property is settled by a person on himself for life (*f*), and after his death on any other persons, with an ultimate reversion of an absolute interest or absolute power of disposition to the settlor, the property is not deemed to pass to the settlor on the death of any such other person, by reason only that the settlor, being then in possession of the property, as tenant for life, becomes, in consequence of such death, entitled to the immediate reversion, or acquires an absolute power to dispose of the whole property (*g*). It is so, also, where the enlargement of interest etc. is acquired by any person other than the settlor (*h*).

SUB-SECT. 4.—*Property reverting to Disposer.*

Reverter to disposer,

232. Where by a disposition of any property an interest is conferred on any person, other than the disposer, for the life of such person or determinable on his death, and such person enters into possession of the interest, and thenceforward retains possession of it to the entire exclusion of the disposer, or of any benefit to him by contract or otherwise, and the only benefit (*i*) which the disposer retains in the property is subject to such life or determinable interest, and no other interest, even contingent (*k*), is created by the disposition, then, on the death of such person, the property is not deemed to pass by reason only of its reverter to the disposer in his lifetime (*l*).

It is so, also, where any such interest is conferred on two or more persons, either severally or jointly, or in succession (*m*).

But it is not so where the person or persons taking the life etc. interest had at any time prior to the disposition been competent to dispose of the property (*n*).

Income of settled property acquired on death of spouse.

233. Where a husband or wife is entitled, either solely or jointly with the other, to the income of any property settled by the other, under a disposition which took effect before the 2nd August, 1894, and on his or her death the survivor becomes entitled to the

(*f*) Joint lives, *semble*, otherwise (*A.-G. v. Glossop*, [1907] 1 K. B. 163, C. A., *per* COZENS-HARDY, L.J., at p. 177).

(*g*) Finance Act, 1896 (59 & 60 Vict. c. 28), s. 14. The death, in terms of the Act, must be after the 30th June, 1896 (*ibid.*, s. 24 (1)); but see next note.

(*h*) *A.-G. v. Wood*, [1897] 2 Q. B. 102. It seems that the exception in the Finance Act, 1896 (59 & 60 Vict. c. 28), s. 14, is included in the wider exception in the Finance Act, 1894 (57 & 58 Vict. c. 30), s. 5 (3).

(*i*) *A.-G. v. Penrhyn* (1900), 83 L. T. 103; *A.-G. v. Glossop*, [1907] 1 K. B. 163, C. A.; compare also *Re Cochrane*, [1906] 2 I. R. 200, C. A.

(*k*) *A.-G. v. Penrhyn*, *supra*; *A.-G. v. Glossop*, *supra*.

(*l*) Finance Act, 1896 (59 & 60 Vict. c. 28), s. 15 (1). The death must be after the 30th June, 1896 (*ibid.*, s. 24 (1)). Where executors to meet an annuity set aside a capital sum, as an administrative act, without direction in the will, it seems that, on the annuitant's death, no estate duty is chargeable in respect of the acquisition of the capital sum, in point of beneficial enjoyment, by the persons entitled under the will (*A.-G. v. Hannen* (1904), 48th Report of the Commissioners of Inland Revenue, 121, *per* CHANNELL, J.).

(*m*) Finance Act, 1896 (59 & 60 Vict. c. 28), s. 15 (2). The exemption has been held to apply on the first death (*Watson v. Inland Revenue Commissioners* (1900), 16 Sheriff Court Reports, 235).

(*n*) Finance Act, 1896 (59 & 60 Vict. c. 28), s. 15 (3).

income of the property, as distinguished from the property itself (o), settled by the survivor, estate duty is not payable in respect of that property until the death of the survivor (p).

Where the deceased was entitled by law to the rents and profits of any real or leasehold property (q) of his wife, and has died in her lifetime, the property is not deemed to pass on his death by reason of her then becoming entitled to the property in virtue of her former interest (r).

SECT. 4.
Exceptions from the Charge of Duty.

Wife's real or leasehold property.

SUB-SECT. 5.—Where Money Consideration given.

234. Estate duty is not payable in respect of property passing on the death of the deceased by reason only of a *bonâ fide* purchase (s) from the person under whose disposition the property passes, nor in respect of the falling into possession of the reversion on any lease for lives, nor in respect of the determination of any annuity for lives, where the purchase was made or the lease etc. granted for full consideration (t) in money or money's worth paid to the vendor or grantor for his own use or benefit, or, in the case of a lease, for the use or benefit of any person for whom the grantor was a trustee (a).

Bonâ fide purchase for full consideration in money.

Where any such purchase was made, or lease etc. granted, for partial consideration in money or money's worth, paid as above, the value of the consideration is allowed as a deduction from the value of the property (b).

Bonâ fide purchase for partial consideration.

A *bonâ fide* purchase is one which is not fraudulent or unreal, and the consideration, which was in fact the whole consideration, is the full consideration, even if on the face inadequate (c).

If the consideration comprises something in addition to

(o) *A.-G. v. Strange*, [1898] 2 Q. B. 39, C. A.

(p) Finance Act, 1894 (57 & 58 Vict. c. 30), s. 21 (5).

(q) *I.e.*, real property as defined by the Succession Duty Act, 1853 (16 & 17 Vict. c. 51), s. 1; see p. 263, *post*.

(r) Finance Act, 1896 (59 & 60 Vict. c. 28), s. 15 (4). The death must be after the 30th June, 1896 (*ibid.*, s. 24 (1)).

(s) A change of security is not a purchase (*A.-G. v. Smith-Marriott*, [1899] 2 Q. B. 695).

(t) Compare *Lethbridge v. A.-G.*, [1907] A. C. 19.

(a) Finance Act, 1894 (57 & 58 Vict. c. 30), s. 3 (1). As to what is not consideration in money etc., see *A.-G. v. Cobham (Viscount)* (1904), 90 L. T. 816 (payment within twelve months of death of sum covenanted to be paid by way of gift at death); *H. M. Advocate v. Heywood-Lonsdale's Trustees* (1906), 43 Sc. L. R. 529 (*ditto*); *Re Clark* (1906), 40 I. L. T. 117 (gift of partnership business).

It has been said that the principle of this provision is that property purchased for a price in money etc. is not to be taxed merely because it is acquired in possession on death (*A.-G. v. Dobree*, [1900] 1 Q. B. 442, *per* DARLING, J., at p. 450; see also *A.-G. v. Smyth*, [1905] 2 I. R. 553, *per* PALLES, C.B., at p. 567).

(b) Finance Act, 1894 (57 & 58 Vict. c. 30), s. 3 (2). Compare *Brown v. A.-G.* (1898), 79 L. T. 572, H. L. (partnership deed operating also as a settlement). As to what is not partial consideration in money etc., see *A.-G. v. Johnson*, [1903] 1 K. B. 617, O. A. (transfer of capital sum in consideration of annuity for lives greater than the income obtainable on a trust investment of the same capital sum); *H. M. Advocate v. Heywood-Lonsdale's Trustees* (1906), 43 Sc. L. R. 529 (renunciation of, *inter alia*, claim under marriage settlement by default of exercise of limited power of appointment).

(c) *Re Lombard*, [1904] 2 I. R. 621, *per* PALLES, C.B., at p. 630

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money or money's worth, then the money etc. is partial consideration (*d*).

There may be consideration in money etc. paid to persons other than the vendor or grantor (*e*).

A transaction which, as between strangers, would be regarded as a purchase, is not the less so because the parties are members of the same family, and were impelled to the arrangement for the sake of their interests, or the honour of the family (*f*).

Interest in
expectancy
sold or mort-
gaged prior to
2nd August,
1894.

235. Where an interest in expectancy in any property has, before the 2nd August, 1894 (*g*), been *bonâ fide* sold or mortgaged for full consideration in money or money's worth, then no other duty on such property is payable by the purchaser or mortgagee when the interest falls into possession than would have been payable if the Finance Act, 1894 (*h*), by which the estate duty was imposed, had not passed; and, in the case of a mortgage, any higher duty payable by the mortgagor ranks as a charge subsequent to that of the mortgagee (*i*).

Liability of
mortgagor.

In the case of a mortgage, the exception is personal to the mortgagee, and the mortgagor, if the equity of redemption proves sufficient, must pay the whole estate duty out of it (*k*).

Mode of
treatment
where excep-
tion not
immediately
operative.

In the case of the sale of an interest expectant on the death of the survivor of more than one person, where estate duty is payable and paid on the first death, it seems that a repayment of the duty, but without interest, is to be made on the last death, when the exception becomes operative (*l*).

Interest as
holder of an
office, cor-
poration sole,
or beneficiary
under a
charity.

236. Property in which the deceased or any other person had an interest ceasing on the death of the deceased is not deemed to pass on the death where the interest was only an interest as holder of an office (*m*), or recipient of the benefits of a charity, or as a corporation sole (*n*).

SUB-SECT. 6.—Where Death Duty already paid.

Settled pro-
perty on
which, since
the date of

237. If estate duty has already been paid in respect of any settled property since the date of the settlement, the estate duty is not payable in respect thereof until the death of a person who was

(*d*) *Lethbridge v. A.-G.*, [1907] A. C. 19, *per* Lord ATKINSON, at p. 28; *Re Lombard*, [1904] 2 I. R. 621, *per* PALLES, C.B., at p. 631.

(*e*) *Re Lombard*, *supra*, *per* PALLES, C.B., at p. 632.

(*f*) *Lethbridge v. A.-G.*, *supra*; see title FAMILY ARRANGEMENTS.

(*g*) Where the sale was after the 1st August, 1894, and before the 9th April, 1900, see p. 204, *post*; where it was after the 1st August, 1894, and before the 19th April, 1907, see p. 206, *post*; where it was after the 18th April, 1907, and before the 30th April, 1909, see p. 205, *post*.

(*h*) Finance Act, 1894 (57 & 58 Vict. c. 30).

(*i*) *Ibid.*, s. 21 (3).

(*k*) *Re Vernon*, [1901] 1 K. B. 297. If the equity should prove insufficient, a way, it has been said, would probably be found of protecting the mortgagor from liability to duty in excess of it (*ibid.*, *per* PHILLIMORE, J., at p. 307).

(*l*) *Re Reversionary Interest Society, A.-G. v. Walker* (1896), *Times*, 14th May.

(*m*) *A.-G. v. Eyres*, [1909] 1 K. B. 723 (trustee under a settlement).

(*n*) Finance Act, 1894 (57 & 58 Vict. c. 30), s. 2 (1) (b); see titles CHARITIES, Vol. IV., p. 205; CORPORATIONS, Vol. VIII., p. 378.

at the time of his death, or had been at any time during the continuance of the settlement, competent to dispose of such property (o), and who, if on his death subsequent limitations under the settlement take effect in respect of such property, was *sui juris* at the time of his death, or had been *sui juris* at any time while so competent to dispose of the property (p).

The principle of this exception seemingly applies to property deemed to pass on death by reason of the cesser of an interest, where a further interest arises on the death, and ceases on a later death (q).

Payment of estate duty in respect of an interest in expectancy in settled property of which, subject to an existing life interest, the deceased was competent to dispose, is, where the deceased was the settlor, a payment in respect of settled property (r), whether he had only a general power of appointment, exercised by his will (s), or a vested reversionary interest (a). But the exception does not apply where by deduction of debts etc. estate duty in respect of the interest in expectancy is not in fact paid (b).

Where after-acquired property is covenanted to be settled, the payment of estate duty in respect of property which passes absolutely to the covenantor, or to trustees in his right, and becomes subject to the covenant, is not a payment in respect of settled property (c).

The payment of estate duty in respect of a covenantor's estate, without allowance for (d) a covenant debt, due by him or his executors etc. to the trustees of a settlement, is, seemingly, a payment in respect of settled property (e), although the estate duty,

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Duty.

the settle-
ment, estate
duty has been
paid.

(o) Finance Act, 1894 (57 & 58 Vict. c. 30), s. 5 (2).

(p) Finance Act, 1898 (61 & 62 Vict. c. 10), s. 13. As to the retrospective operation of this last provision, compare *A.-G. v. Theobald* (1890), 24 Q. B. D. 557.

(q) Compare *Inland Revenue v. Muclachlan* (1899), 36 Sc. L. R. 727.

(r) *Inland Revenue Commissioners v. Priestley*, [1901] A. C. 208.

(s) *Ibid.*

(a) Compare *Lord Advocate v. Mackenzie's Trustees* (1905), 42 Sc. L. R. 584. Where the deceased was not the settlor, the position was the same (*Lord Advocate v. Mackenzie's Trustees*, *supra*); but by the Finance (1909-10) Act, 1910 (10 Edw. 7, c. 8), s. 55, for the purpose of any claim to relief from estate duty under the Finance Act, 1894 (57 & 58 Vict. c. 30), s. 5 (2), in the case of persons dying after the 29th April, 1909, payment of duty, whether made before, on, or after that date, is not to be deemed to be a payment in respect of settled property if the payment was made in respect of an interest in expectancy in any property on the death of a person other than the settlor. Where, however, the interest in expectancy was, before the 30th April, 1909, *bonâ fide* sold or mortgaged for full consideration in money or money's worth, then no other duty on the property is payable by the purchaser or mortgagee when the interest falls into possession than would have been payable if the Finance (1909-10) Act, 1910 (10 Edw. 7, c. 8), s. 55, had not passed, and in the case of a mortgage any higher duty payable by the mortgagor ranks as a charge subsequent to that of the mortgagee (*ibid.*, s. 64); and this rule applies generally to all the death duty provisions of that Act (*ibid.*).

(b) *Lord Advocate v. Mackenzie's Trustees*, *supra*.

(c) *Lord Advocate v. Harvey's Trustees* (1901), 39 Sc. L. R. 71.

(d) Compare Finance Act, 1894 (57 & 58 Vict. c. 30), s. 7 (1) (a).

(e) *Re Maryon-Wilson, Wilson v. Maryon-Wilson* (1899), 47 W. R. 635. *per KEKEWICH, J.*, at p. 636.

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from the
Charge of
Duty.

Settlement
 under which
 property
 passes, where
 fund settled
 and re-settled.

except by deficiency of assets, is not, apart from express direction, payable out of the covenanted sum (*f*).

Where a person expectantly entitled to settled property re-settles it, and estate duty is subsequently paid in respect of the property as passing on the original life tenant's death, the "settlement," since the date of which the estate duty has been paid, and during the continuance of which the re-settlor was competent to dispose of the "settled property," is the original settlement under which he derived his benefit, and not the re-settlement by which he parted with his interest (*g*).

(*f*) *Re Gray, Gray v. Gray*, [1896] 1 Ch. 620; *Re Chisholm, Goddard v. Brodie*, [1902] 1 Ch. 457.

(*g*) *A.-G. v. Hay*, [1899] 2 Q. B. 245, 251 (a settlement of a money fund, and a re-settlement of it, whilst still in expectancy, by the expectant beneficiary).

A settlement for the purpose of the Settled Land Act, 1882 (45 & 46 Vict. c. 38), s. 2, may consist of a series of deeds (*Re Ailesbury (Marquis) and Iveagh (Lord)*, [1893] 2 Ch. 345; *Re Du Cane and Nettlefold's Contract*, [1898] 2 Ch. 96, 105), and there may be at the same time a more comprehensive settlement consisting of several deeds, and a less comprehensive settlement constituted by one of the deeds (*Re Mundy and Roper's Contract*, [1899] 1 Ch. 275, 295, C. A.).

In the case of a settlement and re-settlement of a money fund, where, after the date of the re-settlement, the life tenant continued to enjoy his interest under the original settlement, the original settlement is, for the purpose of estate duty, the governing document, and the re-settlement is an appendage (*A.-G. v. Hay, supra, per KENNEDY, J.*, at p. 252); and the original settlement may consist of a series of deeds ending with that under which the re-settlor took his benefit (*ibid.*, at p. 251).

The decisions under the Settled Land Act, 1882 (45 & 46 Vict. c. 38), it has been said, may be regarded to ascertain the meaning of the word "settlement" for the purpose of estate duty (see note (*p*), p. 184, *ante*); but contrast the language of s. 22 (1) (i) of the Finance Act, 1894 (57 & 58 Vict. c. 30), which enacts that the expression settlement is to mean any "instrument" which is, or would be etc., a settlement within the meaning of s. 2 of the Settled Land Act, 1882 (45 & 46 Vict. c. 38), with the language of that section, which enacts that any "instrument or instruments," under or by virtue of which etc., is or are to be a settlement.

In the case of a disentail of settled land by the remainderman in tail, with the life tenant's consent, and a re-settlement of the remainder in fee, subject to a life estate to the original life tenant, whether expressed to be in restoration of his old life estate (*Re Ailesbury (Marquis) and Iveagh (Lord)*, *supra*) or not (*Re Mundy and Roper's Contract, supra*), the series of deeds, including the re-settlement, form a settlement for the purpose of the Settled Land Act, 1882 (45 & 46 Vict. c. 38).

But, at any rate where the new life estate is expressed to be in restoration of the old life estate, the effect of the re-settlement is to leave the original settlement where it was, affected only by such matters as might be introduced, not for the purpose of destroying the life estate, but for the purpose of giving effect to the new arrangements (*Harrison v. Round* (1852), 2 De G. M. & G. 190; *Re Wright's Trustees and Marshall* (1884), 28 Ch. D. 93). *Quere*, in such circumstances, whether or not the doctrine of *A.-G. v. Hay, supra*, applies to a re-settlement of land, notwithstanding that the operative instrument under which the life tenant enjoyed his interest after the date of the re-settlement was, in form at least, the re-settlement, and not the original settlement; see also, *A.-G. v. Londesborough (Earl)*, [1904] 1 K. B. 749.

For succession duty purposer, the disposition which, in such circumstances, is deemed to confer the succession on the life tenant's death is made by the disentailing assurance and re-settlement (*Braybrooke (Lord) v. A.-G.* (1861), 9 H. L. Cas. 150, *per Lord CAMPBELL, L.C.*, at p. 168); and it has been said that this is the rule also for estate duty (Parliamentary Debates, 4th Series, Vol. 50 (1897), col. 785, *per FINLAY, S.-G.* (with the concurrence of WEBSTER, A.-G.), in the House of Commons).

238. Estate duty is not payable on the death of a deceased person in respect of personal property settled by a will or disposition made by a person dying before the 2nd August, 1894, in respect of which property probate duty or account duty has been paid or is payable, unless in either case the deceased was at the time of his death, or at any time since the will or disposition took effect had been, competent to dispose of the property (*h*).

Payment of probate duty in respect of an interest in expectancy in personal property settled by deed, and which, subject to an existing life interest, the settlor appoints by will under a general power reserved to himself, is a payment in respect of personal property settled by a disposition made by him (*i*).

Where the settled personal property is directed to be invested in land, the exception equally applies (*k*), and not the less so where, in the lifetime of the life tenant under the will, the land is disentailed and re-settled (*l*).

239. Where, however, the property is not "settled," the exception does not apply (*m*).

240. Where on the death of a deceased person estate duty becomes payable by a person in respect of any property passing under a settlement made by a will or disposition which took effect before the 2nd August, 1894, and before that date the additional succession duty (*n*), the temporary estate duty (*o*), or the 1 per cent.

SECT. 4.
Exceptions from the Charge of Duty.

Settled property on which probate or account duty has been paid or is payable.

Property must be settled.
Allowance in respect of certain duties already paid.

(*h*) Finance Act, 1894 (57 & 58 Vict. c. 30), s. 21 (1). The paramount object of this provision is that settled property shall not pay two duties, first probate duty and then estate duty (*A.-G. v. Dodington*, [1897] 2 Q. B. 373, C. A., *per* A. L. SMITH, L.J., at p. 380). Where a mortgage on real property settled by a will is, under a direction for that purpose, paid off out of the testator's personal estate which has borne probate duty, the amount of such mortgage can seemingly be deducted in arriving at the principal value of the real property for estate duty purposes (*H. M. Advocate v. M'Taggart Stewart* (1906), 43 Sc. L. R. 465, *per* the Lord Ordinary (PEARSON), at p. 470).

(*i*) *A.-G. v. Dodington*, *supra*; approved by the House of Lords in *Inland Revenue Commissioners v. Priestley*, [1901] A. C. 208, 211, 214, 216. Where probate duty has once been paid, or become payable, in respect of the interest of the settlor in the settled property, that is effectual to exempt the property from estate duty (*A.-G. v. Dodington*, *supra*, *per* RIGBY, L.J., at p. 383). The instrument exercising the power is to be read into the instrument creating it (compare *A.-G. v. Chapman*, [1891] 2 Q. B. 526, and see *A.-G. v. Dodington*, [1897] 1 Q. B. 722, *per* VAUGHAN WILLIAMS, J., at p. 732). The provision in the Finance (1909-10) Act, 1910 (10 Edw. 7, c. 8), s. 55, referred to in note (*a*), p. 197, *ante*, applies equally to the payment of or liability to probate duty in respect of an interest in expectancy in any property on the death of a person other than the settlor. Payment of or liability to account duty confers a like exception from estate duty in similar circumstances.

(*k*) *A.-G. v. Londesborough (Earl)*, [1905] 1 K. B. 98, C. A.; Finance Act, 1894 (57 & 58 Vict. c. 30), s. 22 (1) (*f*). The fact that since the payment of the probate duty the property has changed its form from that of personality into that of realty cannot affect the application of the principle, for the intention of the legislature to remedy an injustice must be to remedy it fully, and in every case in which it might arise (*A.-G. v. Londesborough (Earl)*, *supra*, *per* COLLINS, M.R., at p. 106).

(*l*) *A.-G. v. Londesborough (Earl)*, *supra*.

(*m*) *H. M. Advocate v. M'Taggart Stewart*, *supra*, at pp. 470, 473; see also *Lord Advocate v. Stewart*, [1902] A. C. 344.

(*n*) See p. 283, *post*.

(*o*) See note (*c*), p. 283, *post*.

SECT. 4.

Exceptions
from the
Charge of
Duty.

legacy or succession duty (*p*), has been paid or is payable under the same will or disposition on the capital value of the property, the Commissioners are to allow the amount which would have been payable on account of the duty if the duty were calculated on the value of the property on which estate duty is payable (*q*).

Provided that, if the person by whom the duty is payable so requires on the first delivery of his account, the deduction to be allowed (*r*) is to be the amount of the duty so paid (*s*), or payable, in respect of the property on which estate duty is payable (*t*).

Allowance
of death duty
paid in
British
Possessions.

241. Where the Commissioners are satisfied that, in a British Possession to which this provision applies, duty is payable by reason of a death in respect of any property situate in such Possession and passing on such death, they are to allow a sum equal to the amount of that duty to be deducted from the estate duty payable in respect of that property on the same death (*u*).

Condition
under which
provision
applied.

The Sovereign (*b*) may by Order in Council apply this provision to any British Possession where he is satisfied that, by the law of such Possession, either no duty is leviable in respect of property situate in the United Kingdom when passing on death, or the law of such Possession as respects any duty so leviable is to the like effect as the foregoing provision (*c*).

Order may
be revoked if
law altered.

The Sovereign in Council may revoke any such order where it appears that the law of the Possession has been so altered that it would not authorise the making of an order (*d*).

(*p*) See pp. 243, 282, *post*.

(*q*) Finance Act, 1896 (59 & 60 Vict. c. 28), s. 21; Finance Act, 1907 (7 Edw. 7, c. 13), s. 15. The deduction is only allowable in connection with deaths after the 30th June, 1896 (Finance Act, 1896 (59 & 60 Vict. c. 28), ss. 21, 24 (1)).

(*r*) Finance Act, 1907 (7 Edw. 7, c. 13), s. 15.

(*s*) An allowance cannot be made for duty paid upon a life interest (*Re Foley (Indy)* (1898), *Times*, 18th May).

(*t*) The amount of the allowance is not affected by a loss of capital value due merely to a change of investment (*Re Sykes* (1899), County Court of Redhill, 12th April, cited Soward's *Estate Duty*, 4th ed., p. 23).

(*u*) Finance Act, 1894 (57 & 58 Vict. c. 30), s. 20 (1).

(*b*) Interpretation Act, 1889 (52 & 53 Vict. c. 63), s. 30.

(*c*) Finance Act, 1894 (57 & 58 Vict. c. 30), s. 20 (3). Orders in Council have been made as follows:—Bahama Islands, 11th May, 1895; Barbados, 29th June, 1896; Bermudas, 11th May, 1895; British Columbia, 26th October, 1896; British Guiana, 22nd February, 1896; Ceylon, 11th May, 1895; Falkland Islands, 3rd October, 1895; Fiji, 24th August, 1895; Gambia, 11th May, 1895; Gibraltar, 16th July, 1895; Gold Coast Colony, 16th July, 1895; Grenada, 18th October, 1909; Hong Kong, 11th May, 1895; India (British, not including the Feudatory Native States), 2nd February, 1895; Jamaica, 3rd August, 1897; Labuan, 18th May, 1897; Lagos, 16th July, 1895; Leeward Islands, 16th July, 1895; Manitoba, 26th October, 1896; Natal, 16th July, 1895; New Brunswick, 26th February, 1897; Newfoundland, 8th March, 1895; New South Wales, 29th May, 1905; New Zealand, 2nd February, 1895; Nova Scotia, 20th October, 1898; Ontario, 26th October, 1896; Quebec, 15th January, 1897; Sierra Leone, 8th February, 1896; South Australia, 11th May, 1895; Straits Settlements, 11th May, 1895; Tasmania, 13th October, 1897; Trinidad and Tobago, 13th August, 1895; Victoria, 8th February, 1896; Western Australia, 1st August, 1896; Yukon Territory, 10th January, 1910.

(*d*) Finance Act, 1894 (57 & 58 Vict. c. 30), s. 20 (4). The Order in Council dated 13th August, 1895, applying s. 20 to the colony of the Cape of Good Hope, has been revoked by Order in Council dated 21st November, 1908.

SUB-SECT. 7.—*Other Exceptions.*

SECT. 4.

Exceptions from the Charge of Duty.

242. The law and practice existing at the time of the imposition of the estate duty relating to any of the death duties are, subject to the provisions of the Finance Act, 1894 (*e*), and so far as they are applicable, to apply, as if in terms made applicable, for the exemption of the property of common seamen, marines, or soldiers, who are slain or die in the service of the Sovereign (*f*).

Property of common seamen etc. and sums under £100.

The like law and practice, subject as above, similarly apply for the purpose of the payment of sums under £100 without requiring probate or letters of administration (*g*).

243. Estate duty is not payable in respect of a single annuity not exceeding £25 purchased or provided by the deceased, either by himself alone or in concert or arrangement with any other person (*h*), for the life of himself and of some other person and the survivor of them, or to arise on his own death in favour of some other person; and if in any case there is more than one such annuity, the annuity first granted is alone entitled to the exemption (*i*).

Annuity of £25 purchased or provided by the deceased.

244. Estate duty is not payable in respect of gifts made in consideration of marriage, or which are proved to the satisfaction of the Commissioners to have been part of the normal expenditure of the deceased, and to have been reasonable, having regard to the amount of his income, or to the circumstances, or which, in the case of any donee, do not exceed in the aggregate £100 in value or amount (*j*).

Gifts in consideration of marriage, or as forming part of normal expenditure, or not above £100 in value.

245. Estate duty is not payable in respect of any pension or annuity payable by the Government of British India to the widow

Indian pensions.

(*e*) Finance Act, 1894 (57 & 58 Vict. c. 30).

(*f*) *Ibid.*, s. 8 (1); Stamp Act, 1815 (55 Geo. 3, c. 184), Sched., Part III., Exemptions, branch 1 (representation to common seamen etc. slain or dying etc. not chargeable with probate duty). As to meaning of "common" seamen etc., compare the contemporary statute (now repealed) (1815) 55 Geo. 3, c. 60, Sched. B, where a warrant or petty officer in the navy, or non-commissioned officer of marines, is contrasted with a common seaman or marine. But see Navy and Marines (Property of Deceased) Act, 1865 (28 & 29 Vict. c. 111), s. 2.

(*g*) Finance Act, 1894 (57 & 58 Vict. c. 30), ss. 8 (1), 22 (1) (*c*). Compare, e.g., Regimental Debts Act, 1893 (56 & 57 Vict. c. 5), s. 16; Navy and Marines (Property of Deceased) Act, 1865 (28 & 29 Vict. c. 111), s. 6; Superannuation Act, 1887 (50 & 51 Vict. c. 67), s. 8. In the case of a person entitled to make a nomination under the Friendly Societies Act, 1896 (59 & 60 Vict. c. 25), whose estate in respect of which estate duty is payable exceeds £100, any sum paid under the Act without representation is liable to estate duty (*ibid.*, s. 59). In the case of a deceased depositor in the Post Office or a Trustee Savings Bank, if his total property, after deduction of debts and funeral expenses, exceeds £100, any sum payable under the Statutory Regulations, otherwise than to his legal personal representative, is, nevertheless, for the purposes of estate duty, treated as passing under his will or intestacy (see Post Office Savings Bank Act, 1861 (24 & 25 Vict. c. 14), s. 11, and Post Office Savings Bank Regulations, 1910, cl. 88; Savings Banks Act, 1887 (50 & 51 Vict. c. 40), ss. 2, 3; Savings Banks Act, 1891 (54 & 55 Vict. c. 21), s. 12 (2); and Trustee Savings Bank Regulations, 1900, cl. 26 (1). See also the Supreme Court Funds Rules, r. 62).

(*h*) See note (*d*), p. 191, *ante*.

(*i*) Finance Act, 1894 (57 & 58 Vict. c. 30), s. 15 (1).

(*j*) Finance (1909-10) Act, 1910 (10 Edw. 7, c. 8), s. 59 (2). The death, *semble*, must be after the 29th April, 1909.

SECT. 4.

Exceptions
from the
Charge of
Duty.

Advowson.

Pictures etc.
of national
etc. interest.

or child of any deceased officer of such Government, notwithstanding that the deceased contributed during his lifetime to any fund out of which the pension or annuity is paid (*k*).

246. Estate duty is not payable in respect of any advowson or church patronage which would have been free from succession duty under the exemption stated later (*l*).

247. Where any property passing on the death of a deceased person consists of pictures, prints, books, manuscripts, works of art, scientific collections, or other things not yielding income, which appear to the Treasury to be of national, scientific, historic, or artistic interest, such property only becomes chargeable with estate duty when it is sold, and then only in respect of the last death on which it passed (*m*).

The Treasury finding has relation back to the time of the death, and it seems that the estate duty when ultimately payable does not become so "upon or by reason of" the death (*n*).

SECT. 5.—*Aggregation of Property, and Rates of Duty.*SUB-SECT. 1.—*Aggregation of Property.*

General rule.

248. For determining the rate of estate duty to be paid on any property passing on the deceased's death, all property so passing in

(*k*) Finance Act, 1894 (57 & 58 Vict. c. 30), s. 15 (3).

(*l*) *Ibid.*, s. 15 (4); Succession Duty Act, 1853 (16 & 17 Vict. c. 51), s. 24. See p. 281, *post*.

(*m*) Finance Act, 1896 (59 & 60 Vict. c. 28), s. 20 (1); Finance (1909-10) Act, 1910 (10 Edw. 7, c. 8), s. 63. The death must be after the 29th April, 1909. Where the death was after the 30th June, 1896, and before the 30th April, 1909, the exception does not extend to pictures etc. of merely artistic interest, and is restricted to property which is settled so as to be enjoyed in kind in succession by different persons, and while enjoyed in kind by a person not competent to dispose of it (Finance Act, 1896 (59 & 60 Vict. c. 28), ss. 20 (1), 24 (1)). In such a case, if the property is sold, or is in the possession of some person who is then competent to dispose of it, it becomes liable to estate duty (*ibid.*). As to legacy duty, see p. 240, *post*; and as to succession duty, see p. 281, *post*. See *per* the Lord Privy Seal (Viscount Cross) in the House of Lords (1897), Parliamentary Debates, 4th series, Vol. 49, col. 1500, as to the Treasury interpretation of this provision, and the procedure to be adopted.

Where it is considered that any particular works of art are of national etc. interest, within this provision, and it is desired to obtain exemption from estate duty accordingly in respect thereof, application must be made to the Treasury. The application should state the short particulars of the "settlement" (if there is one), and the grounds upon which the articles are considered to be of national etc. interest. An inventory of the articles, showing the separate value attributed to each, should accompany the application. If there is a "settlement," and it is by a will which, at the date of the application, has not been proved, an extract from the will, so far as material, should accompany such application. But if the "settlement" is by deed which has not hitherto been noted in the Estate Duty Office, it, or a copy of it, should be sent there for that purpose. The application is forwarded by the Treasury to the Commissioners of Inland Revenue, and if their expert adviser on art etc. matters, after examination of the articles, if considered necessary, is of opinion that they come within the meaning of the provision, the Commissioners report to the Treasury accordingly.

As to the power of the Treasury to remit death duties in respect of any such pictures etc. given or bequeathed for national etc. purposes, see p. 182, *ante*.

(*n*) *Re Leconfield, Wyndham v. Leconfield* (1904), 90 L. T. 399, C. A. (direction to pay out of residuary estate the estate duty "payable upon or by reason of" the testator's death in respect of such settled property).

respect of which estate duty is leviable is, subject to the exceptions stated below, aggregated so as to form one "estate," and the duty is levied at the proper graduated rate on the principal value thereof (o).

Property passing on any death is not aggregated more than once (p).

249. Property in which the deceased never had an interest is not aggregated with any other property, but is an estate by itself (q).

250. Settled property which passes, or is deemed to pass, on the deceased's death under a disposition made by a person dying before the 2nd August, 1894, and which would, if the disponent had died on or after that date, have been liable to estate duty on his death, is treated as an estate by itself (r).

251. Where the net value of the property in respect of which estate duty is payable on the deceased's death, exclusive of property settled otherwise than by his will, does not exceed £1,000, such property forms an estate by itself (s).

252. Where the Treasury, under the power conferred upon them (t), remit the estate duty in respect of pictures etc. which appear to them to be of national etc. interest, such property is not aggregated with any other property (u).

Property consisting of pictures etc., which pass on the deceased's death, and appear to the Treasury (a) to be of national etc. interest, is not aggregated with other property on the death, but forms an estate by itself (b).

253. Where an estate includes an interest in expectancy, and the payment of the estate duty in respect of that interest is deferred,

SECT. 5.
Aggregation of Property, and Rates of Duty.

Property in which the deceased never had an interest.

Settled property under disposition by person dying prior to 2nd August, 1894.

Small estates.

Pictures etc. of national etc. interest.

Interests in expectancy.

(o) Finance Act, 1894 (57 & 58 Vict. c. 30), s. 4; Finance Act, 1900 (63 & 64 Vict. c. 7), s. 12 (1).

(p) Finance Act, 1894 (57 & 58 Vict. c. 30), s. 7 (10).

(q) *Ibid.*, s. 4; Finance Act, 1900 (63 & 64 Vict. c. 7), s. 12 (1).

(r) Finance Act, 1900 (63 & 64 Vict. c. 7), s. 12 (2); Finance Act, 1907 (7 Edw. 7, c. 13), s. 16.

Where, however, the deceased died before the 19th April, 1907, but after the 8th April, 1900, such settled property is aggregated, but the aggregation does not operate to enhance the rate of duty payable either upon the settled property or upon any other property by more than one half per cent. in excess of the rate at which duty would have been payable if such settled property had been treated as an estate by itself (Finance Act, 1900 (63 & 64 Vict. c. 7), s. 12 (2)).

Property is not "settled," within the meaning of this enactment, where it is given to a person for life, with remainder to her children, and, in default, for such persons as she appoints, and she dies without issue, having exercised the power of appointment (*Re Magan* (1908), *Irish Times*, 19th May).

Where the deceased died before the 9th April, 1900, such settled property follows the rule of aggregation stated at the end of para. 253, p. 204, *post*.

(s) Finance Act, 1894 (57 & 58 Vict. c. 30), s. 16 (3).

(t) See p. 182, *ante*.

(u) Finance Act, 1894 (57 & 58 Vict. c. 30), s. 15 (2).

(a) See p. 202, *ante*.

(b) Finance Act, 1896 (59 & 60 Vict. c. 28), s. 20 (1); Finance (1909-10) Act, 1910 (12 Edw. 7, c. 8), s. 63. The death must be after the 30th June, 1896

SECT. 5.
Aggregation
of Property,
and Rates
of Duty.

Accretions
under the
Wills Act,
1837, s. 33.

Sale or
mortgage of
interest in
expectancy
after 1st
August, 1891,
and before 9th
April, 1900.

as it may be (c), until the interest falls into possession, then, for the purpose of determining the rate of estate duty in respect of the rest of the estate, the value of the interest is its value at the date of the deceased's death, and the rate in respect of the interest when it falls into possession is calculated according to its then value, together with the value of the rest of the estate as previously ascertained (d).

Property accruing to a deceased person's estate after his death, under the will of an ancestor who survived him, in the circumstances stated earlier (c), is aggregated with the other aggregable property passing on the death of such person to find the rate appropriate for the accruing property, but it seems that no higher duty is chargeable on such other property (f).

Where an interest in expectancy in any property has, after the 1st August, 1894, but before the 9th April, 1900 (g), been *bonâ fide* sold or mortgaged for full consideration in money or money's worth, then no other duty on such property is payable by the purchaser or mortgagee when the interest falls into possession than would have been payable if the law as to aggregation had contained the following provision:—

The provision is, that any property which, under a disposition not made by the deceased, passes immediately on his death to some person other than the wife or husband, or a lineal ancestor or lineal descendant of the deceased, is an estate by itself, except that any benefit which, under such a disposition, is reserved or given to the wife etc., is aggregated with property of the deceased (h).

SUB-SECT. 2.—Rates of Duty.

Rates of
estate duty.

254. The rates of estate duty are as follows (i):—

Where the principal value of the estate exceeds £100 and does not exceed £500, the rate is 1 per cent. Where the value exceeds £500 and does not exceed £1,000, the rate is 2 per cent. Where the value exceeds £1,000 and does not exceed £5,000, the rate is 3 per cent. Where the value exceeds £5,000 and does not exceed £10,000, the rate is 4 per cent. Where the value exceeds £10,000 and does not exceed £20,000, the rate is 5 per cent. Where the value exceeds £20,000 and does not exceed £40,000, the rate is 6 per cent. Where the value exceeds £40,000 and does not exceed

(Finance Act, 1896 (59 & 60 Vict. c. 28), s. 24 (1)). In the case of deaths before the 30th April, 1909, the provision only applies to settled objects; see note (m), p. 202, *ante*.

(c) See p. 213, *post*.

(d) Finance Act, 1894 (57 & 58 Vict. c. 30), s. 7 (6).

(e) Wills Act, 1837 (7 Will. 4 & 1 Vict. c. 26), s. 33; see p. 186, *ante*.

(f) *Re Scott*, [1900] 1 Q. B. 372, 388; affirmed, [1901] 1 K. B. 228, C. A.

(g) Where the interest has been sold or mortgaged etc. before the 2nd August, 1894, see p. 196, *ante*.

(h) Finance Act, 1900 (63 & 64 Vict. c. 7), s. 12 (1) (proviso); Finance Act, 1891 (57 & 58 Vict. c. 30), s. 4 (proviso); and this provision applies generally where the deceased died before the 9th April, 1900 (*ibid.*). In the case of a mortgage, any higher duty, payable by the mortgagor, ranks as a charge subsequent to that of the mortgagee (Finance Act, 1900 (63 & 64 Vict. c. 7), s. 12 (1) (proviso)).

(i) Finance (1909-10) Act, 1910 (10 Edw. 7, c. 8), s. 54, Sched. II, The death must be after the 29th April, 1909 (*ibid.*, s. 54).

£70,000, the rate is 7 per cent. Where the value exceeds £70,000 and does not exceed £100,000, the rate is 8 per cent. Where the value exceeds £100,000 and does not exceed £150,000, the rate is 9 per cent. Where the value exceeds £150,000 and does not exceed £200,000, the rate is 10 per cent. Where the value exceeds £200,000 and does not exceed £400,000, the rate is 11 per cent. Where the value exceeds £400,000 and does not exceed £600,000, the rate is 12 per cent. Where the value exceeds £600,000 and does not exceed £800,000, the rate is 13 per cent. Where the value exceeds £800,000 and does not exceed £1,000,000, the rate is 14 per cent. Where the value exceeds £1,000,000, the rate is 15 per cent.

SECT. 5.
Aggregation
of Property.
and Rates
of Duty.

255. Where an interest in expectancy has, after the 18th April, 1907, and before the 30th April, 1909, been *bonâ fide* sold or mortgaged for full consideration in money or money's worth, then no other duty is payable by the purchaser etc. than would have been payable if the scale of rates had been as follows (*k*) :—

Sale or
mortgage of
interest in
expectancy
after 18th
April, 1907,
and before
30th April,
1909.

Where the principal value of the estate exceeds £100 and does not exceed £500, as if the rate had been 1 per cent. Where the value exceeds £500 and does not exceed £1,000, as if the rate had been 2 per cent. Where the value exceeds £1,000 and does not exceed £10,000, as if the rate had been 3 per cent. Where the value exceeds £10,000 and does not exceed £25,000, as if the rate had been 4 per cent. Where the value exceeds £25,000 and does not exceed £50,000, as if the rate had been 4½ per cent. Where the value exceeds £50,000 and does not exceed £75,000, as if the rate had been 5 per cent. Where the value exceeds £75,000 and does not exceed £100,000, as if the rate had been 5½ per cent. Where the value exceeds £100,000 and does not exceed £150,000, as if the rate had been 6 per cent. Where the value exceeds £150,000 and does not exceed £250,000, as if the rate had been 7 per cent. Where the value exceeds £250,000 and does not exceed £500,000, as if the rate had been 8 per cent. Where the value exceeds £500,000 and does not exceed £750,000, as if the rate had been 9 per cent. Where the value exceeds £750,000 and does not exceed £1,000,000, as if the rate had been 10 per cent. Where the value exceeds £1,000,000 and does not exceed £1,500,000, as if the rate had been 10 per cent. on £1,000,000 and 11 per cent. on the remainder. Where the value exceeds £1,500,000 and does not exceed £2,000,000, as if the rate had been 10 per cent. on £1,000,000 and 12 per cent. on the remainder. Where the value exceeds £2,000,000 and does not exceed £2,500,000, as if the rate had been 10 per cent. on £1,000,000 and 13 per cent. on the remainder. Where the value exceeds £2,500,000 and does not exceed £3,000,000, as if the rate had been 10 per cent. on £1,000,000 and 14 per cent. on the remainder. Where the value

(*k*) Finance Act, 1907 (7 Edw. 7, c. 13), s. 12, Sched. I.; Finance (1909-10) Act, 1910 (10 Edw. 7, c. 8), s. 64. And this scale applies generally where the deceased died after the 18th April, 1907, and before the 30th April, 1909 (Finance Act, 1907 (7 Edw. 7, c. 13), s. 12; Finance (1909-10) Act, 1910 (10 Edw. 7, c. 8), s. 54). In the case of a mortgage, any higher duty payable by the mortgagor ranks as a charge subsequent to that of the mortgagee (Finance (1909-10) Act, 1910 (10 Edw. 7, c. 8), s. 64).

SECT. 5. exceeds £3,000,000, as if the rate had been 10 per cent. on Aggregation of Property, and Rates of Duty. £1,000,000 and 15 per cent. on the remainder.

Sale or mortgage of interest in expectancy after 1st August, 1894, and before 19th April, 1907.

256. Where an interest in expectancy has, after the 1st August, 1894, and before the 19th April, 1907, been *bonâ fide* sold or mortgaged for full consideration in money or money's worth, then no other duty is payable by the purchaser etc. than would have been payable if the scale of rates in the last paragraph, in the case of estates exceeding £150,000 in value, had been as follows (l):—

Where the principal value of the estate exceeds £150,000 and does not exceed £250,000, as if the rate had been $6\frac{1}{2}$ per cent. Where the value exceeds £250,000 and does not exceed £500,000, as if the rate had been 7 per cent. Where the value exceeds £500,000 and does not exceed £1,000,000, as if the rate had been $7\frac{1}{2}$ per cent. Where the value exceeds £1,000,000, as if the rate had been 8 per cent.

Fixed duty of 30s. or 50s. where gross value not over £300 or £500.

257. Where the gross value of the property in respect of which estate duty is payable on the death of the deceased, exclusive of property settled otherwise than by his will, does not exceed £500, the person intending to apply for representation (m) to the deceased may pay a fixed duty in place of the duty according to the scale. Where the gross value of the property does not exceed £300, the fixed duty is 30s., and where it exceeds £300 and does not exceed £500, the fixed duty is 50s. (n).

Where such property includes property which is proved to the satisfaction of the Commissioners to be subject to a charge created for securing unpaid purchase-money, or money borrowed to pay

(l) Finance Act, 1894 (37 & 58 Vict. c. 30), s. 17; Finance Act, 1907 (7 Edw. 7, c. 13), s. 12 (proviso). And this scale applies generally where the deceased died after the 1st August, 1894, and before the 19th April, 1907 (Finance Act, 1894 (37 & 58 Vict. c. 30), s. 17; Finance Act, 1907 (7 Edw. 7, c. 13), s. 12). In the case of a mortgage, any higher duty payable by the mortgagor ranks as a charge subsequent to that of the mortgagee (Finance Act, 1907 (7 Edw. 7, c. 13), s. 12 (proviso)).

Where the deceased died after the 1st August, 1894, and before the 1st July, 1896, and the principal value of the estate contains a fractional part of £10 over £10, or any multiple of £10, the duty is payable for the full sum of £10. Where the deceased died after the 30th June, 1896, and before the 9th April, 1900, and the principal value comprises a fraction of £100 in excess of £100 or any multiple thereof, such fraction is excluded, except that where the principal value exceeds £100, and does not exceed £200, the duty is £1 (Finance Act, 1894 (37 & 58 Vict. c. 30), s. 17 (proviso); Finance Act, 1896 (59 & 60 Vict. c. 28), s. 17; Finance Act, 1900 (63 & 64 Vict. c. 7), s. 13 (1)). Where the deceased died on or after the 1st June, 1881, and before the 2nd August, 1894, and account duty is payable, the rate of duty is in accordance with the scale of rates of probate duty as set out at p. 312, *post* (Customs and Inland Revenue Act, 1881 (44 & 45 Vict. c. 12), s. 38 (1)). Where in the case of an account for account duty delivered on or after the 1st June, 1889, the value of the property exceeds £10,000, temporary estate duty is also payable. The rate is as set out in note (b), p. 312, *post*, in the case of the like duty when payable as an addition to probate duty (Customs and Inland Revenue Act, 1889 (52 & 53 Vict. c. 7), s. 5 (2)).

(m) *I.e.*, probate of a will or letters of administration (Finance Act, 1894 (37 & 58 Vict. c. 30), s. 22 (1) (c)).

(n) *Ibid.*, s. 16 (1), (2); Customs and Inland Revenue Act, 1881 (44 & 45 Vict. c. 12), s. 33 (1).

purchase-money, or to be subject to, or liable to be made subject to, a charge for securing an advance made, or to be made, for the purpose of the purchase thereof, the gross value of the property is to be taken to be its value subject to such charge or liability (o).

Where it is afterwards discovered that such gross value exceeds £300 or £500, as the case may be, estate duty according to the scale is payable (p).

If, however, the Commissioners are satisfied that there were reasonable grounds for the original estimate of the value of the property, they may allow to be deducted from such duty an amount equal to the fixed duty paid (q).

258. Estate duty is, in the first instance, to be calculated at the appropriate rate according to the value of the estate as set forth in the Inland Revenue affidavit or account delivered, but if afterwards it appears that for any reason too little duty has been paid additional duty is payable (r), unless a certificate of discharge has been delivered, and is to be treated as duty in arrear (s).

The issue of such certificate of discharge, under the provisions for that purpose, does not affect the rate of duty payable in respect of any property afterwards shown to have passed on the death, and the duty in respect of such property is at such rate as would be payable if its value were added to the value of the property in respect of which duty has already been accounted for (t).

SECT. 5.
Aggregation
of Property,
and Rates
of Duty.

Rate, as first
determined,
may require
to be
subsequently
rectified.

SECT. 6.—Value Chargeable.

SUB-SECT. 1.—Gross Value.

259. The principal value of any property is estimated to be the price which, in the opinion of the Commissioners (u), it would fetch if sold in the open market (x) at the time (a) of the deceased's death (b).

Meaning of
"principal
value."

In estimating such principal value under this provision, the Commissioners are to fix the price of the property according to the market price at the time of the deceased's death, and are not to

(o) Finance (1909-10) Act, 1910 (10 Edw. 7, c. 8), s. 61 (2).

(p) Finance Act, 1894 (57 & 58 Vict. c. 30), s. 16 (1), (2); Customs and Inland Revenue Act, 1881 (44 & 45 Vict. c. 12), s. 35.

(q) Revenue Act, 1903 (3 Edw. 7, c. 46), s. 14. The death must be after the 31st August, 1903 (*ibid.*).

(r) With interest (Finance Act, 1896 (59 & 60 Vict. c. 28), s. 18 (1)).

(s) Finance Act, 1894 (57 & 58 Vict. c. 30), s. 8 (7).

(t) *Ibid.*, s. 11 (3).

(u) The Commissioners have exclusive jurisdiction to estimate the price in the first instance (*A.-G. v. Jameson*, [1905] 2 I. R. 218, C. A., *per* FITZGIBBON, L.J., at p. 228). All the court can do is to decide the legal points that lie at the threshold of any inquiry as to value (*A.-G. v. Jameson*, [1904] 2 I. R. 644, *per* KENNY, J., at p. 664).

(x) Price in the open market is what would be obtainable upon a sale where it was open to every one who had the will, and the money, to offer the price which the deceased's property was worth as he held it (*A.-G. v. Jameson*, *supra*, *per* FITZGIBBON, L.J., at p. 230).

(a) The value at the time of the death is not ascertainable by the larger value at a sale at a later date, less the intermediate cost (*Inland Revenue v. Marr's Trustees* (1906), 44 Sc. L. R. 647).

(b) Finance Act, 1894 (57 & 58 Vict. c. 30), s. 7 (5).

SECT. 6.

**Value
Chargeable.**

make any reduction in the estimate on account of the estimate being made on the assumption that the whole property is to be placed on the market at one and the same time. Where, however, it is proved to the Commissioners that the value of the property has been depreciated by reason of the death of the deceased, the depreciation is to be taken into account in fixing the price (c).

Exception as regards agricultural property.

260. In the case of any agricultural property, where no part of the principal value is due to the expectation of an increased income (d) from such property, there is a special rule of valuation for determining the value of such property in connection with the provisions affecting small estates not exceeding £1,000 in net value (e). The rule is that the principal value is not to exceed twenty-five times the annual value as assessed under Schedule A of the Income Tax Acts (f), after making such deductions as have not been allowed in that assessment and are allowed under the Succession Duty Act, 1853 (g), and making a deduction for expenses of management (h) not exceeding 5 per cent. of the annual value so assessed (i).

Meaning of "agricultural property."

"Agricultural property" means agricultural land, pasture, and woodland, and also includes such cottages, farm buildings, farm-houses, and mansion-houses (together with the lands occupied therewith) as are of a character appropriate to the property (j).

Shares in a private limited company where alienation is restricted.

261. In the case of shares in a private limited company where the articles of association contain restrictive provisions as to alienation, the value is what the shares would fetch if they could be sold in the open market on the terms of the purchaser being entitled to be registered as holder subject to the articles (k).

Benefit accruing by the cesser of an interest.

262. The value of the benefit accruing or arising from the cesser of an interest ceasing on the deceased's death is, if the interest extended to the whole income of the property, the principal

(c) Finance (1909-10) Act, 1910 (10 Edw. 7, c. 8), s. 60 (2). The death must be after the 29th April, 1909 (*ibid.*).

(d) By the future conversion of the property to a different and more profitable use (*A.-G. v. Robinson*, [1901] 2 I. R. 67, *per* PALLES, C.B., at p. 80).

(e) Finance (1909-10) Act, 1910 (10 Edw. 7, c. 8), s. 61 (1). As to the small estates in question, see Finance Act, 1894 (57 & 58 Vict. c. 30), s. 16 (1), (3), and p. 203, *ante*. Where the death was before the 30th April, 1909, the special rule applies generally to agricultural property where no part of the principal value is due to the expectation of an increased income from such property (Finance Act, 1894 (57 & 58 Vict. 30), s. 7 (5) (proviso); Finance (1909-10) Act, 1910 (10 Edw. 7, c. 8), s. 60 (1)); see *Re Feeny* (1902), 36 I. L. T. 80.

(f) See Income Tax Act, 1842 (5 & 6 Vict. c. 35), s. 60.

(g) Decisions upon the appropriate portions of the Succession Duty Act, 1853 (16 & 17 Vict. c. 51), may be referred to (*A.-G. v. Robinson*, [1901] 2 I. R. 67, *per* PALLES, C.B., at p. 79).

(h) These expenses do not include expenses of cultivation, but must be restricted to remuneration to a third party incident to the collection of rent (*A.-G. v. Robinson*, *supra*, *per* PALLES, C.B., at p. 85). There must, it has been said, be management in fact, and inherently necessary (*ibid.*, *per* JOHNSON, J., at p. 92); although, it has been said, some allowance is always to be made (*ibid.*, *per* PALLES, C.B., at p. 84).

(i) Finance Act, 1894 (57 & 58 Vict. c. 30), s. 7 (5) (proviso).

(j) *ibid.*, s. 22 (1) (g).

(k) *A.-G. v. Jameson*, [1905] 2 I. R. 218, C. A. The value of a business is not necessarily the price at which the owner's will gives a person the option of purchasing it (*Lord Advocate v. Wood's Trustees* (1910), 53rd Report of Commissioners of Inland Revenue, p. 50).

value of that property; and, if the interest extended to less than such whole income, the principal value of an addition to the property equal to the income to which the interest extended (*l*).

In the latter case, if the property is incumbered, and the incumbrance is not large enough to affect the security of the interest which ceased, the incumbrance is to be disregarded in ascertaining the principal value of the hypothetical addition to the property (*m*).

SECT. 6.
Value
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263. Where any lands or chattels are so settled, whether by Act of Parliament or royal grant, that no one of the persons successively in possession is capable of alienating them, otherwise than under the powers of sale or exchange in the Settled Land Act, 1882 (*n*), whether his interest is in law a tenancy for life or in tail, the property passing on the death of any person in possession of the lands and chattels is the interest of his successor therein, and such interest is to be valued for estate duty in like manner as for succession duty (*o*).

Lands or
chattels
settled by Act
of Parliament
or royal
grant.

264. Where an estate includes an interest in expectancy, and the estate duty in respect of it is paid, at the option of the person accountable, when the interest falls into possession, the duty is payable upon its then value (*p*).

Interest in
expectancy.

265. The value of any property for the purposes of estate duty is, subject to the above provisions, to be ascertained by the Commissioners in such manner and by such means as they think fit (*q*).

How value of
property to
be ascer-
tained.

If the Commissioners authorise a person to inspect any property and report to them its value, the person having the custody or possession of that property is to permit the person so authorised to inspect it at such reasonable times as the Commissioners consider necessary (*r*).

Inspection of
property by
valuers.

Where the Commissioners require a valuation to be made by a person named by them, they are to defray the reasonable costs of the valuation (*s*).

266. The Commissioners on application from a person accountable for the duty on any property forming part of an estate are, if they consider that it can conveniently be done, to certify (*t*) the

Certificate
of acceptance
of valuation.

(*l*) Finance Act, 1894 (57 & 58 Vict. c. 30), s. 7 (7). The concluding phrase has been described as an inaccurate expression for property the income of which is equal to the income to which the interest extended (*A.-G. v. Power*, [1906] 2 I. R. 272, *per* PALLIS, C.B., at p. 277).

(*m*) *Lord Advocate v. Henderson's Trustees* (1905), 42 Sc. L. R. 720.

(*n*) Settled Land Act, 1882 (45 & 46 Vict. c. 38), s. 58 (1) (*i*); *Re Bolton Estates Act*, 1863, [1904] 2 Ch. 289.

(*o*) Finance Act, 1894 (57 & 58 Vict. c. 30), s. 5 (5); compare *A.-G. v. Richmond (Duke)* (No. 2), [1907] 2 K. B. 940. *Semble*, it is immaterial that in the actual case succession duty may in fact not be payable (*Re Bolton Estates Act*, 1863, [1904] 2 Ch. 289, *per* JOYCE J., at p. 303).

(*p*) *Re Eyre*, [1907] 1 K. B. 331.

(*q*) Finance Act, 1894 (57 & 58 Vict. c. 30), s. 7 (8).

(*r*) *Ibid.*, s. 7 (8).

(*s*) *Ibid.*, s. 7 (9).

(*t*) See note (*b*), p. 218, *post*.

SECT. 6.
Value
Chargeable.

amount of the valuation accepted by them for any class or description of property forming part of the estate (a).

SUB-SECT. 2.—Deductions.

What allow-
ances may be
made.

267. In determining the value of an estate for the purpose of estate duty, allowance is made for reasonable funeral expenses (b), and for debts and incumbrances (c), including mortgages and terminable charges (d).

What debts
may not be
deducted.

An allowance is not made for debts incurred by the deceased, or incumbrances created by a disposition made by him, unless such debts etc. were incurred or created (e) *bonâ fide* (f), for full consideration in money or money's worth (g), wholly for his own use and benefit (h), and take effect out of his interest (i).

Where a debt or incumbrance has been incurred or created in whole or in part for the purpose of or in consideration for the purchase or acquisition or extinction, whether by operation of law or otherwise, of any interest in expectancy in any property passing, or

(a) Finance Act, 1894 (57 & 58 Vict. c. 30), s. 8 (8).

(b) Compare *Edwards v. Edwards* (1834), 2 Cr. & M. 612 (amount depends upon deceased's condition in life, and the price of the requisite articles at the particular place); *Hancock v. Podmore* (1830), 1 B. & Ad. 260 (as against a creditor); *Il. v. Price* (1884), 12 Q. B. D. 247, per STEPHEN, J., at p. 254, referring to *Williams v. Williams* (1882), 20 Ch. D. 659 (cremation); *Stag v. Punter* (1744), 3 Atk. 119 (carriage of body from distance); *Bridge v. Brown* (1843), 2 Y. & O. Ch. Cas. 181 (tomb); *Mellick v. Asylum (President and Guardians)* (1821), Jac. 180 (expensive monument); *Johnson v. Baker* (1825), 2 O. & P. 207 (mourning); *Pitt v. Pitt* (1758), 2 Lee, 508 (ditto); *Ambrose v. Kerrison* (1851), 10 O. B. 776 (married woman separated from husband); *Gregory v. Lockyer* (1821), Madd. & G. 90 (married woman with separate estate); *Re M'Myn, Lightbown v. M'Myn* (1886), 33 Ch. D. 575 (married woman who appointed husband executor).

(c) Finance Act, 1894 (57 & 58 Vict. c. 30), s. 7 (1). *Semble*, this provision applies only to the case of an estate passing from a deceased owner subject to his debts and incumbrances (*Cowley (Earl) v. Inland Revenue Commissioners*, [1899] A. C. 198, per Lord DAVEY, at p. 221).

(d) Finance Act, 1894 (57 & 58 Vict. c. 30), s. 22 (1) (k).

(e) *Quere*, whether the words "wholly for the deceased's own use and benefit" in *ibid.*, s. 7 (1) (a), are to be read with the word "created," or relate only to the "consideration" (*A.-G. v. Richmond and Gordon (Duke)*, [1909] A. C. 466, per Lord LOEBURN, L.C., at p. 469); see also note (h), *infra*.

(f) A *bonâ fide* transaction is a real and genuine transaction intended to have full and real operation without any secret or covinous arrangement or reservation (*A.-G. v. Richmond (Duke)* (No. 1), [1907] 2 K. B. 923, per BRAY, J., at p. 937; affirmed, *A.-G. v. Richmond and Gordon (Duke)*, *supra*, per Lord ATKINSON, at p. 475).

(g) A debt for a philanthropic purpose is not allowable (*H. M. Advocate v. Gunning's Trustees* (1902), 39 So. L. R. 534), nor is a debt in consideration of the release of a voluntary debt of like amount (compare *A.-G. v. Cobham (Viscount)* (1904), 90 L. T. 816), nor a debt in consideration of marriage and money (*H. M. Advocate v. Alexander's Trustees* (1905), 42 So. L. R. 307, 310; compare also *H. M. Advocate v. Warrender's Trustees* (1906), 43 So. L. R. 278, per the Lord Ordinary (PEARSON), at p. 281). As to dissection of the consideration in questions under the Finance Act, 1894 (57 & 58 Vict. c. 30), s. 3 (2), see *Re Lombard*, [1904] 2 I. R. 621.

(h) These words apply to the consideration given for the incumbrance, not to the incumbrance itself (*A.-G. v. Richmond and Gordon (Duke)*, [1909] A. C. 466, per Lord ATKINSON, at p. 478). The motive for incurring the debt is immaterial, and so also what the debtor intends to do with the money (*ibid.*, at pp. 475, 478); see also note (e), *supra*.

(i) Finance Act, 1894 (57 & 58 Vict. c. 30), s. 7 (1) (a).

deemed to pass, on the deceased's death, and any person whose interest in expectancy is so purchased etc. becomes (under any disposition made by, or through devolution of law from, or under the intestacy of, the deceased) entitled to any interest in that property, then no allowance is made in respect of such debt etc., and any property charged with any such debt etc. is deemed to pass freed therefrom (*j*).

If part only of such debt etc. was incurred etc. for such purpose etc., the above provision applies to that part only (*k*).

If a person whose interest in expectancy in the property so purchased etc. becomes entitled to an interest in part only of that property, the above provision applies only to such part of the debt etc. as bears the same proportion to the whole debt etc. as the value of the part of the property to an interest in which he becomes entitled bears to the value of the whole of that property (*l*).

An allowance is not made for any debt in respect of which there is a right to reimbursement from any other estate or person, unless the reimbursement cannot be obtained (*m*).

268. Allowance is made for increment value duty which is to be collected on the occasion of the death in respect of the fee simple of any land, or any interest in land, comprised in the property passing on the death, as if such duty were a debt (*n*).

SECT. 6.
Value
Chargeable.

Increment
value duty to
be allowed.

269. Any debt or incumbrance for which an allowance is made is to be deducted from the value of the land or other subjects of property liable thereto (*o*), and the allowance is not made more than once for the same debt etc. charged upon different portions of the estate (*p*).

Against what
property
debts are to
be allowed.

An allowance is not made in the first instance for debts due from the deceased to persons resident out of the United Kingdom (unless contracted to be paid in the Kingdom, or charged on property situate therein), except out of the value of any personal property of the deceased situate out of the Kingdom in respect of which estate duty is paid; and there is to be no repayment of estate duty in respect of any such debts, except to the extent to which it is shown to the satisfaction of the Commissioners that the personal property of the deceased situate in the foreign country or British Possession in which the person to whom such debts are due resides, is insufficient for their payment (*q*).

Debts to
persons resi-
dent out of
the United
Kingdom.

270. In the case of settled property, where the expectant successor mortgages his interest in expectancy, no allowance can be made in respect of the incumbrance when the interest falls into possession (*r*).

Mortgage of
an interest in
expectancy.

(*j*) Finance (1909-10) Act, 1910 (10 Edw. 7. c. 8), s. 57.

(*k*) *Ibid.*, s. 57 (*a*).

(*l*) *Ibid.*, s. 57 (*b*).

(*m*) Finance Act, 1894 (57 & 58 Vict. c. 30), s. 7 (1) (*b*).

(*n*) Finance (1909-10) Act, 1910 (10 Edw. 7, c. 8), s. 62.

(*o*) Finance Act, 1894 (57 & 58 Vict. c. 30), s. 7 (1) (last branch).

(*p*) *Ibid.*, s. 7 (1) (*c*).

(*q*) *Ibid.*, s. 7 (2).

(*r*) *Re Vernon*, [1901] 1 K. B. 297. Here the mortgage was before the

SECT. 6.

Value Chargeable

Mortgage of settled property by tenant for life and remainderman.

Annuity which ceases on death.

Cost of realising or administering foreign property.

Duty paid in a foreign country on foreign property.

Where the tenant for life and the expectant successor mortgage their respective interests, and the tenant for life is indemnified, allowance for the incumbrance cannot be made (*s*).

Where the tenant for life and the expectant successor, under a joint general power of appointment, appoint the settled property by way of mortgage, only the equity of redemption passes on the life tenant's death, so that, in effect, allowance is made for the incumbrance (*t*).

No allowance can be made for an annuity which ceases on the deceased's death, and is not an incumbrance when the settled property passes (*u*).

271. Where the Commissioners are satisfied that any additional expense in administering or in realising property has been incurred by reason of the property being situate out of the United Kingdom, they may make an allowance from the value of the property on account of such expense, not exceeding in any case 5 per cent. on the value of the property (*v*).

Where any property passing on the death of the deceased is situate in a foreign country, and the Commissioners are satisfied that by reason of such death any duty is payable in the foreign country in respect of the property, they are to make an allowance the amount of the duty from the value of the property (*w*).

SECT. 7.—Collection of the Duty.

SUB-SECT. 1.—The Duty.

The duty is a stamp duty.

Payment in kind.

272. Estate duty is a stamp duty (*a*), which is to be collected by means of stamps or such other means (*b*) as the Commissioners (*c*) may prescribe (*d*).

The Commissioners may, if they think fit, on the application of any person liable to pay estate duty in respect of any real or

Finance Act, 1894 (57 & 58 Vict. c. 30). Where the mortgage is after the Act, *a fortiori* it is so.

(*a*) *A.-G. v. Montagu (Lord)*, [1904] A. C. 316.

(*t*) *Cowley (Earl) v. Inland Revenue Commissioners*, [1899] A. C. 198. *Seem*, the result is the same where tenant for life and remainderman mortgage their respective interests (*ibid.*, *per* Lord DAVEY, at p. 219; *A.-G. v. Montagu (Lord)*, [1904] A. C. 316, *per* Lord DAVEY, at p. 319; but see, *contra*, *Cowley (Earl) v. Inland Revenue Commissioners*, *supra*, *per* Lord WATSON, at p. 208).

(*u*) *Cowley (Earl) v. Inland Revenue Commissioners*, *supra*. But if property definitely vests in the successor during the deceased's lifetime, subject to this, that the successor until the death is only to enjoy the income, there is no liability to estate duty (*Re Townsend*, [1901] 2 K. B. 331).

(*v*) Finance Act, 1894 (57 & 58 Vict. c. 30), s. 7 (3).

(*w*) *Ibid.*, s. 7 (4).

(*a*) *Ibid.*, s. 6 (1).

(*b*) The fixed duty of 30s. or 50s. (Finance Act, 1894 (57 & 58 Vict. c. 30), s. 16 (1)) is paid by means of adhesive stamps to be affixed to the Inland Revenue affidavit. In all other payments of duty, a stamped receipt for the amount paid is given on the affidavit or account on which the duty is assessed. The stamp indicates the nature of the duty, but not the rate.

(*c*) *I.e.*, the Commissioners of Inland Revenue (*ibid.*, s. 22 (1) (m)).

(*d*) *Ibid.*, ss. 8 (16), 22 (1) (o). As to remission of duty and interest, see p. 182, *ante*.

leasehold property, accept in satisfaction of the whole or any part of such duty such part of the property as may be agreed upon (e).

The law and practice existing at the time of the imposition of the estate duty, relating, in matters of procedure (f), to any of the death duties are, subject to the provisions of the Finance Act, 1894 (g), and so far as the same are applicable, to apply for the purpose of the collection of the estate duty as if in terms made applicable to such duty (h).

SECT. 7.
Collection
of the
Duty.

Application of
existing law
and practice
as on the 2nd
August, 1894.

SUB-SECT. 2.—When the Duty is payable.

273. The duty is due on the delivery of the Inland Revenue affidavit or account upon which it is to be collected (i), or on the expiration of six months from the death, whichever first happens (j), and, except as stated below, interest from the date of the death is to be paid (k).

When the
duty is due.

274. Where an estate includes an interest in expectancy, the estate duty in respect of that interest is to be paid, at the option of the person accountable, either with the estate duty in respect of the rest of the estate or when the interest falls into possession (l).

Rule as
regards (1) an
interest in
expectancy ;

The estate duty due upon an account of real property (m) may, at the option of the person delivering the account, be paid by eight equal yearly instalments or sixteen half-yearly instalments, with interest at the rate of 3 per cent. per annum from the date at which the first instalment is due, i.e., at the expiration of twelve months from the death (n), and the interest on the unpaid portion of the duty is to be added to each instalment and paid accordingly, but the duty for the time being unpaid, with any interest due, may be paid at any time, and if the property is sold, is to be paid on completion of the sale, and if not so paid is duty in arrear (o).

(2) Real
estate ;

The estate duty in respect of timber trees or wood is payable on the net moneys (if any), after deducting all necessary outgoings since the death, which may from time to time be received from the sale thereof when felled, until the land on which the timber etc. is growing again becomes liable to estate duty, or would but for this

(3) Wood-
lands ;

(e) Finance (1909-10) Act, 1910 (10 Edw. 7, c. 8), s. 56 (1). No stamp duty is payable on any conveyance or transfer of land to the Commissioners under this provision (*ibid.*, s. 56 (2)). The provision extends also to settlement estate duty and succession duty (*ibid.*, s. 56 (1)).

(f) *Wetherston's Trustees v. Lord Advocate* (1901), 38 Sc. L. R. 324.

(g) Finance Act, 1894 (57 & 58 Vict. c. 30).

(h) *Ibid.*, s. 8 (1).

(i) See pp. 215, 216, *post*.

(j) Finance Act, 1894 (57 & 58 Vict. c. 30), s. 6 (7).

(k) *Ibid.*, s. 6 (6); Finance Act, 1896 (59 & 60 Vict. c. 28), s. 40, Sched., Part III.; see also note (p), p. 223, *post*.

(l) Finance Act, 1894 (57 & 58 Vict. c. 30), s. 7 (6).

(m) For the purpose of succession duty, real property includes leaseholds for years (Succession Duty Act, 1853 (16 & 17 Vict. c. 51), s. 1), but there is no similar provision in the case of estate duty, except for the specific purpose of the Finance Act, 1896 (59 & 60 Vict. c. 28), s. 15 (4); see p. 195, *ante*.

(n) Under the Finance Act, 1894 (57 & 58 Vict. c. 30), s. 6 (8), income tax could be deducted against the interest on the duty. This provision was repealed by the Finance Act, 1896 (59 & 60 Vict. c. 28), s. 40, Sched., Part III.

(o) Finance Act, 1894 (57 & 58 Vict. c. 30), s. 6 (8).

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provision have become so liable, and is to be paid as and when such moneys are received, with interest at the rate of 3 per cent. per annum from the date of receipt (*p*).

If, however, at any time the timber, trees etc., are sold, either with or apart from the land on which they are growing, the amount of estate duty on the principal value thereof which, but for the above provision, would have been payable on the death of the deceased, after deducting the amount (if any) of estate duty paid in respect of the timber etc. since that date, becomes payable (*q*).

(4) An annuity
or other
definite
annual sum ;

The estate duty due in respect of any annuity or other definite annual sum, whether terminable or perpetual, purchased or provided by the deceased (*r*), may, at the option of the person delivering the account, be paid by four equal yearly instalments, the first of which is due at the expiration of twelve months from the death, and after that period interest at 3 per cent. per annum on the unpaid duty is to be added to each instalment and paid accordingly, but the duty for the time being unpaid, with any interest due, may be paid at any time (*s*).

(5) Settled
objects of
national etc.
interest ;

The estate duty due in respect of pictures, prints, books etc. of national, scientific, historic, or artistic interest becomes payable within one month after the property is sold (*t*).

(6) Advowson
or church
patronage.

When an advowson or church patronage is sold or disposed of by the successor or in concert with him for money or money's worth, the estate duty due in respect of the money etc. becomes payable at the time of such disposal (*u*).

Postponement
of payment
where exces-
sive sacrifice
is involved in
raising the
duty.

275. Where the Commissioners are satisfied that the estate duty leviable in respect of any property cannot, without excessive sacrifice, be raised at once, they may allow payment to be postponed for such period, to such an extent, and on payment of such interest, not exceeding 4 per cent., or any higher interest yielded by the property, and on such terms, as they think fit (*a*).

SUB-SECT. 3.—By whom the Duty is payable.

(1) *Personal Property of which the Deceased was competent to dispose at his Death.*

Duty which
the executor

276. The executor of the deceased is accountable for (*b*) the estate duty in respect of all personal property wheresoever

(*p*) Finance (1909-10) Act, 1910 (10 Edw. 7, c. 8), s. 61 (5). The death must be after the 28th April, 1910 (*ibid.*). The value of the timber etc. is to be aggregated with the other property passing on the death of the deceased to determine the value of the estate and the rate of estate duty (*ibid.*).

(*q*) *Ibid.*, s. 61 (5) (proviso).

(*r*) *I.e.*, the annuity or annual sum indicated in the Finance Act, 1894 (57 & 58 Vict. c. 30), s. 2 (1) (d).

(*s*) Finance Act, 1896 (59 & 60 Vict. c. 28), ss. 16, 18 (1).

(*t*) *Ibid.*, s. 20 (2); Finance (1909-10) Act, 1910 (10 Edw. 7, c. 8), s. 63. In the case of deaths before the 30th April, 1909, where the exception from duty is restricted as stated in note (*m*), p. 202, *ante*, the estate duty is alternatively payable, in the case of a person coming into possession, or if in possession becoming competent to dispose of the property, within six months after the date thereof (Finance Act, 1896 (59 & 60 Vict. c. 28), s. 20 (2)).

(*u*) Finance Act, 1894 (57 & 58 Vict. c. 30), s. 15 (4), incorporating Succession Duty Act, 1853 (16 & 17 Vict. c. 51), s. 24.

(*a*) Finance Act, 1894 (57 & 58 Vict. c. 30), s. 8 (9).

(*b*) *Ibid.*, s. 8 (3).

situate (c) of which the deceased was competent to dispose at his death, and is to pay it on delivering the Inland Revenue affidavit (d).

The "Executor" means the executor or administrator of a deceased person, and includes, as regards any obligation under the estate duty part of the Finance Act, 1894 (e), any person who takes possession of or intermeddles with the personal property of a deceased person (f).

The "Inland Revenue Affidavit" means the affidavit of value of the estate which is delivered in connection with an application for probate or letters of administration, with the account and schedule annexed thereto, or an affidavit correcting the same (g).

277. The executor is to the best of his knowledge and belief (h) to specify in appropriate accounts annexed to the Inland Revenue affidavit all the property in respect of which estate duty is payable (i) upon the death of the deceased (k).

Where the executor does not know the amount or value of any property which has passed on the death, he may state in the Inland Revenue affidavit that such property exists, but he does not know the amount or value of it, and that he undertakes, as soon as the amount and value are ascertained, to bring in an account of it, and to pay both the duty for which he is liable,

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must pay on
the Inland
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affidavit.

Duty of
executor.

Executor to
furnish
particulars of
"other
property"
passing.

(c) Accordingly, it appears to be incumbent on the executor, to the extent of the assets which he has received as such, or might but for his own neglect or default have received (Finance Act, 1894 (57 & 58 Vict. c. 30), s. 8 (3)), to pay the estate duty on the deceased's personal property locally situate out of the United Kingdom at the death, whether or not such property comes under his control. It does not, however, pass to him as executor (*Re Dixon, Fenfold v. Dixon*, [1902] 1 Ch. 248, *per* BUCKLEY, J., at p. 251).

(d) Finance Act, 1894 (57 & 58 Vict. c. 30), s. 6 (2); see also *Winans v. A.-G.*, [1910] A. C. 27, 37. Estate duty is not a "disbursement" within the Solicitors Act, 1843 (6 & 7 Vict. c. 73), s. 37 (*Re Kingston and Wilson*, [1902] 2 Ch. 242, C. A., overruling *Re Lamb* (1889), 23 Q. B. D. 5 (a case which related to probate duty)). Where the deceased is a Greek subject resident in Greece, and his only asset in this country consists of shares in the Ionian Bank, the bank, on paying the duty, may, without a British grant of representation, transfer the shares to any Greek subject, who in Greece, and according to Greek law, has established his right to be considered the owner of the shares (Ionian Bank (Limited) Act, 1899 (62 & 63 Vict. c. xcix.), s. 2).

(e) Finance Act, 1894 (57 & 58 Vict. c. 30), Part I.

(f) *Ibid.*, s. 22 (1) (d); compare *New York Breweries Co. v. A.-G.*, [1899] A. C. 62.

(g) *I.e.*, the affidavit made under the following enactments, namely:—Stamp Act 1815 (55 Geo. 3, c. 184), s. 38; Customs and Inland Revenue Act, 1880 (43 Vict. c. 14), s. 10; Customs and Inland Revenue Act, 1881 (44 & 45 Vict. c. 12), ss. 29, 32; Finance Act, 1894 (57 & 58 Vict. c. 30), s. 22 (1) (n), Sched. II. As to who may administer oaths, see note (t), p. 216, *post*. An original Inland Revenue affidavit may not be sworn before the solicitor acting for the deponent, or before his agent, correspondent, clerk, or partner (Commissioners for Oaths Act, 1889 (52 & 53 Vict. c. 10), s. 1 (3); R. S. C., Ord. 38, rr. 16, 17).

(h) He must make full inquiry before deposing to the affidavit (*In the Goods of Beech* (1904), *Times*, 9th August), and must ascertain the value of the property within a reasonable time (*Re Horrex* (1910), *Times*, 9th March).

(i) The whole duty on the deceased's personal property is to be paid although application is being made for a grant of administration *pendente lite* only (*In the Goods of Grimthorpe* (Baron), *Deal v. Grimthorpe* (Baron) (1905), *Times*, 6th June and 1st and 8th August).

(k) Finance Act, 1894 (57 & 58 Vict. c. 30), s. 8 (3); see also *Winans v. A.-G.*, *supra*, *per* Lord SHAW OF DUNFERMLINE, at pp. 48, 49; and title EXECUTORS AND ADMINISTRATORS.

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and any further duty payable by reason thereof for which he is liable in respect of the other property mentioned in the affidavit (*l*).

The affidavit is to be in such form and to contain such particulars as the Commissioners may prescribe (*m*).

The Commissioners may, if they think fit, accept a statement, by or on behalf of the executor, correcting an affidavit without requiring the statement to be verified on oath (*n*).

(2) *Other Property.*

Duty which
the executor
may pay on
the affidavit.

278. The executor of the deceased may also, on delivering the Inland Revenue affidavit, pay the estate duty in respect of any other property passing on the deceased's death which, by virtue of any testamentary disposition (*o*) of the deceased, is under his control (*p*), or, in the case of property which is not under his control, if the accountable persons request him to make such payment (*q*).

How "other
property" to
be accounted
for.

279. Estate duty, so far as not paid by the executor, is to be collected upon an account setting forth the particulars of the property, and delivered to the Commissioners within six months after the death by the person accountable for the duty, or within such further time as the Commissioners may allow (*r*).

Form of
account.

The account is to be to the best of the knowledge and belief of the accountable person (*s*), and is to be verified on oath (*t*), and by production of books and documents in the manner prescribed by the Commissioners (*a*).

The account is to be in the form, and to contain such particulars, as may be prescribed by the Commissioners, and, if required by them, is to be in duplicate (*b*).

The Commissioners may, if they think fit, accept a statement, by or on behalf of the accountable person, correcting an account, without requiring the statement to be verified on oath (*c*).

Persons
accountable.

280. If the executor is not accountable for the estate duty on the property passing on the death, every person (*d*) to whom any

(*l*) Finance Act, 1894 (57 & 58 Vict. c. 30), s. 6 (3).

(*m*) *Ibid.*, s. 8 (14). If required, the affidavit is to be in duplicate (*ibid.*).

(*n*) Finance Act, 1900 (63 & 64 Vict. c. 7), s. 13 (2).

(*o*) The expression "will" includes any testamentary instrument (Finance Act, 1894 (57 & 58 Vict. c. 30), s. 22 (1) (*b*)).

(*p*) In his capacity as executor (*Re Meyrick, Meyrick v. Hargreaves*, [1897] 1 Ch. 99, *per* CHITTY, J., at p. 103).

(*q*) Finance Act, 1894 (57 & 58 Vict. c. 30), s. 6 (2).

(*r*) *Ibid.*, s. 6 (4).

(*s*) *Ibid.*, s. 8 (4).

(*t*) Oath includes affirmation and declaration (Interpretation Act, 1889 (52 & 53 Vict. c. 63), s. 3). Oaths, affirmations, and declarations, relating to duties may be made before any of the Commissioners, or any officer or person authorised by them, or before any commissioner for oaths, or any justice or notary public in the United Kingdom, or at any place elsewhere before any person duly authorised to administer oaths there (Stamp Duties Management Act, 1891 (54 & 55 Vict. c. 38), s. 24; Revenue Act, 1898 (61 & 62 Vict. c. 46), s. 7 (6)).

(*a*) Finance Act, 1894 (57 & 58 Vict. c. 30), s. 8 (14).

(*b*) *Ibid.*, s. 8 (14).

(*c*) Finance Act, 1900 (63 & 64 Vict. c. 7), s. 13 (2).

(*d*) As to the position of a mortgagor, see *Re Vernon*, [1901] 1 K. B. 297, *per* PHILLIMORE, J., at p. 307.

property so passes for any beneficial interest in possession, and also, to the extent of the property actually received or disposed of by him, every trustee, guardian, committee or other person in whom any interest in the property so passing or the management thereof is at any time vested (*e*), and every person in whom the same is vested in possession by alienation or other derivative title, is accountable (*f*) for the estate duty (*g*).

Every person so accountable, and every person whom the Commissioners believe to have taken possession of or administered (*h*) any part of the estate in respect of which estate duty is leviable on the deceased's death, or of the income of any part thereof, is, to the best of his knowledge and belief, if required by the Commissioners, to deliver to them, and verify on oath, a statement, in such form as may be prescribed by them, of such particulars, together with such evidence as they may require relating to any property which they have reason to believe to form part of such an estate (*i*).

281. Where the deceased was life tenant of property comprised in a settlement, and, subject to a succeeding life interest therein under such settlement, he had and exercised by his will an absolute power of appointment over the fund, the trustee of the settlement, and not the deceased appointor's representative, is accountable for the estate duty payable on the death of the deceased in respect of such property (*j*).

When objects of national, scientific, historic, or artistic interest become liable to estate duty, the person by whom or for whose benefit they are sold is accountable for the duty (*k*).

Where the sale moneys of timber etc. become liable to estate duty, the owners or trustees of the land on which the same was growing are to account for and pay the duty (*l*).

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Statement to be delivered where Commissioners believe that property passing has not been accounted for.

Persons accountable in various cases.

(*e*) In the case of a jointure charged on land the owner of the land is accountable for the duty (*Inland Revenue v. MacLachlan* (1899), 36 Sc. L. R. 727, *per* the Lord President (ROBERTSON), at p. 731). As to whether an insurance company is a person having the management of policy moneys, compare *Matthew v. Northern Assurance Co.* (1878), 9 Ch. D. 80.

(*f*) It has been said that an accountable person is a "debtor to the Crown" for the duty (*Berry v. Haukroger*, [1903] 2 Ch. 116, C. A., *per* VAUGHAN WILLIAMS, L.J., at p. 130).

(*g*) Finance Act, 1894 (57 & 58 Vict. c. 30), s. 8 (4).

(*h*) *A.-G. v. Wack* (1899), *Times*, 14th June; and compare *New York Breweries Co. v. A.-G.*, [1899] A. C. 62. Where moneys are payable by a British insurance company to the representatives of a person dying domiciled abroad, and a grant of representation in the United Kingdom is not necessary by virtue of the provisions of the Revenue Act, 1889 (52 & 53 Vict. c. 42), s. 19, such moneys nevertheless are, *semble*, chargeable with estate duty (Finance Act, 1894 (57 & 58 Vict. c. 30), s. 1), and the duty is a charge thereon (*ibid.*, s. 9 (1)).

(*i*) Finance Act, 1894 (57 & 58 Vict. c. 30), s. 8 (5), (14).

(*j*) *Re Dixon, Penfold v. Dixon*, [1902] 1 Ch. 248.

(*k*) Finance Act, 1896 (59 & 60 Vict. c. 28), s. 20 (2); Finance (1909-10) Act, 1910 (10 Edw. 7, c. 8), s. 63. In the case of deaths before the 30th April, 1909, where the exception from duty is restricted as stated in note (*m*), p. 202, *ante*, a person being in possession and competent to dispose of the settled objects is accountable for the estate duty in respect of them (Finance Act, 1896 (59 & 60 Vict. c. 28), s. 20 (2)).

(*l*) Finance (1909-10) Act, 1910 (10 Edw. 7, c. 8), s. 61 (5); see p. 213, *ante*.

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ment of
account.**

**Certificate of
discharge.**

282. A *bonâ fide* purchaser for valuable consideration without notice is not liable to or accountable for estate duty (*m*), and a person who acts merely as agent or bailiff for another person in the management of property is not accountable for any estate duty payable in respect of such property (*n*).

(3) *Limitation of Personal Liability.*

283. The liability of an executor (or administrator) for the payment of estate duty is limited to the amount of the assets which he has received as executor, or might but for his own neglect or default have received (*o*).

The limitation of personal liability to duty, in certain circumstances, after a specified lapse of time from the date of the settlement of the account in respect of which duty is payable, which obtains with regard to legacy duty (*p*) and succession duty (*q*), applies also to estate duty (*r*). In the case, however, of estate duty, an account is not regarded as "settled" until the time for the payment of the duty thereon has arrived (*s*).

There is a power also, as in the case of succession duty (*t*), to deposit with the Commissioners attested copies of certain documents which create a liability to estate duty, and to give notice of the facts which give rise to immediate claims for the duty, after the specified period from the date of which notices personal liability for the payment of the estate duty ceases (*a*).

284. When a person accountable for the estate duty in respect of any property passing on a death applies to the Commissioners and delivers to them and verifies a full statement, to the best of his knowledge and belief, of all property so passing and the several persons entitled thereto, the Commissioners may determine the rate of the estate duty in respect of the property for which the applicant is accountable, and on payment of the duty at that rate the applicant, so far as regards that property, is discharged from any further claim for estate duty, and the Commissioners are to give a certificate of such discharge (*b*).

(*m*) Finance Act, 1894 (57 & 58 Vict. c. 30), s. 8 (18).

(*n*) *Ibid.*, s. 8 (4).

(*o*) *Ibid.*, s. 8 (3). The term "assets" applies to personal property appointed by the will of the deceased under a general power of appointment as well as to the deceased's own personal property (*Re Fearnside, Baines v. Chadwick*, [1903] 1 Ch. 250, *per* SWINFEN EADY, J., at p. 256).

(*p*) See p. 256, *post*.

(*q*) See p. 297, *post*.

(*r*) Finance Act, 1894 (57 & 58 Vict. c. 30), s. 8 (2), incorporating the Customs and Inland Revenue Act, 1889 (52 & 53 Vict. c. 7), s. 14.

(*s*) Finance Act, 1894 (57 & 58 Vict. c. 30), s. 8 (2).

(*t*) See p. 298, *post*.

(*a*) Finance Act, 1894 (57 & 58 Vict. c. 30), s. 8 (2), incorporating Customs and Inland Revenue Act, 1889 (52 & 53 Vict. c. 7), s. 13. As to the form of notice, compare the Customs and Inland Revenue Act, 1889 (52 & 53 Vict. c. 7), s. 16, which, however, although explanatory of s. 13 (3), is not, in terms, incorporated in the Finance Act, 1894 (57 & 58 Vict. c. 30), by s. 8 (2); see p. 298, *post*.

(*b*) Finance Act, 1894 (57 & 58 Vict. c. 30), s. 11 (2), as modified by Finance Act, 1907 (7 Edw. 7, c. 13), s. 14. Certificates are to be in such form, and to contain such particulars, as the Commissioners may prescribe (Finance Act, 1894 (57 & 58 Vict. c. 30), s. 8 (14)), and are to be issued free of charge (*ibid.*, s. 8 (15)).

The certificate does not operate as a discharge in case of fraud or failure to disclose material facts (c), except as regards a *bonâ fide* purchaser for valuable consideration without notice (d).

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SUB-SECT. 4.—*Out of what Property the Duty is payable.*

(1) *Property which passes to the Executor as such.*

285. The estate duty payable in respect of the deceased's personal estate in this country (e), including any leasehold property forming part of it (f), passing or deemed to pass on his death, which the executor as such (g) is liable to pay, is payable out of the residue (h) of such personal estate (i), and, consequently, is not a specific charge upon the individual assets.

The deceased's personal estate.

Personal property which a deceased person appoints by his will, in exercise of a general power for that purpose, constitutes property passing to his executor as such, and the duty in respect of it is, accordingly, payable by him out of the testator's general

Personal property appointed in exercise of a general power.

(c) Finance Act, 1894 (57 & 58 Vict. c. 30), s. 11 (3).

(d) *Ibid.*, s. 11 (4).

(e) Foreign personal property does not pass to the executor as such (*Re Dixon, Penfold v. Dixon*, [1902] 1 Ch. 248, per BUCKLEY, J., at p. 251).

(f) *Re Culverhouse, Cook v. Culverhouse*, [1896] 2 Ch. 251; and compare *Re Fish, Lea v. Fish* (1897), 103 L. T. Jo. 267.

(g) Compare *Re Hadley, Johnson v. Hadley*, [1909] 1 Ch. 20, C. A.

(h) Compare *De Quetteville v. De Quetteville*, [1905] W. N. 130, C. A., where the general residue was insufficient to satisfy the duty. Where the residuary personal estate is insufficient, a specific bequest does not exonerate real estate taken by the heir (*Re Pullen, Parker v. Pullen*, [1910] 1 Ch. 564). A legacy out of personal estate, given "subject to death duties," other legacies being given free of duty, is not subject to its rateable proportion of the estate duty in respect of the personal estate (*Re Morrison, Morrison v. Morrison* (1910), 102 L. T. 530). A direction in a will made before the Finance Act, 1894 (57 & 58 Vict. c. 30), where the testator died after that Act, that the probate duty attributable to a legacy of Consols was to be paid thereout does not cover estate duty (*Re Boxer, Morris v. Woore*, [1910] 2 Ch. 69).

(i) *Re Webber, Gribble v. Webber*, [1896] 1 Ch. 914; and compare *Re Bourne, Martin v. Martin*, [1893] 1 Ch. 188. The estate duty in respect of a deceased person's personal estate is a "testamentary expense" (*Re Clemow, Yeo v. Clemow*, [1900] 2 Ch. 182; *Re Pullen, Parker v. Pullen*, *supra*), and where the deceased directs payment of his testamentary expenses, the duty falls to be paid out of the particular fund to which the direction refers (*Re Clemow, Yeo v. Clemow*, *supra*), and is to be paid out of the assets in the same order as other testamentary expenses (*Re Pullen, Parker v. Pullen*, *supra*). Estate duty in respect of the bequest of a personal annuity secured by a first charge on specific real property is also a "testamentary expense" (*Re Trenchard, Trenchard v. Trenchard*, [1905] 1 Ch. 82). But the estate duty in respect of settled personal estate passing on the deceased's death, over which, expectant upon the death of a succeeding life tenant, the deceased had, and exercised by will, a general power of appointment, is not a "testamentary expense" (*Re Dixon, Penfold v. Dixon*, *supra*). Where on the death of a deceased person his executors have to satisfy a covenant debt for which, under the Finance Act, 1894 (57 & 58 Vict. c. 30), s. 7 (1) (a), allowance in determining the value of the estate cannot be made, the estate duty payable in respect of his estate, without allowance for the debt, falls to be satisfied out of his residuary estate, and, except there is a deficiency of assets, no portion of it, apart from express direction, can be deducted against the amount due under the covenant (*Re Gray, Gray v. Gray*, [1896] 1 Ch. 620; *Re Chisholm, Goddard v. Brodie*, [1902] 1 Ch. 457). Where the debt was charged upon specific property, see *Alexander's Trustees v. Alexander's Marriage-Contract Trustees* (1910), 47 Sc. L. R. 537.

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Duty a first
 charge on
 such property.

Inalienable
 property.

Inter vivos
 gifts.

Evidence of
 the amount of
 the charge.

personal estate, and is not a specific charge upon the appointed property (*k*).

(2) *Other Property.*

286. Where property in respect of which estate duty is leviable does not pass to the executor as such (*l*), a rateable part of the duty, in proportion to the value of the property, is a first charge (*m*) on such property, except as against a *bonâ fide* purchaser of it for valuable consideration without notice (*n*).

Where lands or chattels are so settled by Act of Parliament or royal grant that no person is capable of alienating them, and the property passing is the interest of the successor (*o*), the duty is payable thereout (*p*).

Inter vivos gifts also bear their own charge of estate duty (*q*).

287. On an application submitting in the prescribed form the description of the lands or other subjects of property, and of the debts and incumbrances allowed by them in assessing the value of the property for the purpose of estate duty, the Commissioners are

(*k*) *Re Hadley, Johnson v. Hadley*, [1909] 1 Ch. 20, C. A., upholding *Re Moore, Moore v. Moore*, [1901] 1 Ch. 691; *Re Dixon, Penfold v. Dixon*, [1902] 1 Ch. 248; *Re Fearnside, Baines v. Chadwick*, [1903] 1 Ch. 250; *Re Creed, Thomas v. Hudson*, [1905] W. N. 94; *Re Orlebar, Wynter v. Orlebar*, [1908] 1 Ch. 136; and overruling *Re Treasure, Wild v. Stanham*, [1900] 2 Ch. 648; *Re Mardock, Llewelyn v. Washington*, [1901] 2 Ch. 372; *Re Power, Re Stone, Acworth v. Stone*, [1901] 2 Ch. 659; and *Re Dodson (P.)*, *Re Dodson (A. L. P.)*, *Gibson v. Dodson*, [1907] 1 Ch. 284.

(*l*) Real estate which becomes vested in the deceased's personal representative under the Land Transfer Act, 1897 (60 & 61 Vict. c. 65), does not pass to the executor "as such" (*Re Palmer, Palmer v. Rose-Innes*, [1900] W. N. 9; *Re Sharman, Wright v. Sharman*, [1901] 2 Ch. 280). The Land Transfer Act, 1897 (60 & 61 Vict. c. 65), does not affect any duty payable in respect of real estate, or impose on real estate any other duty than was then payable in respect thereof (*ibid.*, s. 5).

(*m*) Finance Act, 1894 (57 & 58 Vict. c. 30), s. 9 (1). As regards real property, the duty is a charge upon it whether the death occurred before or after the Land Transfer Act, 1897 (60 & 61 Vict. c. 65) (*Re Palmer, Palmer v. Rose-Innes*, [1900] W. N. 9; *Re Sharman, Wright v. Sharman*, [1901] 2 Ch. 280); and it is not, in either case, a testamentary expense (*Re Palmer, Palmer v. Rose-Innes*, *supra*; *Re Jolley, Neal v. Jolley* (1901), 17 T. L. R. 244; *Re Sharman, Wright v. Sharman*, *supra*; *Re Spencer Cooper, Poë v. Spencer Cooper*, [1908] 1 Ch. 130). As to real estate converted in equity, re-converted in the deceased's lifetime, and passing on his death as real estate, see *Re Grimthorpe (Lord), Beckett v. Grimthorpe (Lord)*, [1908] 1 Ch. 666. The charge of duty upon property is not affected by the fact that a sum sufficient to pay and discharge the estate duty may have been bequeathed by a testator to the successor to the property (*Mexborough (Earl) v. Savile* (1903), 88 L. T. 131, H. L.).

(*n*) Finance Act, 1894 (57 & 58 Vict. c. 30), s. 9 (1). Marriage settlement trustees are purchasers for valuable consideration for this purpose (*Morris v. Morris's Trustees* (1904), 11 Scots Law Times, 793); see also note (*g*), p. 301, *post*.

(*o*) Finance Act, 1894 (57 & 58 Vict. c. 30), s. 5 (5).

(*p*) *Re Bolton Estates Act*, 1863, [1904] 2 Ch. 289.

(*q*) Compare *Re Beddington, Micholls v. Samuel*, [1900] 1 Ch. 771, *per* BYRNE, J., at p. 773. In the case of account duty in respect of gifts made by persons dying after the 31st May, 1881, and before the 2nd August, 1894, the duty was also payable by the donee, and not out of the donor's estate (*Re Foster, Thomas v. Foster*, [1897] 1 Ch. 484).

to grant a certificate (r) of the estate duty paid in respect of the property, and to specify the debts and incumbrances so allowed, as well as the lands or other subjects of property in respect of which the payment was made (s).

Subject to any repayment (t) of estate duty arising from want of title to the property, or from the existence of any debt or incumbrance thereon for which an allowance ought to have been but has not been made, or from any other cause, the certificate so granted is conclusive evidence that the amount of duty named therein is a first charge (a) on the lands or other subjects of property after the debts and incumbrances have been allowed (b).

288. If the rateable part of the estate duty in respect of any property is paid by the executor, it is, where occasion requires, to be repaid to him by the trustees or owners of the property, but if the duty is in respect of real property, it may, unless otherwise agreed upon, be repaid by the same instalments (c), and with the same interest, as have been mentioned (d).

If a person who has a limited interest in any property pays the estate duty in respect thereof, he is entitled to the like charge as if the estate duty in respect of that property had been raised by means of a mortgage to him (e).

289. Estate duty, though leviable, is not a charge upon any property while situate in a British Possession (f).

(3) *Apportionment of Duty.*

290. Where property does not pass to the executor as such, an amount equal to the proper rateable part of the estate duty paid in respect of any property by a person authorised or required to pay it, may be recovered by him from the person entitled to any sum charged on the property (whether as capital or as an annuity or otherwise) (g)

SECT. 7.
Collection
of the
Duty.

Refund of
duty paid by
(1) executor ;

(2) person
having a
limited
interest only
in the
property.
Exception to
the charge.

Apportion-
ment as be-
tween owner
of property
and person
entitled to a
charge upon
it.

(r) See note (b), p. 218, *ante*.

(s) Finance Act, 1894 (57 & 58 Vict. c. 30), s. 9 (2).

(t) Any such repayment is to be made to the person producing the certificate (*ibid.*, s. 9 (3)).

(a) Compare *Laurie, Petitioner* (1898), 35 Sc. L. R. 496, *per* the Lord Ordinary (PEARSON), at p. 498.

(b) Finance Act, 1894 (57 & 58 Vict. c. 30), s. 9 (3).

(c) *Ibid.*, s. 6 (8).

(d) *Ibid.*, s. 9 (4); see p. 213, *ante*.

(e) *Ibid.*, s. 9 (6); *Lord Advocate v. Moray (Countess)*, [1905] A. C. 531. But not as against purchasers for valuable consideration without notice (*Morris v. Morris's Trustees* (1904), 12 Scots Law Times, 612). The life tenant is entitled to a mortgage in fee, and not merely to a terminable rentcharge (*Turnbull v. Turnbull* (1910), 47 Sc. L. R. 668). Compare *Re Hole, Davies v. Wills*, [1906] 1 Ch. 673, O. A. (estate duty on a lunatic's real estate paid out of his personal estate by his committee); and see note (n), p. 220, *ante*.

(f) Finance Act, 1894 (57 & 58 Vict. c. 30), s. 20 (2).

(g) It is intended that the duty should fall upon the beneficiaries in the proportion of their respective interests; see *Re Orford (Countess, Cartwright v. del Balzo (Duc)*, [1896] 1 Ch. 257, *per* NORTH, J., at p. 263; see also *Re Power, Power v. Howell* (1898), 47 W. R. 183; *Re Chisholm, Goddard v. Brodie*, [1902] 1 Ch. 457; *Berry v. Gaukroger*, [1903] 2 Ch. 116, O. A.; *Cope v. Breslin*, [1903] 1 I. R. 418; *Re Hacket, Hacket v. Gardiner*, [1907] 1 Ch. 385; *Alexander's Trustees v. Alexander's Marriage-Contract Trustees* (1910), 47 Sc. L. R. 537 and

SECT. 7.
Collection
of the
Duty.

Dispute as to
apportion-
ment.

under a disposition not containing any express provision (*h*) to the contrary (*i*).

The person from whom the rateable part of the estate duty can be recovered is bound by the accounts and valuations as settled between the person entitled to recover the same and the Commissioners (*k*).

Any dispute as to the proportion of estate duty to be borne by any property or person may be determined upon application by any person interested, in the manner directed by rules of court, either by the High Court (*l*) or, where the amount in dispute is less than £50, by a county court (*m*) for the county or place in which the person recovering the same resides or the property in respect of which the duty is paid is situate (*n*).

compare *Re Meyrick, Meyrick v. Hargreaves*, [1897] 1 Ch. 99, and *Wade v. Wade*, [1898] 2 Ch. 276. As to estates in dower, compare *Ross v. Ross' Trustees* (1901), 9 Scots Law Times 340.

(*h*) A direction to pay a jointure "free from any deduction whatever, except income tax," shifts the charge of estate duty (*Re Parker-Jervis, Salt v. Locker*, [1898] 2 Ch. 643). So also do directions (1) to pay a jointure "free from all taxes and deductions, except property tax and legacy or succession duty" (*Re Fitzhardinge (Lord), Fitzhardinge (Lord) v. Jenkinson* (1899), 80 L. T. 376, C. A.; (2) to pay an annuity "without any deduction except for legacy duty or income tax" (*Re Rayer, Rayer v. Rayer*, [1903] 1 Ch. 685); and (3) to pay "my duties" out of residuary estate (*Re Pimm, Sharpe v. Hodgson*, [1904] 2 Ch. 345). *Scrus*, where there were directions (4) to pay a "legacy" out of the proceeds of the sale of real estate (*Berry v. Gaultroger*, [1903] 2 Ch. 116, C. A.); (5) to raise "such sums as may be required to pay all . . . succession duties which may fall upon [the wife] after my decease" (*Fraser v. Croft* (1898), 25 R. (Ct. of Sess.) 496); and (6) to pay "the necessary expenses connected with this trust" out of a particular share (*Michie's Executors v. Michie* (1905), 42 Sc. L. R. 386).

A direction to pay out of residuary estate "all estate and other duties other than settlement estate duties" does not include the estate duty payable in respect of real property comprised in a voluntary conveyance made by the testator within twelve months of his death (*Re Barter, Baxter v. Baxter* (1898), 42 Sol. Jo. 611).

Where a mortgage on Blackacre is directed to be paid out of Whiteacre, the case is not within the Finance Act, 1894 (57 & 58 Vict. c. 30), s. 14 (1), and the estate duty is to be paid without regard to such direction (*Re Stamford and Warrington (Earl), Payne v. Grey*, [1910] 2 Ch. 83).

(*i*) Finance Act, 1894 (57 & 58 Vict. c. 30), s. 14 (1). Where, under the exercise of a power of appointment over property, which does not pass to the executor as such, sums of "clear amount or value" and "like amount or value" are appointed, the duty in respect of such sums is payable out of the residue of the appointed property (*Re Cozwell's Trusts, Kinloch-Cooke v. Public Trustees*, [1910] 1 Ch. 63). Where, however, the appointed sums are of specific amounts, they bear their proper rateable proportions of the duty (*ibid.*; see also *Re Chisholm, Goddard v. Brodie*, [1902] 1 Ch. 457). And it is so, also, where the appointment is of sums of "cash value" (*Kekewich v. Kekewich* (1909), 101 L. T. 887). In the case of account duty, where the death was after the 31st May, 1881, and before the 2nd August, 1894, appointees of specific sums, in the absence of any express provision to the contrary, bore the duty rateably (*Re Croft, Deane v. Croft*, [1892] 1 Ch. 652; *Re Shaw, Tucket v. Shaw*, [1895] 1 Ch. 343).

(*k*) Finance Act, 1894 (57 & 58 Vict. c. 30), s. 14 (3).

(*l*) R. S. C., Ord. 54, r. 4B, and App. K, No. 1A; Ord. 55, r. 90; see title PRACTICE AND PROCEDURE.

(*m*) County Court Rules, 1903, Ord. 42, r. 12. Compare County Courts Act, 1903 (3 Edw. 7, c. 42), s. 3. See title COUNTY COURTS, Vol. VIII, pp. 648 *et seq.*

(*n*) Finance Act, 1894 (57 & 58 Vict. c. 30), s. 14 (2).

(4) *Powers to raise the Duty.*SECT. 7.
Collection of the Duty.

Mode of raising the duty.

291. For the purpose of paying the estate duty, or of raising the amount thereof when already paid, a person authorised or required to pay the duty in respect of any property (o) has power, whether the property is or is not vested in him, to raise the amount of such duty, and any interest (p) and expenses (q) properly paid or incurred by him in respect thereof, by the sale (r), or mortgage (s), or a terminable charge on such property, or any part of it (t).

Any money arising from the sale of property comprised in a settlement, or held upon trust to lay out upon the trusts of a settlement, and capital money arising under the Settled Land Act, 1882 (a), may be expended in paying any estate duty in respect of property comprised in the settlement and held upon the same trusts (b).

Application of capital moneys in a settlement.

(5) *Limitation of the Charge of Duty.*

292. The limitation of the charge of estate duty on property, in the case of purchasers for valuable consideration, and mortgagees, after specified lapses of time from certain events, which obtains with regard to succession duty (c), applies also to estate duty (d).

As against purchasers and mortgagees.

(o) This applies to all property passing, whether "free property" of the testator or not (*Berry v. Gaukroger*, [1903] 2 Ch. 116, C. A., per VAUGHAN WILLIAMS, L.J., at p. 130).

(p) In the case of settled property the tenant for life would appear, in general, to be personally liable for the payment of interest on the duty (*Re Howe's (Earl) Settled Estates, Howe (Earl) v. Kingscote*, [1903] 2 Ch. 69, C. A.); *secus*, in the case of the interest from the date of the death up to the delivery of the affidavit or account, or the expiration of six months after the death, whichever first happened, which, under the Finance Act, 1894 (57 & 58 Vict. c. 30), s. 6 (6) (repealed as to the provision in question by the Finance Act, 1896 (59 & 60 Vict. c. 28), s. 40, and Sched., Part III.), was to form part of the estate duty (*Re Fish, Lea v. Fish* (1897), 103 L. T. Jo. 267).

(q) *I.e.*, expenses incurred in paying the duty; see *Harris's Trustees v. Harris* (1904), 41 Sc. L. R. 357, 358. As to the charging of expenses upon Scottish heritable property under the cognate provision in the Finance Act, 1894 (57 & 58 Vict. c. 30), s. 23 (18), see *Mackechnie, Petitioner* (1898), 6 Scots Law Times, 242; *Menzies, Petitioner* (1903), 10 Scots Law Times, 636; and compare *Laurie, Petitioner* (1898), 35 Sc. L. R. 496. With regard to the rateable apportionment of the costs of raising the duty on funds in a marriage settlement, as between the appointees of capital sums and of the residue, see *Re Chisholm, Goddard v. Brodie*, [1902] 1 Ch. 457.

(r) The court made an order for sale in the Scottish case of *Mackechnie, Petitioner*, *supra*, under the cognate provision in the Finance Act, 1894 (57 & 58 Vict. c. 30), s. 23 (18) (a).

(s) *Harris's Trustees v. Harris* (1904), 41 Sc. L. R. 357.

(t) Finance Act, 1894 (57 & 58 Vict. c. 30), s. 9 (5). As to payment of estate duty out of a fund in court, see Supreme Court Fund Rules, 1905, rr. 20, 52 (b), 66; County Court Rules, 1903, Ord. 2, r. 14; see title COUNTY COURTS, Vol. VIII., p. 500.

(a) Settled Land Act, 1882 (45 & 46 Vict. c. 38).

(b) Finance Act, 1894 (57 & 58 Vict. c. 30), s. 9 (7).

(c) See p. 301, *post*.

(d) Finance Act, 1894 (57 & 58 Vict. c. 30), s. 8 (2), incorporating Customs and Inland Revenue Act, 1889 (52 & 53 Vict. c. 7), s. 12. As to the charge of duty in general remaining until the duty has been paid, see *Re Jolley, Neal v. Jolley* (1901), 17 T. L. R. 244, per JOYCE, J., at p. 245. The charge of duty is an "equitable charge" within the Real Estate Charges Act, 1877 (40 & 41 Vict. c. 34), s. 1 (*Re Bowerman, Porter v. Bowerman*, [1908] 2 Ch. 340).

SECT. 7.

**Collection
of the
Duty.**Certificate of
discharge of
the property.

The Commissioners, on being satisfied that the full estate duty has been or will be paid in respect of an estate or any part thereof, are, if required by the person accounting for the duty, to give a certificate (e) to that effect, and such certificate discharges from any further claim for estate duty the property shown by the certificate to form the estate or part thereof (f).

Where a person accountable for the estate duty in respect of any property passing on a death proceeds in the manner elsewhere stated (g), the property, as well as the applicant, is discharged from any further claim for estate duty (h).

The certificate of the Commissioners, in the case of the property as in the case of the applicant, does not operate as a discharge in case of fraud or failure to disclose material facts (i), except as regards a *bonâ fide* purchaser for valuable consideration without notice (k).

SUB-SECT. 5.—*Remission of Duty and Interest.*Power to
remit.

293. The Commissioners and the Treasury, respectively, have, as already stated (l), certain powers to remit estate duty and interest thereon.

SUB-SECT. 6.—*Commutation of Duty and Composition of Claims.*Commutation
of future
claims.

294. The Commissioners, in their discretion (m), upon application by a person entitled to an interest in expectancy, may, by means of

(e) See note (b), p. 218, *ante*.

(f) Finance Act, 1894 (57 & 58 Vict. c. 30), s. 11 (1). As to a certificate that property may be registered under the Land Transfer Act, 1897 (60 & 61 Vict. c. 65), without notice of any liability to the Crown for any death duty (see *ibid.*, s. 13), by reason of a death, see the Land Transfer Rules, 1903 (Statutory Rules and Orders Revised, Vol. VII., Land (Registration) England, pp. 33, 68, 69), rr. 208–211). Applicants for a certificate under r. 210 (b) should fill in the official form No. 0500 in duplicate, and transmit it to the Estate Duty Office. The certificate, if it can be issued, will be placed upon one copy of the application; and see note (b), p. 218, *ante*.

(g) See p. 218, *ante*.

(h) Finance Act, 1894 (57 & 58 Vict. c. 30), s. 11 (2), as modified by Finance Act, 1907 (7 Edw. 7, c. 13), s. 14.

(i) Finance Act, 1894 (57 & 58 Vict. c. 30), s. 11 (3).

(k) *Ibid.*, s. 11 (4).

(l) See p. 182, *ante*.

(m) It is the practice to commute future claims for estate duty in those cases only in which the property is being so dealt with as to render it desirable to free it from the charge of duty. The application should disclose the dealings with the property, which is the subject of the application, and should set forth the circumstances which are regarded as sufficient to warrant the commutation. It should also contain the following particulars, namely: (1) a full description of the property, and also, as regards real estate and leaseholds, the gross annual value and the gross amount for which the property has been contracted to be sold, or the gross amount for which it is being mortgaged; (2) the title to the property, including, if derived under a will, the name of the testator, the date of his death, and the date and place of probate, and, if under a deed, the date thereof (if the deed has not hitherto been noted in the Estate Duty Office, the deed, or a copy of it, should accompany the application); and (3) the date of birth of the tenant for life or the annuitant in connection with whose death the presumptive claim is considered to be outstanding, and also the date of birth of the remainderman.

If there is no objection to the commutation, the applicants are notified accordingly, and appropriate forms of account are forwarded with the notification. Every agreement to commute is made subject to the reservations

a present payment, commute the estate duty presumptively payable in respect of that interest (*n*).

In arriving at the present value to be set upon the duty, the contingencies affecting the liability to, and the rate and amount of, the duty, are to be taken into consideration, and the rate of interest is to be reckoned at 3 per cent. (*n*).

When the duty agreed to be accepted by way of commutation has been paid, the Commissioners are to give a certificate (*o*) of discharge accordingly (*p*).

The Commissioners, as already stated (*q*), have certain powers to compound for estate duty.

SECT. 7.
Collection
of the
Duty.

Power to
compound.

SECT. 8.—*Interest, Penalties, and Proceedings.*

SUB-SECT. 1.—*Interest.*

295. Simple interest at the rate of 3 per cent. per annum (*r*), without deduction for income tax (*s*), is payable upon all estate duty from the date of the death of the deceased, except where the duty is payable by instalments (*t*), or becomes due at any date later than six months after the death, in which case interest commences to run from the date at which the first instalment of the duty, or the whole duty, as the case may be, becomes due (*a*).

Interest is recoverable in the same manner as if it were part of the duty (*b*).

Where the fixed estate duty of 30s. or 50s. is paid within twelve months after the death of the deceased, interest on such duty is not chargeable (*c*).

Rate of
interest
payable.

How
recoverable.

Small estates.

SUB-SECT. 2.—*Penalties.*

296. Any person who wilfully fails to comply with any of the foregoing provisions as to the delivery of an Inland Revenue affidavit, an account or statement, in the manner prescribed by the Commissioners, or as to the production of books, documents, or

On executors
and other
accountable
persons.

(1) that the life tenant or annuitant is in ordinary good health, and (2) that the commuted sum for duty is paid in his or her lifetime, and forthwith.

(*n*) Finance Act, 1894 (57 & 58 Vict. c. 30), s. 12. Where a life interest in a fund in court has been released in favour of the remainderman, and the Commissioners deem the case not one for commutation, it appears to be necessary for a sufficient sum to be retained in court to satisfy any claim for estate duty which may arise under the Finance Act, 1900 (63 & 64 Vict. c. 7), s. 11 (1), as amended by the Finance (1909-10) Act, 1910 (10 Edw. 7, c. 8), s. 59 (1) (*Taylor v. Poncia*, [1901] W. N. 87); see also note (*r*), p. 254, *post*.

(*o*) See note (*b*), p. 218, *ante*.

(*p*) Finance Act, 1894 (57 & 58 Vict. c. 30), s. 12.

(*q*) See p. 181, *ante*.

(*r*) Formerly 4 per cent. (Finance Act, 1894 (57 & 58 Vict. c. 30), s. 8 (10), incorporating Inland Revenue Act, 1868 (31 & 32 Vict. c. 124), s. 4); see also note (*p*), p. 223, *ante* (interest which forms part of duty).

(*s*) See note (*n*), p. 213, *ante*.

(*t*) No discount is allowable where the whole estate duty payable by instalments, though not actually due, is paid within the twelve months subsequent to the death.

(*a*) Finance Act, 1896 (59 & 60 Vict. c. 28), s. 18 (1).

(*b*) *Ibid*.

(*c*) Finance Act, 1894 (57 & 58 Vict. c. 30), s. 16 (5).

SECT. 8.**Interest,
Penalties,
and Pro-
ceedings.****Reduction of
penalty.**

evidence required by them, is liable to pay £100, or a sum equal to double the amount of the unpaid duty for which he is accountable, as the Commissioners may elect (*d*).

The Commissioners have power to reduce the penalty, and it may be reduced by the court if proceedings (*e*) are taken for its recovery (*f*).

SUB-SECT. 3.—Proceedings.**Existing law
and practice
as on the 2nd
August, 1894.**

297. The law and practice existing at the time of the imposition of the estate duty relative to the recovery of any of the death duties are, subject to the provisions of the Finance Act, 1894 (*g*), and so far as the same are applicable, to apply, as if in terms made applicable, to the recovery of the estate duty (*h*).

**Appointment
of a receiver
of the
property.**

Where any proceeding is instituted for the recovery of the estate duty in respect of any property, the High Court has jurisdiction to appoint a receiver of the property and the rents and profits thereof, and to order a sale of the property (*i*).

**British
Possession.**

The Commissioners are not authorised to take proceedings in a British Possession for the recovery of any estate duty (*j*).

**Appeal from
the decision
of the Com-
missioners.**

298. Any person aggrieved by the decision of the Commissioners with respect to the repayment of any excess of duty, or by the amount of duty claimed by them, whether on the ground of the value of any property (not being real or leasehold (*k*)), or the rate charged, or otherwise, may, on payment of the duty claimed by the Commissioners, or such portion of it as is then payable by him, or on giving security for it, appeal to the High Court to determine the amount of duty payable (*l*).

**Conditions as
to appeal.**

The appeal must be made within the time, and in the manner, and on the conditions, directed by rules of court (*m*).

**Costs and
leave of
further
appeal.**

The costs of the appeal are to be in the discretion of the court, and no appeal from any order, direction, determination, or decision of the court is to be allowed except with the leave of the High Court or Court of Appeal (*n*).

Where the High Court is satisfied that it would impose

(*d*) Finance Act, 1894 (57 & 58 Vict. c. 30), s. 8 (6), (14).

(*e*) See Inland Revenue Regulation Act, 1890 (53 & 54 Vict. c. 21), ss. 21 *et seq.*

(*f*) Finance Act, 1894 (57 & 58 Vict. c. 30), s. 8 (6). The acceptance of interest by the Commissioners is tantamount to a waiver of penalties (Finance Act, 1896 (59 & 60 Vict. c. 28), s. 18 (1); Inland Revenue Act, 1868 (31 & 32 Vict. c. 124), s. 9).

(*g*) 57 & 58 Vict. c. 30.

(*h*) *Ibid.*, s. 8 (1). See pp. 260, 303, 317, *post*; and title CROWN PRACTICE, Vol. X., p. 20. An order for attachment will be made for non-compliance with a writ (*Re Horrex* (1910), *Times*, 9th March).

(*i*) Finance Act, 1894 (57 & 58 Vict. c. 30), s. 8 (13).

(*j*) *Ibid.*, s. 20 (2).

(*k*) Finance (1909-10) Act, 1910 (10 Edw. 7, c. 8), s. 60 (3).

(*l*) Finance Act, 1894 (57 & 58 Vict. c. 30), s. 10 (1), which, prior to the Finance (1909-10) Act, 1910 (10 Edw. 7, c. 8), s. 60 (3), extended also to real and leasehold property.

(*m*) Finance Act, 1894 (57 & 58 Vict. c. 30), s. 10 (1); R. S. O. (Finance Act). 1895; see title PRACTICE AND PROCEDURE.

(*n*) Finance Act, 1894 (57 & 58 Vict. c. 30), s. 10 (2), (3).

hardship to require the appellant, as a condition of an appeal, to pay the duty claimed by the Commissioners, or such portion of it as is then payable by him, it may allow the appeal to be brought without payment of any of the duty, or upon payment of such part only thereof as to the court seems reasonable, provided that security, satisfactory to the court, is given for the whole or any part of the duty which remains unpaid (*o*).

If the court determines the amount of duty payable to be less than the amount paid, the difference is to be returned (*p*), and the court may order interest at the rate of 3 per cent. per annum for such period as appears to the court to be just to be paid by the Commissioners on the amount of duty to be returned (*q*).

On the other hand, if on the ground of hardship an appeal is allowed to proceed without payment of the whole of the duty claimed by the Commissioners, the court may order interest at the rate of 3 per cent. per annum to be paid upon any unpaid duty which the court determines to be payable (*r*).

Where the value of the property in respect of which the dispute arises does not, as alleged by the Commissioners, exceed £10,000, the appeal may be to the county court for the county or place in which the appellant resides or the property is situate (*s*).

For the purpose of the appeal, the above provisions are to apply as if the county court were the High Court (*t*), but in every case which comes before the county court, any party has a right of appeal to the Court of Appeal (*a*).

In the case of real or leasehold property, the appeal of any person aggrieved by the decision of the Commissioners as to the value of any such property is to be referred, in accordance with rules, to a referee appointed for the purpose of appeals in connection with the duties on land values (*b*). Any person aggrieved by the decision of the referee may appeal against the decision to the court (*c*).

Such appeals to the court are to be in accordance with the above provisions affecting property other than real or leasehold property, save that appeals to the county court can only be made where the value as alleged by the Commissioners of the property in respect of which the dispute arises does not exceed £500 (*c*).

299. The county council of every county or county borough in Great Britain may from time to time appoint qualified persons to act as valuers under the Finance Act, 1894 (*d*), in their respective

SECT. 8.
Interest,
Penalties,
and Pro-
ceedings.

Hardship involved in payment of whole duty. Court may order interest to be paid (1) by the Commissioners; (2) by the appellant.

When appeal may be made to county court.

Appeal from decision of county court.

Appeal against the value placed by the Commissioners upon real or leasehold property.

Appointment of valuers.

(*o*) Finance Act, 1894 (57 & 58 Vict. c. 30), s. 10 (4).

(*p*) *Ibid.*, s. 10 (1).

(*q*) *Ibid.*, s. 10 (3); see *Sprot's Trustees v. Lord Advocate* (1903), 10 Scots Law Times, 452.

(*r*) Finance Act, 1894 (57 & 58 Vict. c. 30), s. 10 (4).

(*s*) *Ibid.*, s. 10 (5). The form of procedure is indicated in the County Court Rules, Ord. 42; see title COUNTY COURTS, Vol. VIII., p. 649.

(*t*) Finance Act, 1894 (57 & 58 Vict. c. 30), s. 10 (5).

(*a*) Finance Act, 1896 (59 & 60 Vict. c. 28), s. 22.

(*b*) Finance (1909-10) Act, 1910 (10 Edw. 7, c. 8), ss. 33, 34, 60 (3). See Land Values (Reference) Rules, 1910, dated 25th July, 1910 (Stat. E. & O. 1910. No. 859, L. 22).

(*c*) *Ibid.*, s. 33 (4) (proviso), applying Finance Act, 1894 (57 & 58 Vict. c. 30), s. 10 (2), (3), (4).

(*d*) Finance Act, 1894 (57 & 58 Vict. c. 30).

SECT. 8.
Interest,
Penalties,
and Pro-
ceedings.

counties, and are to fix a scale of charges for their remuneration, and the court may refer any question of disputed value, except as to real or leasehold property (*e*), to the arbitration of any person so appointed for the county in which the appellant resides or the property is situate (*f*).

The costs of the arbitration are to be part of the costs of the appeal (*f*).

SECT. 9.—Repayment of Overpaid Duty.

Existing law
and practice
as on the 2nd
August, 1894.

300. The law and practice, existing at the time of the imposition of the estate duty, relating, in matters of procedure (*g*), to the repayment of any of the death duties are, as in the case of the recovery of estate duty (*h*), and to the same extent, applied to the repayment of estate duty (*i*).

Commis-
sioners to
refund duty
paid in excess.

Where it is proved to the satisfaction of the Commissioners that too much estate duty has been paid, the excess is to be repaid by them, and where the over-payment was due to an over-valuation by them, the repayment is to be with interest at 3 per cent. per annum (*k*).

Part III.—Settlement Estate Duty.

SECT. 1.—The Imposition of the Duty.

Further
estate duty
on settled
property.

301. Settlement estate duty (*l*) is a further estate duty (*m*), and is leviable on the principal value (*n*) of settled property (*o*), with certain express exceptions (*p*), in respect of which estate duty is leviable (*q*).

(*e*) *Semble*, compare Finance (1909-10) Act, 1910 (10 Edw. 7, c. 8), s. 60 (3).

(*f*) Finance Act, 1894 (57 & 58 Vict. c. 30), s. 10 (6).

(*g*) *Watherston's Trustees v. Lord Advocate* (1901), 38 Sc. L. R. 324.

(*h*) See p. 226, *ante*.

(*i*) Finance Act, 1894 (57 & 58 Vict. c. 30), s. 8 (1).

(*k*) *Ibid.*, s. 8 (12); see *Sprot's Trustees v. Lord Advocate* (1903), 10 Scots Law Times, 452. Except as stated here and at p. 227, *ante*, there is no statutory obligation on the Commissioners to allow interest. Interest is only payable by statute or contract (*Re Gosman* (1881), 17 Ch. D. 771, C. A.).

(*l*) Finance Act, 1894 (57 & 58 Vict. c. 30), ss. 5 (1), (4), (5), 16 (3), 21 (4); Finance Act, 1896 (59 & 60 Vict. c. 28), s. 19 (1), (2); Finance Act, 1898 (61 & 62 Vict. c. 10), s. 14; Finance (1909-10) Act, 1910 (10 Edw. 7, c. 8), ss. 54, 56 (1). The Finance Act, 1894 (57 & 58 Vict. c. 30), s. 23, contains provisions affecting Scotland exclusively.

(*m*) Finance Act, 1894 (57 & 58 Vict. c. 30), s. 5 (1) (a).

(*n*) As to fractional parts of £10 in the principal value, where the deceased died before the 1st July, 1896, and of £100, where the deceased died after the 30th June, 1896, and before the 9th April, 1900, see note (*l*), p. 206, *ante*.

(*o*) See p. 184, *ante*. Property is not "settled" for this purpose where it is limited to the same person for different interests (*Lord Advocate v. Wood's Trustees* (1910), 53rd Report of Commissioners of Inland Revenue, 50).

(*p*) See p. 230, *post*.

(*q*) Finance Act, 1894 (57 & 58 Vict. c. 30), s. 5 (1) (first branch). The ratio for settlement estate duty is that it affords some compensation, where property is settled, for the immunity of the property from a second estate duty when the life tenant dies (*Lord Advocate v. Stewart's Trustees* (1899), 36 Sc. L. R. 297, *per Lord STORMONTH DARLING*, at p. 299).

SECT. 2.—*Settled Property.*SECT. 2.
Settled
Property.

302. The property must either have been settled by the deceased's will, or, if settled by some other disposition, must pass thereunder on his death to some person not competent to dispose of it (*r*).

Passing to a person not competent to dispose.

If property which has been settled by the deceased's will passes to a person whose competency to dispose of it is only exercisable in a particular event, settlement estate duty is leviable (*s*).

An immediate gift of property *inter vivos*, by way of settlement, excluding the donor, made by him within three years (*t*) of his death, involves the liability to settlement estate duty (*u*). The property so given is deemed to pass on the donor's death under the disposition by which the settlement is effected (*x*).

Gifts *inter vivos*.

303. Property comprised in a contingent settlement is to be regarded as settled property (*y*); and not the less so where, by the same instrument, there is a prior disposition of the same property, the continuance of which would exclude the contingent settlement altogether (*z*).

Contingent settlements.

Where, however, after payment of the settlement estate duty, it is shown that the contingency has not arisen, and cannot arise, the duty is repayable (*a*).

Repayment where contingency does not arise.

304. Where an annuity is bequeathed by the deceased's will, and a capital sum is directed to be set apart to yield it, such sum is to be regarded as settled property, and settlement estate duty is leviable (*b*).

Annuity fund.

(*r*) Finance Act, 1894 (57 & 58 Vict. c. 30), s. 5 (1) (first branch).

(*s*) *Lord Advocate v. Stewart's Trustees* (1899), 36 Sc. L. R. 297, 300. It is not clearly leviable where the competency is exercisable in any event. That it is leviable, see *Re Palmer, Palmer v. Rose-Innes*, [1900] W. N. 9; but compare, *contra*, *A.-G. v. Owen, A.-G. v. Coulson*, [1899] 2 Q. B. 253, *per* GRANTHAM, J., at p. 262.

(*t*) Formerly twelve months; see note (*k*), p. 188, *ante*.

(*u*) *A.-G. v. Chamberlain* (1904), 90 L. T. 581; *A.-G. v. Smyth*, [1905] 2 I. R. 553; *H. M. Advocate v. Heywood-Lonsdale's Trustees* (1906), 43 Sc. L. R. 529; *Inland Revenue v. Heywood-Lonsdale's Trustees* (1906), 43 Sc. L. R. 589.

(*x*) *Inland Revenue v. Heywood-Lonsdale's Trustees*, *supra*, *per* the Lord Ordinary (JOHNSTON), at p. 591.

(*y*) *A.-G. v. Fairley*, [1897] 1 Q. B. 698. In *A.-G. v. Clarkson*, [1900] 1 Q. B. 156, O. A., the court, at p. 163, doubted the accuracy of the decision in *A.-G. v. Fairley*, *supra*, but regarded the Finance Act, 1898 (61 & 62 Vict. c. 10), s. 14, as a legislative adoption of it.

(*z*) *A.-G. v. Fairley*, *supra*, at p. 701.

(*a*) Finance Act, 1898 (61 & 62 Vict. c. 10), s. 14. The death on which the duty was paid must have occurred after the 30th June, 1898 (*ibid.*). Whether a settlement with a competency to dispose of the settled property only in a particular event is a contingent settlement, so that, if the competency to dispose afterwards becomes exercisable in any event, the settlement estate duty is repayable, is not clear. That it is not so repayable, see *Watherston's Trustees v. Lord Advocate* (1901), 38 Sc. L. R. 324, *per* the Lord President (BALFOUR), at p. 328; *contra*, see *Lord Advocate v. Stewart's Trustees*, *supra*, *per* Lord M'LAREN, at p. 300.

(*b*) *A.-G. v. Owen, A.-G. v. Coulson*, *supra*, at pp. 263, 266; *Re Campbell*, [1902] 1 K. B. 113, 120, 122, C. A. *Secus*, *semble*, in the case of an annuity *simpliciter* (compare *A.-G. v. Hannen* (1904), 48th Report of Commissioners of Inland Revenue, 121).

SECT. 2. The duty is also leviable where a capital sum representing the annuity is bequeathed after the annuitant's death (c).
Settled Property.

SECT. 3.—Exceptions from the Charge of Duty.

Only once during settlement. **305.** During the continuance of the settlement, settlement estate duty is not payable more than once (d), and it is not payable at all in respect of :—

Dispositions before 2nd August, 1894.

Where only life interest that of spouse.

Small estates.

Inalienable property.

Deduction of stamp duty.

(1) Property settled by a disposition which has taken effect before the 2nd August, 1894 (e);

(2) Property wherein the only life interest after the deceased's death is that of a husband or wife of the deceased (f);

(3) Property settled by the deceased's will, where the net value of the whole property passing on his death, in respect of which estate duty is payable, exclusive of other settled property, does not exceed £1,000 (g); and

(4) Any lands or chattels which are so settled, whether by Act of Parliament or royal grant, that no one of the persons successively in possession is capable of alienating them (h), otherwise than under the powers of sale or exchange in the Settled Land Act, 1882 (i).

306. Any person paying the settlement estate duty upon settled property may deduct the amount of the *ad valorem* stamp duty (if any) charged on the settlement in respect of that property (k).

SECT. 4.—The Rate of Duty.

Rate of duty. **307.** The rate of the settlement estate duty is 2 per cent. (l).

SECT. 5.—Collection of the Duty.

Payment in kind. **308.** Land may be transferred in satisfaction of settlement estate duty (m), as in the case of estate duty (n).

(c) *A.-G. v. Owen, A.-G. v. Coulson*, [1899] 2 Q. B. 253. The capital sum required to yield the annuity, and not the capital sum bequeathed on the annuitant's death, is, seemingly, the measure of taxation (S. C. (1899), 81 L. T. 121, *per* KENNEDY, J., at p. 127). The annuity may, seemingly, be contingent (*Re St. Albans (Duke)*, *Loder v. St. Albans (Duke)*, [1900] 2 Ch. 873).

(d) Finance Act, 1894 (57 & 58 Vict. c. 30), s. 5 (1) (b).

(e) *Ibid.*, s. 21 (4). Where, however, under such a disposition, the deceased is absolutely entitled to the property, expectant on his own death, without issue, and settles it by his will, settlement estate duty is leviable (*Re Lewis, Lewis v. Smith*, [1900] 2 Ch. 176).

(f) Finance Act, 1894 (57 & 58 Vict. c. 30), s. 5 (1) (a).

(g) *Ibid.*, s. 16 (3).

(h) *Ibid.*, s. 5 (5).

(i) Settled Land Act, 1882 (45 & 46 Vict. c. 38); *Re Bolton Estates Act*, 1863, [1904] 2 Ch. 289.

(k) Finance Act, 1894 (57 & 58 Vict. c. 30), s. 5 (4); Stamp Act, 1891 (54 & 55 Vict. c. 39), Sched.

(l) Finance Act, 1894 (57 & 58 Vict. c. 30), s. 17; Finance (1909-10) Act, 1910 (10 Edw. 7, c. 8), s. 54. In the case of deaths prior to the 30th April, 1909, the rate is 1 per cent. (*ibid.*).

(m) Finance (1909-10) Act, 1910 (10 Edw. 7, c. 8), s. 56 (1).

(n) See p. 212, *ante*.

309. The settlement estate duty in respect of a legacy, or other personal property, settled by the deceased's will, is to be collected upon an account setting forth the particulars thereof (o).

The account is to be delivered to the Commissioners, by the executor, within six months after the deceased's death, or within such further time as the Commissioners may allow (p).

An Inland Revenue affidavit (q), rendered on obtaining a grant of representation to the deceased, is not an "account" within the meaning of this enactment (r).

The settlement estate duty in respect of such legacy etc. is payable thereout, in exoneration of the rest of the deceased's estate, unless the will contains an express provision to the contrary (s).

Annuitytants under the will are to bear their proper proportion of the settlement estate duty (t).

Settlement estate duty in respect of personal property settled by the deceased's will is not a testamentary expense (u).

SECT. 5.
Collection of the Duty.

Personal property settled by deceased's will.

Not a testamentary expense.

SECT. 6.—Application of General Estate Duty Enactments.

310. Settlement estate duty is estate duty, and, except where there is special provision, the legislative enactments as to estate duty cover also the settlement estate duty (a).

The duty is estate duty.

(o) Finance Act, 1896 (59 & 60 Vict. c. 28), s. 19 (2).

(p) *Ibid.*

(q) See p. 215, *ante*.

(r) *A.-G. v. Montefiore* (1909), 52nd Report of Commissioners of Inland Revenue, 85 (a case on the limitation of liability under the Finance Act, 1894 (57 & 58 Vict. c. 30), s. 8 (2), embodying the Customs and Inland Revenue Act, 1889 (52 & 53 Vict. c. 7), s. 14).

(s) Finance Act, 1896 (59 & 60 Vict. c. 28), s. 19 (1). Compare *Re Gibbs, Thorne v. Gibbs*, [1898] 1 Ch. 625. Apparently the law under the Finance Act, 1894 (57 & 58 Vict. c. 30), was the same (*Re Maryon-Wilson, Wilson v. Maryon-Wilson*, [1900] 1 Ch. 565, C. A., per LINDLEY, M.R., at p. 570), although the contrary had been decided in *Re Webber, Gribble v. Webber*, [1896] 1 Ch. 914. A direction in the will for the payment out of the testator's residuary estate of "the estate duty on the whole of the real and personal estate" (*Re Leveridge, Spain v. Lejoindre*, [1901] 2 Ch. 830); or of "my duties" (*Re Pimm, Sharpe v. Hodgson*, [1904] 2 Ch. 345); or of "the death duties payable out of my estate" (*Re Cayley, Awdry v. Cayley*, [1904] 2 Ch. 781); or for the payment of legacies "free from duty" (*Re Turnbull, Skipper v. Wade*, [1905] 1 Ch. 726); or to set aside a fund to produce a "clear" annuity (*Re Dyet, Morgan v. Dyet* (1902), 87 L. T. 744); shifts the burden of the settlement estate duty from the settled legacy etc. to the residuary estate. Where also a sum is covenanted to be paid "without any deduction," any settlement estate duty payable in respect of the sum is payable out of the covenantor's residuary estate (*Re Maryon-Wilson, Wilson v. Maryon-Wilson, supra*). A direction in the will, however, to pay out of the testator's residuary estate "all duties payable by law out of my estate" does not shift the burden of the settlement estate duty (*Re Lewis, Lewis v. Smith*, [1900] 2 Ch. 176). A direction which is operative to shift the charge of duty confers an additional legacy, which, on a deficiency of assets, is to be added to the original legacy for abatement (*Re Turnbull, Skipper v. Wade, supra*).

(t) *Re St. Albans (Duke), Loder v. St. Albans (Duke)*, [1900] 2 Ch. 873, which applied to settlement estate duty the principle of *Re Parker-Jervis, Salt v. Locker*, [1898] 2 Ch. 643.

(u) *Re King, Travers v. Kelly*, [1904] 1 Ch. 363. *A fortiori*, in other circumstances, it is not.

(a) *Re Leveridge, Spain v. Lejoindre*, [1901] 2 Ch. 830, 832; compare, also, *Re Webber, Gribble v. Webber*, *supra*, at p. 921; and *Re Maryon-Wilson, Wilson v. Maryon-Wilson, supra*, at p. 570.

Part IV.—Legacy Duty.

SECT. 1.

The Imposition of the Duty.

The extent of the charge.

SECT. 1.—*The Imposition of the Duty.*

311. Legacy duty (*b*) is payable, save as expressly provided (*c*), according to the value, ascertained in the prescribed manner (*d*), in respect of every "legacy" of personal estate (*e*), or succession thereto upon intestacy (*f*).

The date of the death of the testator or intestate is immaterial (*g*).

(*b*) Legacy Duty Act, 1796 (36 Geo. 3, c. 52), ss. 4—6, 8—31, 33—35, 37—39, 41, 43, 44; Legacy Duty Act, 1799 (39 Geo. 3, c. 73), s. 1; Legacy Duty Act, 1805 (45 Geo. 3, c. 28), ss. 5, 7; Probate and Legacy Duties Act, 1808 (48 Geo. 3, c. 149), s. 44; Stamp Act, 1815 (55 Geo. 3, c. 184), s. 2, Sched., Part III.; Revenue Act, 1845 (8 & 9 Vict. c. 76), s. 4; Succession Duty Act, 1853 (16 & 17 Vict. c. 51), ss. 11, 19, 31, 53; Crown Suits etc. Act, 1865 (28 & 29 Vict. c. 104), Part V.; Inland Revenue Act, 1868 (31 & 32 Vict. c. 124), s. 9; Customs and Inland Revenue Act, 1880 (43 Vict. c. 14), ss. 11—13; Customs and Inland Revenue Act, 1881 (44 & 45 Vict. c. 12), ss. 36, 41—43; Customs and Inland Revenue Act, 1888 (51 & 52 Vict. c. 8), s. 21 (2); Customs and Inland Revenue Act, 1889 (52 & 53 Vict. c. 7), s. 14; Finance Act, 1894 (57 & 58 Vict. c. 30), ss. 1, 5 (2), 13, 15 (2), 16 (1), (3), 21 (2), Sched. I. (5); Finance Act, 1896 (59 & 60 Vict. c. 28), ss. 18 (2), (3), 21, 40, Sched., Part III.; Finance Act, 1898 (61 & 62 Vict. c. 10), s. 13; Finance Act, 1900 (63 & 64 Vict. c. 7), s. 14 (1), (2); Finance Act, 1907 (7 Edw. 7, c. 13), ss. 13, 15; Finance (1909-10) Act, 1910 (10 Edw. 7, c. 8), ss. 58, 63, 64.

The following further statutes deal with legacy duty in Scotland:—Succession Duty Act, 1853 (16 & 17 Vict. c. 51), s. 48; Probate Duty Act, 1861 (24 & 25 Vict. c. 92), s. 1.

The following further statutes deal with legacy duty in Ireland:—Probate and Legacy Duties (Ireland) Act, 1814 (54 Geo. 3, c. 92), ss. 5, 7—33, 35—39, 43; Probate Duty (Ireland) Act, 1816 (56 Geo. 3, c. 56), ss. 115, 128; Stamp Duties (Ireland) Act, 1842 (5 & 6 Vict. c. 82), ss. 37—39; Succession Duty Act, 1853 (16 & 17 Vict. c. 51), s. 48; Probate Duty Act, 1861 (24 & 25 Vict. c. 92), s. 1.

The general provisions and regulations of the Legacy Duty Act, 1796 (36 Geo. 3, c. 52), so far as not expressly repealed, remain in full force, notwithstanding that the actual charge of duty no longer arises under that Act (*Advocate-General v. Stair (Earl)* (1850), Scotch Exchequer, not reported). See also *Re Cholmondeley* (1832), 1 Cr. & M. 149, which (*Advocate-General v. Stair (Earl)*), *supra*, per Lord FULLERTON) was decided on that very ground.

(*c*) See pp. 239—242, *post*.

(*d*) See pp. 245—249, *post*.

(*e*) Stamp Act, 1815 (55 Geo. 3, c. 184), s. 2, Sched., Part III.; Revenue Act, 1845 (8 & 9 Vict. c. 76), s. 4; Customs and Inland Revenue Act, 1888 (51 & 52 Vict. c. 8), s. 21 (2).

(*f*) Stamp Act, 1815 (55 Geo. 3, c. 184), s. 2, Sched., Part III.

(*g*) Provided that the interest was not reduced into possession, and the executor fully exonerated, on or before the 31st August, 1815 (Stamp Act, 1815 (55 Geo. 3, c. 184), Sched., Part III.; *A.-G. v. Hancock* (1837), 2 M. & W. 563, 597). As to earlier cases, see stat. (1780) 20 Geo. 3, c. 28; stat. (1783) 23 Geo. 3, c. 58; stat. (1789) 29 Geo. 3, c. 51 (all repealed); Legacy Duty Act, 1796 (36 Geo. 3, c. 52); Stamp Act, 1804 (44 Geo. 3, c. 98); Legacy Duty Act, 1805 (45 Geo. 3, c. 28); Probate and Legacy Duties Act, 1808 (48 Geo. 3, c. 149); *Green v. Croft* (1792), 2 Hy. Bl. 30; *Hill v. Atkinson* (1816) 2 Mer. 45.

SECT. 2.—*Legacies, and Successions upon Intestacy.*SUB-SECT. 1.—*The "Legacy."*

SECT. 2.

Legacies,
and Successions upon
Intestacy.

Gifts by will.

312. Every gift by any will or testamentary instrument of any person, which, by virtue thereof, is payable, or has effect, or is satisfied, out of (*h*) the personal or movable (*i*) estate or effects of such person (*k*), or out of any personal estate which such person had power to dispose of (*l*), whether the gift is by way of annuity or in any other form, is deemed to be a "legacy" (*m*), and is chargeable with legacy duty accordingly (*n*).

Every gift which has effect as a donation *mortis causâ* is also deemed to be a "legacy" (*o*), and is chargeable with legacy duty (*p*).

Donationes
mortis causâ.

313. A gift by will with a condition annexed is liable to legacy duty without regard to the condition (*q*), unless the performance of

Legacy with
a condition
annexed.

(*h*) A gift out of the profits to arise from the testator's business, carried on by his executors after his death, is a legacy chargeable with duty (*Re Thorley, Thorley v. Massam*, [1891] 2 Ch. 613, 625, O. A. : *Inland Revenue v. Dick's Trustees* (1907), 44 Sc. L. R. 567). So is a gift of the profits to arise after the testator's death from a patent for an invention (*Advocate-General v. Oswald* (1848), 10 Dunl. (Ct. of Sess.) 969). And so would be a gift of the fruit of an orchard of trees for a term of years (*Re Thorley, Thorley v. Massam, supra, per KAY, L.J.*, at p. 627).

(*i*) Every such gift which is payable or has effect or is satisfied out of, or is charged or made a burden upon, the testator's real estate, or any real estate, or the rents or profits thereof, which he had any right or power to charge, burden, or affect, with the payment of money, or out of or upon any moneys to arise by the sale, burden, mortgage, or other disposition of any such real estate or any part thereof, is also deemed to be a legacy (Revenue Act, 1845 (8 & 9 Vict. c. 76), s. 4; which superseded the Legacy Duty Act, 1805 (45 Geo. 3, c. 28), s. 4), and, where the testator died before the 1st July, 1888, is chargeable with legacy duty (Stamp Act, 1815 (55 Geo. 3, c. 184), s. 2, Sched., Part III.). Where, however, the testator died on or after that date, succession duty and not legacy duty is chargeable (Customs and Inland Revenue Act, 1888 (51 & 52 Vict. c. 8), s. 21 (2); see p. 264, *post*). As to leaseholds for years, see p. 235, *post*.

(*k*) This expression does not extend to the personal estate of a stranger, which the testator induced him to dispose of, as the condition upon which he should be entitled to take a legacy (*Laurie v. Clutton* (1852), 15 Beav. 131, *per ROMILLY, M.R.*, at p. 139).

(*l*) This expression extends to personal estate over which the testator had a general power of appointment (*Re Cholmondeley* (1832), 1 Cr. & M. 149; *Druke v. A.-G.* (1843), 10 Cl. & Fin. 257, H. L.).

(*m*) Revenue Act, 1845 (8 & 9 Vict. c. 76), s. 4; see note (*o*), *infra*.

(*n*) Stamp Act, 1815 (55 Geo. 3, c. 184), s. 2, Sched., Part III.

(*o*) Revenue Act, 1845 (8 & 9 Vict. c. 76), s. 4; which superseded the Legacy Duty Act, 1805 (45 Geo. 3, c. 28), s. 4, which, in its turn, superseded the Legacy Duty Act, 1796 (36 Geo. 3, c. 52), s. 7.

(*p*) There are no special provisions with regard to the collection of legacy duty in respect of donations *mortis causâ*.

(*q*) *A.-G. v. Sharpe* (1891), 7 T. L. R. 558, O. A. (sum to be invested by trustees, and income paid to legatee on a condition, namely, that she should, *inter alia*, provide a home for such (if any) of testator's children as, in the judgment of the trustees, required it; compare note (*k*), p. 237, *post*). See also *Re Thorley, Thorley v. Massam, supra*, at pp. 626, 628 (gift on condition of carrying on business); *Inland Revenue v. Dick's Trustees, supra* (ditto); *Re White, Pennell v. Franklin*, [1898] 1 Ch. 297, 299; affirmed, [1898] 2 Ch. 217, 219, C. A. (gift on condition of acting as professional trustee).

SECT. 2. Legacies, and Succes- sions upon Intestacy.	the condition causes something to be returned to the testator's personal estate, in which case it seems that only the difference would be liable to the duty (<i>r</i>). The condition may be imposed by the donee of a limited power of appointment (<i>s</i>), or it may be annexed by the testator himself to the exercise of such a power (<i>t</i>).
Legacy in satisfaction of a covenant,	A bequest of residue, or a share thereof, although made in fulfilment of a covenant in a marriage settlement, is chargeable with legacy duty (<i>a</i>). It is otherwise, however, where the bequest, in fulfilment of the covenant, is of a definite sum (<i>b</i>).
Forgiveness of a debt.	The forgiveness of a debt due to the testator is a legacy (<i>c</i>), except where the debt is not recoverable at law (<i>d</i>). If the debt is owing jointly by two persons, one of whom predeceases the testator, the bequest operates in favour of the survivor, who is liable to the duty as upon a legacy to him (<i>e</i>).
Direction to pay debts.	A direction in a deceased person's will to pay his own debts does not constitute a legacy even where the debts are statute-barred (<i>f</i>), although it is otherwise where they have been legally released or extinguished (<i>g</i>). But a direction to pay interest on debts which do not bear interest constitutes a legacy as regards the interest (<i>h</i>).
Legacy to an executor or trustee for his trouble,	A direction in a will to pay the debts of another person, who has died insolvent, confers a legacy on that person's creditors (<i>i</i>). Where there is a disposition by will in favour of an executor or trustee, in return for his trouble, the sums received by him are legacies (<i>k</i>).

(*r*) *Sweeting v. Sweeting* (1853), 1 Drew. 331, per KINDERSLEY, V.-C., at p. 334; *Re Kirk, Kirk v. Kirk* (1882), 21 Ch. D. 431, C. A., per JESSEE, M.R., at p. 437; *Re Thorley, Thorley v. Massam*, [1891] 2 Ch. 613, C. A., per KAY, L.J., at p. 629.

(*s*) *Hemiker (Lord) v. A.-G.* (1852), 8 Exch. 257, Ex. Ch. (jointure on condition of release of dower).

(*t*) *Sweeting v. Sweeting*, *supra* (ditto).

(*a*) Compare *Jervis v. Wolferstan* (1874), L. R. 18 Eq. 18, per JESSEL, M.R., at p. 24; see also *Moir's Trustees v. Lord Advocate* (1874), 11 Sc. L. R. 157 (whole residue); *Marshall v. Lord Advocate* (1874), 11 Sc. L. R. 392 (share of residue); *A.-G. v. Murray* (1887), 20 L. R. Ir. 124, C. A. (whole residue).

(*b*) *Graham v. Wickham* (1863), 1 De G. J. & Sm. 474, 486, C. A.; see also *Eyre v. Monro* (1857), 3 K. & J. 305; *Lord Advocate of Scotland v. Hagart* (1872), L. R. 2 Sc. & Div. 217. In such circumstances, succession duty is presumptively chargeable (see p. 263, *post*).

(*c*) *A.-G. v. Holbrook* (1823), 3 Y. & J. 114; see also *Morris v. Livie* (1842), 1 Y. & C. Ch. Cas. 380; *A.-G. v. Hollingworth* (1857), 2 H. & N. 416.

(*d*) Compare *A.-G. v. Hollingworth*, *supra*.

(*e*) *A.-G. v. Holbrook*, *supra*, per HULLOCK, B., at p. 123.

(*f*) *Williamson v. Naylor* (1838), 3 Y. & C. (ex.) 208; see also *Re O'Leary's Estate*, [1896] 1 I. R. 283, where the statement in a will that a bequest was made in satisfaction of a debt was regarded as sufficient evidence that the testator was so indebted.

(*g*) *Turner v. Martin* (1857), 7 De G. M. & G. 429.

(*h*) *Cooke v. Turner* (1850), cited, Hanson's Death Duties, 5th ed., p. 361 (reported on other points (1848), 15 Sim. 611).

(*i*) *Foster v. Ley* (1835), 2 Bing. (N. C.) 269.

(*k*) *Re Thorley, Thorley v. Massam*, *supra* (legacies to trustee and to manager of business); see also *Inland Revenue v. Dick's Trustees* (1907), 44 Sc. L. R. 567 (legacies to managers of business).

Where a testator appoints a professional person as his executor or trustee, and empowers him to charge for business done in relation to the estate, his profit costs constitute a legacy (*l*), which is chargeable with duty (*m*).

SECT. 2.
Legacies,
and Successions upon
Intestacy.

SUB-SECT. 2.—Successions upon Intestacy.

314. The clear residue (when devolving to one person), and every share of residue (when devolving to two or more persons), of the personal or movable estate of any deceased person (after deducting debts, funeral expenses, legacies, and other charges first payable thereout), whether the title to such residue, or any share of it, accrues upon a partial or total intestacy, although not deemed to be a "legacy," is chargeable with legacy duty (*n*).

Residue under
intestacy.

SUB-SECT. 3.—Personal Estate.

315. Personal estate (*o*) chargeable with legacy duty (*p*) includes an interest in a partnership, even where attributable to partnership real estate (*q*).

Partnership
real estate.

It includes also a mortgage debt (*r*), even if secured on the testator's own real estate, provided that in that case he kept it alive in his lifetime, and notwithstanding that it devolved on his death upon the person upon whom the real estate itself devolved (*s*).

Mortgage
debts etc.

It includes also a capital sum, to which the testator was entitled, to be raised out of settled real estate at his own death, although, in the event, as the legatee to whom it eventually came was the owner of the real estate out of which the sum was raisable, it was not in fact raised (*t*).

It does not, however, include leaseholds for years, which are deemed for this purpose to be real property (*u*).

Leaseholds
for years.

Estates *pur autre vie*, applicable by law in the same manner as personal estate, are chargeable with legacy duty as personal

Estates *pur*
autre vie.

(*l*) *Re White, Pennell v. Franklin*, [1898] 2 Ch. 217, C. A.

(*m*) S. C. [1898] 1 Ch. 297, *per* KEKEWICH, J., at p. 299.

(*n*) Stamp Act, 1815 (55 Geo. 3, c. 184), s. 2, Sched., Part III.

(*o*) Tolls of a lighthouse, levied under a private Act of Parliament, have been held to be real estate, and so not liable to legacy duty (*A.-G. v. Jones* (1849), 1 Mac. & G. 574).

(*p*) It has been said that property was personal estate liable to legacy duty because the executor had taken it, had dealt with it as executor, and had, as executor, authorised the delivery of it to the legatee, although he was not bound, in the particular circumstances, in order to get it, to take out probate or administration (*Re Ewin* (1830), 1 Cr. & J. 151, *per* ALEXANDER, C.B., at pp. 152, 154).

(*q*) *Forbes v. Steven, Mackenzie v. Forbes* (1870), L. R. 10 Eq. 178; *Re Stokes, Stokes v. Ducroz* (1890), 38 W. R. 535. It would, however, very materially alter the case if it could be made out that the real estate was not a partnership asset, but belonged to the partners as tenants in common (*Forbes v. Steven, Mackenzie v. Forbes, supra, per* JAMES, V.-C., at p. 188).

(*r*) *Lawson v. Inland Revenue Commissioners*, [1896] 2 I. R. 418.

(*s*) *Swabey v. Swabey* (1848), 15 Sim. 502.

(*t*) *A.-G. v. Metcalfe* (1851), 6 Exch. 26.

(*u*) Succession Duty Act, 1853 (16 & 17 Vict. c. 51), s. 19. Prior to this Act, legacy duty was chargeable; see p. 263, *post*.

SECT. 2.**Legacies,
and Successions upon
Intestacy.**

What is a
testamentary
instrument.

Transmitted
interests.

Gift to
persons to be
chosen by
trustees.

estate (b). It is otherwise, however, with estates *pur autre vie* descending to the heir as special occupant (c).

SUB-SECT. 4.—The Will or Intestacy.

316. A testamentary instrument is any writing, whatever the form and however by law it may be required to be executed, if it remains dormant during the life of the person executing it, if it be revocable until his death, and if it only comes into active power at his death (d).

317. Legacy duty is payable under the will or intestacy of every person, whether legatee, or successor upon intestacy, for the benefit of whose estate a fund is retained, and it is immaterial that a person entitled to an expectant interest dies before the interest falls into possession (e).

SUB-SECT. 5.—The Legatee or Successor.

318. Under a bequest to trustees to dispose of the testator's estate in favour of such persons and for such purposes as the trustees in their discretion think proper, the persons in whose favour the trustees dispose of the estate, when ascertained, are the legatees (f).

(b) Legacy Duty Act, 1796 (36 Geo. 3, c. 52), s. 20. The phrase "*estate pur autre vie*" includes the unexhausted residuum of an estate for the deceased's own life and the life of others (*Chatfield v. Berchtoldt* (1872), 7 Ch. App. 192).

(c) *R. v. Norreys* (1852), 2 I. C. L. R. 414 (a case upon the Probate and Legacy Duties (Ireland) Act, 1814 (54 Geo. 3, c. 92), s. 22).

(d) *Advocate-General v. Ramsay's Trustees* (1823), 2 Cr. M. & R. 224, n., per SHEPHERD, O.B., at p. 229. A secret voluntary deed, reserving a life interest and a power of revocation, has been held to be testamentary (*A.-G. v. Jones and Bartlett* (1817), 3 Price, 368, WOOD, B., *dub.*, at p. 385). *Secus*, in the case of a secret deed of covenant to pay during life or after death, subject to debts and legacies, a sum upon charitable trusts (*Jeffries v. Alexander* (1860), 8 H. L. Cas. 594, 613). So also where the deed was not secret, and the settled securities were duly transferred to the trustees (*Tompson v. Browne* (1835), 3 My. & K. 32). So also where there was a covenant on marriage to pay to children a capital sum at death, with reservation of a limited power of appointment (*Advocate-General v. Trotter* (1847), 10 Dunl. (Ct. of Sess.) 56). And so also where there was a mutual irrevocable settlement, by the deceased and others, upon themselves, and the survivor, subject to the debts of any dying (*Brown (Agnes and Mary) v. H. M. Advocate-General* (1852), 1 Macq. 79, H. L.). It has been said that the phrase "testamentary instrument" was used in the statute for the purpose of including any informal instrument which might still be in effect a will, for a will, properly speaking, is not complete unless there be executors appointed, or it relates to Scotland, where the term testamentary instrument is used instead of will (*A.-G. v. Jones and Bartlett*, *supra*, per WOOD, B., at p. 383); and see title WILLS.

(e) *A.-G. v. Malkin* (1846), 2 Ph. 64 (gift by will to a daughter and her husband for their joint lives, and the life of the survivor, and, on the death of the survivor, as the daughter should appoint, and in default to her executors etc. She died in her husband's lifetime without appointing, and he afterwards died, having, by his will, left the property to his own daughter. Legacy duty was payable under the original testator's will, and under the son-in-law's will. It would also have been payable under the daughter's intestacy, but for the fact that her husband was entitled); *A.-G. v. Maxwell* (1860), 10 I. C. L. R. 262 (a case upon the Stamp Duties (Ireland) Act, 1842 (5 & 6 Vict. c. 82), s. 37). The position is unaffected by the Succession Duty Act, 1853 (16 & 17 Vict. c. 51), s. 14 (*A.-G. v. Cleave* (1873), 31 L. T. 86).

(f) *Lord Advocate v. Nisbet's Trustees* (1878), 15 So. L. R. 508.

If the person to benefit is named, but the amount of the benefit is in the absolute discretion of the trustees, the person is a legatee of any sums in fact paid by the trustees to him or for his benefit (g).

Where, however, the bequest is to persons in confidence that they will apply it in a particular manner, but with the express declaration that no trust is imposed upon them, the persons in whose favour it is applied are not legatees (h).

Where the bequest to the trustees is in terms absolute, although, in truth, the property is bound in their hands by a secret trust, imposed upon them by the testator in his lifetime, it seems that the trustees are the legatees (i).

A gift by will to a person in terms which create a trust of an indefinite part of a legacy for the benefit of another person confers a legacy upon that other person of any sums in fact applied for his benefit under the trust (k).

319. Upon a legacy being accepted and bequeathed by a legatee, his executors cannot disclaim the gift to him, in order to permit the legatee's legatee to take the legacy directly from the original testator, and so to affect the claim for legacy duty under the prior will (l); and a legatee cannot, with a like object, disclaim a gift to him under a will made in exercise of a general power of appointment by which the donee of the power has successfully assumed to himself the entire dominion over the fund, and elect to take, as in default of appointment, under the will creating the power (m).

320. Where a testator bequeaths a legacy and directs that, in the event of the legatee predeceasing him, the legacy is to be paid to the legatee's personal representatives, the persons entitled to the legatee's personal estate take as substituted legatees under the original testator's will (n), and are chargeable with legacy duty accordingly (o).

Where, however, the gift is to a child or other issue who predeceases the testator, but leaves issue living at the testator's death, and the subject of the gift forms part of the property of the dead legatee (p), it is, seemingly, liable to legacy duty as part of the legatee's estate (q).

SECT. 2.

**Legacies,
and Successions upon
Intestacy.**

Gift in confidence.

Gift bound by secret trust.

Trust of indefinite sum.

When a legacy cannot be disclaimed.

Gift to predeceasing legatee.

(g) *A.-G. v. Wade*, [1910] 1 K. B. 703.

(h) *Re Martineau* (1884), 48 J. P. 295.

(i) *Cullen v. A.-G. for Ireland* (1866), L. R. 1 H. L. 190 (a case upon the Stamp Duties (Ireland) Act, 1842 (5 & 6 Vict. c. 82), s. 38); compare *Re Maddock*, *Llewelyn v. Washington*, [1902] 2 Ch. 220, 229, O. A.

(k) *Re Harris* (1852), 7 Exch. 344 (gift to wife, sole executrix, for maintenance of herself and the children); compare *A.-G. v. Sharpe* (1891), 7 T. L. R. 558, C. A. (gift upon a condition; and see note (q), p. 233, ante).

(l) *A.-G. v. Munby* (1858), 3 H. & N. 526.

(m) *A.-G. v. Brackenbury* (1863), 1 H. & O. 782; see also *H. M. Advocate v. Routledge's Trustees* (1907), 44 Sc. L. R. 305, per the Lord President (Lord DUNEDIN), at p. 309.

(n) *Long v. Watkinson* (1852), 17 Beav. 471.

(o) *Lord Advocate v. Bogie*, [1894] A. O. 83; see also *A.-G. v. Loyd*, [1895] 1 Q. B. 496.

(p) Wills Act, 1837 (7 Will. 4 & 1 Vict. c. 26), s. 33.

(q) Compare *Perry's Executors v. R.* (1868), L. R. 4 Exch. 27; *Re Scott*, [1901] 1 K. B. 228, C. A.

SECT. 2.

Legacies,
and Successions
upon
Intestacy.Exercise of
powers of
appointment.Legacies in
joint tenancy.Domicil of
testator etc.
and situation
of property.Partnership
real estate
abroad,
owner
domiciled
here.Estates *pur
autre vie* in
British real
estate, where
owner
domiciled.SUB-SECT. 6.—*The Testator or Intestate.*

321. Where a will exercises a general power of appointment, the appointee's interest is to be treated for the purpose of legacy duty as derived under that will (*r*), even where the instrument creating the power was itself a will (*s*). But where a will confers a limited power of appointment, and the power is exercised, whether by will (*t*) or deed (*a*), the appointee's interest is to be treated as derived under the will which created the power.

Where any legacy is given to or for the benefit of any persons in joint tenancy, if any legatee becomes entitled by survivorship, or by severance of the joint tenancy, to a larger interest in the property, such interest is to be treated as derived from the original testator, and not from the deceased joint tenant (*b*).

SUB-SECT. 7.—*Domicil and Situs.*

322. In order that personal estate may become liable to legacy duty, the testator or intestate must have been domiciled in this country at the time of his death, but the local situation of the property is immaterial (*c*).

Where a person dying domiciled in this country was a partner in a firm owning foreign real estate, as a partnership asset, his interest in the partnership, including such property, being personal estate, is liable to legacy duty (*d*).

An estate *pur autre vie* in real property in this country, applicable by law as personal estate, is chargeable with legacy duty, even where the owner was domiciled abroad (*e*).

(*r*) Revenue Act, 1845 (8 & 9 Vict. c. 76), s. 4; *Re Cholmondeley* (1832), 1 Cr. & M. 149; *Drake v. A.-G.* (1843), 10 Cl. & Fin. 257, 11 L.

(*s*) *Drake v. A.-G.*, *supra*.

(*b*) *Pickard v. A.-G.* (1838), 3 M. & W. 552, affirmed, *Pickard v. A.-G.* (1840), 6 M. & W. 348, Ex. Ch.; see also *A.-G. v. Henniker (Lord)* (1852), 7 Exch. 331, affirmed, *Henniker (Lord) v. A.-G.*, 8 Exch. 257, Ex. Ch.

(*a*) *Sweeting v. Sweeting* (1853), 1 Drew. 331.

(*b*) Legacy Duty Act, 1796 (36 Geo. 3, c. 52), s. 16.

(*c*) *Re Ewin* (1830), 1 Cr. & J. 151 (testator domiciled in this country, assets abroad); *Jackson v. Forbes* (1832), 2 Cr. & J. 382; affirmed *sub nom. A.-G. v. Jackson* (1834), 8 Bli. (N. S.) 15, H. L. (testator domiciled abroad, assets abroad, but remitted to this country for distribution: no representation in this country); *Arnold v. Arnold* (1837), 2 My. & Cr. 256 (ditto, save that there was representation in this country); *Thomson v. Advocate-General* (1845), 12 Cl. & Fin. 1, H. L. (testator domiciled abroad, assets in this country). The operation of the statute is limited to the property of persons who die domiciled in this country, and personal property in contemplation of the law is supposed to be situate where the deceased owner was domiciled (*Thomson v. Advocate-General*, *supra*, per Lord CAMPBELL, at pp. 28, 29). The above cases supersede or overrule *A.-G. v. Cockerell* (1814), 1 Price, 165; *A.-G. v. Beatson* (1819), 7 Price, 560; *Logan v. Fairlie* (1825), 2 Sim. & St. 284; *Hay v. Fairlie* (1826), 1 Russ. 117; *Re Bruce* (1832), 2 Cr. & J. 436; *Re Coales* (1841), 7 M. & W. 390. See also *A.-G. v. Napier* (1851), 6 Exch. 217; *Lyall v. Paton* (1856), 25 L. J. (CH.) 746; *Winans v. A.-G.*, [1904] A. C. 287; *H. M. Advocate v. Brown's Trustees* (1907), 44 Sc. L. R. 275, where the principle of *Thomson v. Advocate-General*, *supra*, was applied.

(*d*) *Forbes v. Steven*, *Mackenzie v. Forbes* (1870), L. R. 10 Eq. 178; *Stokes v. Ducroz* (1890), 38 W. R. 535.

(*e*) *Chatfield v. Berchtoldt* (1872), 7 Ch. App. 192. The same holds with regard to legacies out of real estate in this country under the will of a person

SECT. 3.—*Exceptions from the Charge of Duty.*

323. There are like exceptions from legacy duty as from succession duty (*f*) where estate duty (*g*) has been paid (*h*).

Where personal estate is directed to be applied in the purchase of real estate, and is given so as to be enjoyed by different persons in succession, no legacy duty accrues in respect of it after it has been actually so applied (*i*).

Leasehold hereditaments are excepted from the duty (*k*).

The personal estate generally of any person dying after the 24th March, 1880, where the whole value is less than £100, is also excepted from the duty (*l*).

No legacy of specific articles of less value than £20 is chargeable with the duty unless the total value of the benefit taken by the legatee under the will amounts to £20 (*m*).

SECT. 3.
Exceptions
from the
Charge of
Duty.Various
exceptions.

dying before the 1st July, 1888, domiciled abroad (*Advocate-General v. Grant* (1825), cited 12 Cl. & Fin. at p. 16; *Thomson v. Advocate-General* (1845), 12 Cl. & Fin. 1, II. L., per Lord LYNDHURST, L.C., at p. 22). Where the testator died on or after that date succession duty is chargeable (Customs and Inland Revenue Act, 1888 (51 & 52 Vict. c. 8), s. 21 (2)).

(*f*) See p. 278, *post*.

(*g*) It is so also where probate duty has been paid; see notes (*m*), (*r*), p. 279, *post*.

(*h*) Finance Act, 1894 [(57 & 58 Vict. c. 30), ss. 1, 5 (2), 16 (1), (3), Sched. I. (5); Finance Act, 1898 (61 & 62 Vict. c. 10), s. 13. As to exceptions from legacy duty where probate or account duty has been paid, see Customs and Inland Revenue Act, 1881 (44 & 45 Vict. c. 12), ss. 36, 41.

(*i*) Legacy Duty Act, 1796 (36 Geo. 3, c. 52), s. 19. Succession duty would be presumptively payable upon the purchased real estate on the death of the tenant for life. Where, before the money has been actually applied, the person entitled to an estate of inheritance in the real estate to be purchased died, having survived the limited owner, but having refused to receive either income or capital, it was held that legacy duty, and not succession duty, was payable under her intestacy (*De Lancey v. R.* (1872), L. R. 7 Exch. 140, Ex. Ch.; see also *Re De Lancey* (1870), L. R. 5 Exch. 102, Ex. Ch., which, per MATHEW, J., in *A.-G. v. Dodd*, [1894] 2 Q. B. 150, at p. 156, is qualified by *A.-G. v. Lomas* (1873), L. R. 9 Exch. 29, and is inconsistent with the judgment of Lord MACNAGHTEN in *A.-G. v. Ailesbury (Marquis)* (1887), 12 App. Cas. 672).

(*k*) Except where the legacy duty was already due on the 18th May, 1853, prior to which date leaseholds for years were chargeable with legacy duty as personal estate (Succession Duty Act, 1853 (16 & 17 Vict. c. 51), s. 19). Such property is, however, now presumptively chargeable with succession duty.

(*l*) Customs and Inland Revenue Act, 1880 (43 Vict. c. 14), s. 13.

(*m*) Stamp Act, 1815 (55 Geo. 3, c. 184), s. 2, Sched., Part III. Pecuniary legacies, and residue, or a share of residue under the value of £20, which were exempt from legacy duty under this Act, unless the total benefit taken by the legatee amounted to £20, were charged with the duty in the case of persons dying on or after the 1st June, 1881, provided that the whole personal estate amounted to £100, by the Customs and Inland Revenue Act, 1881 (44 & 45 Vict. c. 12), s. 42. As to charitable gifts before that date, see *Re Wilkinson* (1834), 1 Cr. M. & R. 142, affirmed *sub nom. A.-G. v. Nash* (1836), 1 M. & W. 237, Ex. Ch., where it was held that no duty was payable, on the ground that each beneficiary received less than £20. *Contrà*, see *Re Franklin's Charity* (1829), 3 Sim. 147; *A.-G. v. Fitzgerald* (1843), 13 Sim. 83; *Re Griffiths* (1845), 14 M. & W. 510; *Re Pearce* (1857), 24 Beav. 491; *Re Parker* (1859), 4 H. & N. 666; *Harris v. Howe (Earl)* (1861), 29 Beav. 261, where it was held that duty was payable, on the ground that the gifts were *in solido*. Gifts to the different mission schemes of the Free Church of Scotland (*Stewart's Trustees v. Lord Advocate* (1857), 20 Dunl. (Ct. of Sess.) 453), or of the General Assembly of the Presbyterian Church in Ireland (*A.-G. v. Wilson's Executor* (1869), referred to in

SECT. 3.
Exceptions
from the
Charge of
Duty.

The duty is not chargeable in respect of specific articles, bequeathed to or in trust for any body corporate, whether aggregate or sole, or to any inn of court or chancery, or an endowed school, to be preserved (*n*).

The position is the same in respect of articles not yielding income, and given to be enjoyed by different persons in succession, while enjoyed in kind only by any person not having any power of selling or disposing of them, so as to convert them into money or other property yielding an income (*o*).

In the case of objects which appear to the Treasury to be of national, scientific, historic, or artistic interest, the duty is only chargeable when the property is sold, and then only in respect of the last death on which the property passed (*p*).

Money applied under a direction in a will for the payment of the legacy duty chargeable upon any legacy out of some other fund (*q*), so that the legacy may pass free of duty to the legatee, is not itself chargeable with the duty (*r*). The testator's intention may be collected from any direction in the will (*s*).

Hanson's Death Duties, 5th ed., p. 470), are not separate legacies to the same legatee.

(*n*) Legacy Duty Act, 1799 (39 Geo. 3, c. 73), s. 1; Stamp Act, 1815 (55 Geo. 3, c. 184), s. 2, Sched., Part III.

(*o*) Legacy Duty Act, 1796 (36 Geo. 3, c. 52), s. 14.

(*p*) Finance Act, 1896 (59 & 60 Vict. c. 28), s. 20; Finance (1909-10) Act, 1910 (10 Edw. 7, c. 8), s. 63; see also p. 202, *ante*. The exception from duty only applies, however, in the case of deaths on or after the 30th April, 1909 (Finance (1909-10) Act, 1910 (10 Edw. 7, c. 8), s. 63).

(*q*) *I.e.*, the residue or the real estate (*Lord Advocate v. T aylor* (1884), 21 Sc. L. R. 709, *per* the Lord Ordinary (FRASER), at p. 711).

(*r*) Legacy Duty Act, 1796 (36 Geo. 3, c. 52), s. 21.

(*s*) *Gude v. Mumford* (1837), 2 Y. & O. (EX.) 445, 448, *per* ALDERSON, B., at p. 456. The following terms have been held to amount to a direction that a legacy or annuity is to be paid free of duty: in the case of a legacy, "without any deduction," or "without deduction," or "without any deduction whatever" (*Barksdale v. Gilliat* (1818), 1 Swan. 562; explained, *Gude v. Mumford*, *supra*, *per* ALDERSON, B., at p. 456, dissenting from the explanation of LEACH, M.R., in *Smith v. Anderson* (1828), 4 Russ. 352, at p. 354; *Ferguson v. Ogilby* (1862), 12 L. Ch. R. 411); "clear of property tax and all expenses whatsoever attending the same" (*Courtoy v. Vincent* (1823), Turn. & R. 433); "free from all expense" (*Gooden v. Dotterill* (1832), 1 My. & K. 56, 60); "to be paid clear" (*Ford v. Ruxton* (1844), 1 Coll. 403, 408); "free from any charge or liability in respect thereof" (*Warbrick v. Varley* (No. 1) (1861), 30 Beav. 241); or "free of all outgoings and payments, except the annual and other rent" (*Re Taber, Arnold v. Kayess* (1882), 46 L. T. 805); and in the case of an annuity, "clear of property tax and all expenses whatsoever attending the same" (*Courtoy v. Vincent*, *supra*); "clear of all deductions" (*Dawkins v. Tatham* (1829), 2 Sim. 492); "clear of all taxes and outgoings" (*Louch v. Peters* (1834), 1 My. & K. 489); "without any deduction or abatement out of the same on any account or pretence whatsoever" (*Smith v. Anderson*, *supra*); "clear of all taxes and deductions whatsoever" (*Stow v. Davenport* (1833), 5 B. & Ad. 359, 366); "one annuity or clear yearly sum" (*Gude v. Mumford*, *supra*; *Wilks v. Groom* (1856), 4 W. R. 697, 699); "one clear yearly rentcharge or annuity" (*Baily v. Boulé* (1851), 14 Beav. 595); "a clear annuity or yearly sum" (*Haynes v. Haynes* (1853), 3 De G. M. & G. 590, 598, O. A.); or "clear yearly annuity" (*Re Robins, Nelson v. Robins* (1888), 58 L. T. 382). Pecuniary legacies "free" covers annuities (*Pearse v. Pearse* (1853), 2 W. R. 129). "Net" means "clear" (*Re Saunders, Saunders v. Gore*, [1898] 1 Ch. 17, O. A.). An implied direction to pay

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**Exceptions
 from the
 Charge of
 Duty.**
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free of duty is not cut down by an explicit direction to pay another legacy "free of duty" (*Warbrick v. Varley* (No. 1) (1861), 30 Beav. 241), or another annuity "free from legacy duty" (*Re Robins, Nelson v. Robins* (1888), 58 L. T. 382). A bequest of a sum of money to purchase an annuity "clear for A." means free from taxes (*Hodgworth v. Crawley* (1742), 2 Atk. 376), but not a gift of a share of an estate "after discharging the necessary expenses connected with this trust" (*Michie's Executors v. Michie* (1905), 42 Sc. L. R. 386). A gift of six months "full" salary is not free from legacy duty (*Re Marcus, Marcus v. Marcus* (1887), 56 L. J. (CH.) 830). Where there is a direction to invest a capital sufficient to produce a yearly sum, "clear of legacy duty and all other deductions," to be enjoyed by different persons in succession, liable to the same rate of duty, the whole capital is free of duty (*Calvert v. Sebbon* (1838), 2 Keen, 672), and so also where the direction is to invest a capital to produce a "clear yearly sum" (*Harper v. Morley* (1838), 2 Jur. 653), or with the added direction "clear of all deductions whatsoever" (*Marris v. Burton* (1840), 11 Sim. 161; explained, *Baily v. Boulton* (1851), 14 Beav. 595, per ROMILLY, M.R., at pp. 596, 597); but it is otherwise where the persons entitled to the "clear yearly sum" are liable to different rates of duty (*Sanders v. Kiddell* (1835), 7 Sim. 536; explained, *Baily v. Boulton*, *supra*; *Pridie v. Field* (1854), 19 Beav. 497), the word "clear," in those circumstances, being taken to refer to the expenses of investment etc., and not to legacy duty (*Pridie v. Field*, *supra*, per ROMILLY, M.R., at p. 500, on the authority of *Sanders v. Kiddell*, *supra*). A gift of the income of a capital sum sufficient to realise a clear yearly income of a stated amount is not a gift free from legacy duty (*Banks v. Braithwaite* (1862), 32 L. J. (CH.) 35), although it is otherwise where the gift is to pay "such income or yearly sum" which the capital sum is to be sufficient to realise (*Re Coles' Will* (1869), L. R. 8 Eq. 271). A general direction in a will that all the testator's legacies are to be paid free of duty will apply also to legacies by codicil (*Byne v. Currey* (1834), 2 Cr. & M. 603), and a like direction in a codicil will apply to legacies by a subsequent codicil (*Re Dresden, Lindo v. London Hospital* (1910), *Times*, 22nd July); and so also where the direction is to pay free of duty all the legacies given by "this my will" and, by a codicil, additional and fresh legacies are given "all in addition to those already bequeathed" (*Re Sealy, Tomkins v. Tucker* (1901), 85 L. T. 451). The position is the same where the amounts of the legacies bequeathed by the will are varied by a codicil (*Fisher v. Brierley* (No. 2) (1861), 30 Beav. 267). But where the testator directs that the legacies "hereinbefore" bequeathed (*Early v. Benbow* (1846), 2 Coll. 342, 354), or the "foregoing legacies" (*Brown's Trustees v. Gow* (1902), 40 Sc. L. R. 62; *contra*, *Williams v. Hughes* (1857), 24 Beav. 474, 482), are to be free of duty, the direction does not extend to legacies by a subsequent codicil. A general direction to "pay" legacies free of duty includes a gift of stock (*Ansley v. Cotton* (1846), 16 L. J. (CH.) 55), and of specific articles (*Re Johnston, Cockerell v. Essex (Earl)* (1884), 26 Ch. D. 538, 554; *Re Dresden, Lindo v. London Hospital*, *supra*), but a direction to pay "pecuniary legacies" free of duty does not include a gift of stock (*Douglas v. Congreve* (1836), 1 Keen, 410, 424), although it includes the forgiveness of a debt (*Morris v. Livie* (1842), 11 L. J. (CH.) 172, 173). Where a testator bequeaths "sums" of money and shares, a direction that the above-mentioned "sums" are to be paid free of duty does not extend to the shares (*Dakers v. Lilburn* (1865), 13 W. R. 568, C. A.). A direction that "legacies and bequests" are to be free of duty does not extend to the produce of the sale of real estate (*White v. Lake* (1868), L. R. 6 Eq. 188). Where a legacy or annuity is given by will free of duty, and, by a codicil, another legacy or annuity is substituted for it, the latter gift is to be paid free of duty (*Cooper v. Day* (1817), 3 Mer. 154; *Shaftesbury (Earl) v. Marlborough (Duke)* (1835), 7 Sim. 237), but not where the gift is to a different legatee by reason of the death of the legatee named in the will (*Chatteris v. Young* (1827), 2 Russ. 183), or where, although the gift is to the same legatee, its character has been so altered that it is to be regarded as a separate and distinct gift (*Burrows v. Cottrell* (1830), 3 Sim. 375). If a legacy is given free of duty, an added legacy is also free (*Johnstone v. Harrowby (Earl)* (1859), 1 De G. F. & J. 183, 192), but not where the character of the gifts is entirely different (*Re Howe, Wilkinson v. Fernieough*, [1910] W. N. 190). Where the testator directs that the legacy duty on the annuities given by his will is to be paid out of his general personal estate, the income of the residuary personal estate is not itself an annuity within this direction (*Londesborough*

SECT. 3.
Exceptions
from the
Charge of
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Legacies, and successions upon intestacy, given or devolving to any of the Royal Family, are excepted from the duty (*t*).

No sum of money which by any marriage settlement is subject to any limited power of appointment in favour of any persons specially named or described, or in favour of their issue, is liable to duty under the will in which the power is exercised (*u*).

In the case of an annuitant, or legatee chargeable as an annuitant, whose interest ceases by the death of any person before four years' payments of the annuity or income of the legacy have become due and payable, the duty is payable in proportion only to so many of the payments of the annuity etc. as actually accrued and became due etc. (*a*).

SECT. 4.—Rates of Duty.

How rate
determined.

324. The degree of consanguinity (if any) subsisting between the legatee or successor and the testator or intestate determines the rate of duty chargeable in respect of the legacy or succession.

(*Lord*) *v. Somerville* (1854), 19 Beav. 295, 301). Where residue is given in moieties, one moiety free of duty, the legacy duty on such moiety is payable out of any lapsed residue (*Warbrick v. Varley* (No. 1) (1861), 30 Beav. 241); but if there is none, *quære* whether it is payable out of the other moiety (*Warbrick v. Varley* (No. 1), *supra*), or is to bear its own charge of duty (*Re Dalrymple, Bircham v. Springfield* (1901), 49 W. R. 627). A gift of a share of residue "free" must be in clear terms (*Macdonald's Trustees v. Aberdeen Corporation* (1902), 39 Sc. L. R. 745, 746). The gift of the legacy duty payable on a specific or pecuniary legacy is to be treated as itself a pecuniary legacy, and, where there is a deficiency of assets, must abate accordingly (*Farrer v. St. Catharine's College, Cambridge* (1873), L. R. 16 Eq. 19, 25). Where there is in fact no residue, the legatee must bear the legacy duty to the extent to which the estate is insufficient to provide it (*Wilson v. O'Leary* (1874), L. R. 17 Eq. 419). The legacy duty is to be added to the legacy for the purpose of abatement, and the abated legacy is to bear its own duty (*Lord Advocate v. Taylor* (1881), 21 Sc. L. R. 709; *Re Turnbull, Skipper v. Wade*, [1905] 1 Ch. 726, 728; see also *Re Wilkins, Wilkins v. Rotherham* (1884), 27 Ch. D. 703, followed in principle, but disapproved in arithmetic, *Re Turnbull, Skipper v. Wade, supra*, per FARWELL, J., at p. 730). Prior to the Mortmain and Charitable Uses Act, 1891 (54 & 55 Vict. c. 73), the duty on a charitable legacy, given free of duty, could not be paid out of impure personality any more than the legacy itself could be (*Wilkinson v. Barber* (1872), L. R. 14 Eq. 96). Where a testator directed his estate not to be wasted by too hasty a realisation, a direction to pay the duty on a legacy out of the residuary estate was, nevertheless, operative (*Re Whiteley, Whiteley v. London (Bishop)* (1909), 26 T. L. R. 16, C. A.). See also p. 281, *post*.

(*t*) Stamp Act, 1815 (55 Geo. 3, c. 184), s. 2, Sched., Part III. Where the deceased died before the 30th April, 1909, there is an exception also in the case of the husband or wife of the deceased (Finance (1909-10) Act, 1910 (10 Edw. 7, c. 8), s. 58 (2), (4)).

(*u*) Revenue Act, 1845 (8 & 9 Vict. c. 76), s. 4. Moneys payable under a policy of insurance in the Customs Annuity and Benevolent Fund, over which a subscriber has only a limited power of appointment in favour of a particular class, are not liable to legacy duty (*A.-G. v. Rowsell* (1844), 36 Ch. D. 67, n.). In each case, however, succession duty may be chargeable.

As to the non-liability to duty under the Legacy Duty Act, 1805 (45 Geo. 3, c. 28), s. 4 (superseded by the Revenue Act, 1845 (8 & 9 Vict. c. 76), s. 4, and repealed by the Statute Law Revision Act, 1872 (35 & 36 Vict. c. 63), of an annuity which, under a general power created by deed, a testator charged by will upon real estate, see *A.-G. v. Hertford (Marquis)* (1845), 14 M. & W. 284; and as to the application of the Revenue Act, 1845 (8 & 9 Vict. c. 76), s. 4, to all legacies actually paid after the commencement of that Act, without regard to the time when they became payable, see *A.-G. v. Hertford (Marquis)* (1849), 3 Exch. 670,

(*a*) Legacy Duty Act, 1796 (36 Geo. 3, c. 62), ss. 8, 9, 12.

325. The rates of duty, where the testator or intestate died before the 30th April, 1909, are as follows (*b*):—In the case of a child, or a descendant of a child, or a lineal ancestor, of the testator or intestate, there is no duty (*c*). In the case of a brother or sister, or a descendant of a brother or sister, of the testator etc., the rate is 3 per cent. In the case of a brother or sister of the father or mother, or a descendant of a brother or sister of the father or mother, of the testator etc., the rate is 5 per cent. In the case of a brother or sister of a grandfather or grandmother, or a descendant of a brother or sister of a grandfather or grandmother, of the testator etc., the rate is 6 per cent. In the case of a person in any other degree of collateral consanguinity to the testator etc. than is above described, or in the case of a stranger in blood to him, the rate is 10 per cent. (*d*).

326. Where, however, the testator or intestate died on or after the 30th April, 1909, the rate of duty, in the case of a child etc., is 1 per cent. (*e*), and it is so also in the case of the husband or wife (*e*), who, prior to that date, were specifically excepted from the duty (*f*). In the case of other persons, 5 per cent. is substituted for 3 per cent., and 10 per cent. for 5 per cent. and 6 per cent. (*g*).

The 1 per cent. duty, however, is not levied—(1) where the principal value of the property passing on the death of the deceased (*i.e.*, the testator, intestate, or person making a donation *mortis causâ* (*h*)), in respect of which estate duty is payable (other than property in which the deceased never had an interest, and property of which the deceased never was competent to dispose and which on his death passes to persons other than the husband or wife, or a

SECT. 4. Rates of Duty.

Rates and
relationship:
(1) Where
testator or
intestate died
before 30th
April, 1909;

(2) Where
testator or
intestate died
on or after the
30th April,
1909.

Exceptions
as to the
1 per cent.
duty.

(*b*) Stamp Act, 1815 (55 Geo. 3, c. 184), s. 2, Sched., Part III. Where the testator or intestate died before or upon the 5th April, 1805, the rates, subject to the condition in note (*g*), p. 232, *ante*, are *nil*, 2½ per cent., 4 per cent., 5 per cent., and 8 per cent. respectively (*ibid.*).

(*c*) One per cent. duty is imposed by the Stamp Act, 1815 (55 Geo. 3, c. 184), s. 2, Sched., Part III., but it is not payable under the will or intestacy of any person dying after the 1st August, 1894 (Finance Act, 1894 (57 & 58 Vict. c. 30), s. 1, Sched. I. (5)), or in respect of any legacy or succession consisting of any estate or effects according to the value whereof (*i.e.*, in the case of persons dying before the 2nd August, 1894) duty has been paid on the affidavit or account in conformity with the Customs and Inland Revenue Act, 1881 (44 & 45 Vict. c. 12), s. 41.

(*d*) Natural children, if legitimated according to the law of the father's domicile, are not chargeable with duty as strangers in blood (*Skottowe v. Young* (1871), L. R. 11 Eq. 474). See also, on this point, note (*s*), p. 283, *post*. See titles CHARITIES, Vol. IV., p. 205; CORPORATIONS, Vol. VIII., p. 378. In Ireland, charitable legacies are not chargeable with the duty (Stamp Duties (Ireland) Act, 1842 (5 & 6 Vict. c. 82), s. 38).

(*e*) Finance (1909-10) Act, 1910 (10 Edw. 7, c. 8), s. 58 (2), (4). The duty is to be paid notwithstanding any repeal effected by or anything contained in the Finance Act, 1894 (57 & 58 Vict. c. 30) (except s. 16 (3) thereof), or any other Act (Finance (1909-10) Act, 1910 (10 Edw. 7, c. 8), s. 58 (2)). The provision saving *bond fide* purchasers and mortgagees, for value in money or money's worth, of an interest in expectancy, before the 30th April, 1909, which obtains in the case of the increased estate duty under the Finance (1909-10) Act, 1910 (10 Edw. 7, c. 8) (see p. 205, *ante*), obtains also in the case of the increased legacy duty (*ibid.*, s. 64).

(*f*) See note (*t*), p. 242, *ante*.

(*g*) Finance (1909-10) Act, 1910 (10 Edw. 7, c. 8), s. 58 (1), (4). As to purchasers and mortgagees, see note (*e*), *supra*.

(*h*) *Ibid.*, s. 58 (3).

SECT. 4.
Rates of
Duty.

lineal ancestor or descendant of the deceased) does not exceed £15,000, whatever may be the value of the legacy, or residue, or share thereof (i); or (2) where the amount or value of the legacy or succession, together with any other legacies or successions derived by the same person from the testator, intestate, or predecessor does not exceed £1,000, whatever may be the principal value of such property (j); or (3) where the person taking the legacy etc. is the widow or a child under twenty-one of the testator or intestate, and the amount etc. of the legacy etc., together with etc., does not exceed £2,000, whatever etc. (k).

Persons
married to
persons liable
to lower rate.

327. Any legatee or successor who has been married to a person of nearer consanguinity to the testator or intestate pays the same rate of duty only as such person would have been chargeable with (l).

Disclaimer of
legacy.

328. If a legatee, other than the residuary legatee, declines a bequest, and it becomes merged in the residue, the rate of duty depends upon the relationship of the residuary legatee to the testator; and the result is the same if it follows from an order of the court by consent (m).

Probate
revoked and
administra-
tion issued.

If the probate of a will is revoked, and letters of administration are issued, the rate of duty depends upon the relationship of the next of kin to the intestate, notwithstanding that the revocation may have been the result of a compromise under which persons claiming under the will received part of the estate (n).

The grounds on which the court proceeds cannot be inquired into (o), and the result, whether the decree was obtained by consent for the reason that the will could not be defended, or whether it was obtained after contested litigation, is alone to be regarded. It might, however, be different if the arrangement between the parties was collusive (p).

Will
challenged,
but allowed to
stand on
terms.

Where, in consequence of intrinsic defects applicable to a will as a whole, the will is challenged by the next of kin, but allowed to stand on terms of the next of kin receiving part of the estate, the

(i) Finance (1909-10) Act, 1910 (10 Edw. 7, c. 8), s. 58 (2) (a).

(j) *Ibid.*, s. 58 (2) (b).

(k) *Ibid.*, s. 58 (2) (c).

(l) Succession Duty Act, 1853 (16 & 17 Vict. c. 51), s. 11. In strictness, the testator or intestate must have died after the 18th May, 1853 (*ibid.*). Prior to this enactment, in the case of a legacy to a married woman, who was not entitled to her separate use, the manner in which, by force of the marital rights of the husband, the bequest might ultimately operate could not be taken into consideration in determining the rate of duty (*A.-G. v. Bacchus* (1823), 11 Price, 547, 571, Ex. Ch.; *A.-G. v. Burnie* (1830), 3 Y. & J. 531, 543).

(m) *Lord Advocate v. Gordon* (1895), 32 Sc. L. R. 532, per Lord M'LAREN, at p. 534; *Lord Advocate v. Hamilton (Duke)* (1891), 29 Sc. L. R. 213, per Lord ADAM, at p. 222.

(n) Legacy Duty Act, 1796 (36 Geo. 3, c. 52), s. 37; *R. v. Stamps Commissioners* (1844), 6 Q. B. 657.

(o) *Lord Advocate v. Freckleton's Judicial Factor* (1894), 21 R. (Ct. of Sess.) 743, per Lord WELLWOOD, at p. 745, on the authority of *R. v. Stamps Commissioners*, *supra*.

(p) *Lord Advocate v. Freckleton's Judicial Factor*, *supra*, per Lord ADAM, at p. 747.

SECT. 4.
Rates of
Duty.

duty is to be paid at the rate which is applicable to the person in whose favour the compromise has been made, but only upon the benefit which he has received; and as regards the benefit which results to the next of kin, they only pay upon it at their proper rate (q).

The position is the same where, owing to an objection, not to the will as a whole, but to a particular clause, by reason, *e.g.*, of the uncertainty of the objects of a bequest, a compromise is made under which the next of kin receive part of the bequest (r); and this is the case even where no judgment is given by the court upon the validity of the bequest (s).

SECT. 5.—Value Chargeable.

SUB-SECT. 1.—Gross Value.

329. The value for legacy duty purposes of any legacy or succession about to be paid to or retained for the benefit of any legatee or successor is its actual value at the date of the due delivery of the account for computation of the duty, including all accretions of income to that date (t). The general rule.

330. The value of any legacy given by way of annuity, whether payable annually or otherwise, for any life or lives (u), or for years determinable on any life or lives, or for years or other period of time, is to be calculated according to the tables (v) provided for the purpose (w). Annuities.

The value of the annuity, if determinable upon any contingency besides death (x), is to be calculated without regard to the

(q) *Lord Advocate v. Freckleton's Judicial Factor* (1894), 21 R. (Ct. of Sess.) 743, per Lord ADAM, at p. 748; see also *Lord Advocate v. Christie's Trustees* (1905), 12 Scots Law Times, 690.

(r) *Lord Advocate v. Freckleton's Judicial Factor*, *supra*, per Lord ADAM, at p. 747.

(s) *Ibid.*, per Lord KINNEAR, at p. 748.

(t) *A.-G. v. Cavendish (Lord G.)* (1810), Wight. 82 (duty payable upon the aggregate amount of residue retained by the executor as residuary legatee); *Thomas v. Montgomery* (1827), 3 Russ. 502 (ditto upon the interest on a pecuniary legacy which could not be paid until long after the testator's death); *Nisbett's Trustees v. Learmonth* (1845), 8 Dunl. (Ct. of Sess.) 69 (ditto upon the interest accrued on a pecuniary legacy to which a purchaser from the legatee was entitled); *Advocate-General v. Oswald* (1848), 10 Dunl. (Ct. of Sess.) 969 (ditto upon the profits of patents for inventions accumulated under a trust); *Bate v. Payne* (1849), 13 Q. B. 900 (ditto upon the income of a specific bequest received by the legatee for many years without payment of the duty). In the case of the forgiveness of a debt, no interest on the debt after the death can be added (*A.-G. v. Holbrook* (1823), 3 Y. & J. 114); but interest on the duty as from the death is chargeable (Finance Act, 1896 (59 & 60 Vict. c. 28), s. 18 (2)).

(u) See *A.-G. v. Wynford (Lord)* (1854), 9 Exch. 746 (income of property to A. for life subject to an annuity to B. for life; legacy duty payable by A. in the first instance upon an annuity for A.'s life, and not for the joint lives).

(v) Succession Duty Act, 1853 (16 & 17 Vict. c. 51), s. 31, Sched. When calculations had to be made before the 19th May, 1853, the tables annexed to the Legacy Duty Act, 1796 (36 Geo. 3, c. 52), were applicable; see *Re Cornwallis (Earl)* (1856), 11 Exch. 580, per POLLOCK, C.B., at p. 582.

(w) Legacy Duty Act, 1796 (36 Geo. 3, c. 52), s. 8.

(x) An investment of personal estate in the purchase of real estate under a direction for that purpose (compare, *ibid.*, s. 19) is not a contingency other than

SECT. 5. contingency; provided that if it determines upon the contingency the value of the annuity, upon application by the persons who paid the duty, is to be calculated by the tables according to the term for which it endured (y).

Value Chargeable.

Annuity payable out of another legacy.

Where the legacy so given by way of annuity is charged on and made payable out of any other legacy it is, nevertheless, to be valued in the same manner as other annuities, and any duty payable on the legacy charged with the annuity is to be calculated on the value of the legacy after deducting the value of the annuity (z).

Annuity to be purchased.

The duty payable on any legacy given by direction to purchase an annuity of a certain amount for life or any other term is to be calculated upon the sum necessary to purchase the annuity according to the tables (a) previously mentioned (b).

Where, however, the gift is by direction to apply a stated sum in the purchase of an annuity there is, in effect, a legacy of the sum itself (c).

Benefits from time to time.

331. Where the value of any benefit given by any will can only be ascertained from time to time by the actual application of the fund allotted for the purpose, or made chargeable with the benefit, or where, by reason of the form and manner of the gift, the value of the benefit cannot be so ascertained that the duty can be charged under any other of the directions before mentioned, the duty is to be charged upon the sums of money or effects applied from time to time as separate and distinct legacies (d).

Legacies in succession.

332. The duty on any legacy given so as to be enjoyed in succession by different persons liable to the same rate of duty is to be charged upon the legacy as in the case of a legacy to one person (e).

This rule applies also where the legacy is bequeathed on a future event to legatees to whom the income is given in the meantime in different proportions (f).

The rule does not, however, apply where an annuity, as distinguished from the income of a fund, is given to one legatee, and the fund out of which the annuity is payable is given to another legatee (g).

Where any legacy is given to different persons in succession, some of whom are not chargeable with duty, or who are chargeable with

death (*Advocate-General v. Stair (Earl)* (1850), Scotch Exchequer, referred to in *Trevor's Taxes on Succession*, 4th ed., pp. 118, 119).

(y) *Legacy Duty Act*, 1796 (36 Geo. 3, c. 52), s. 8.

(z) *Ibid.*, s. 9.

(a) See note (v), p. 245, *ante*.

(b) *Legacy Duty Act*, 1796 (36 Geo. 3, c. 52), s. 10. The annuity is to be reduced in proportion to the amount of duty payable upon it, the reduction being calculated in the same manner as the duty; and the purchase of such reduced annuity, together with the payment of such duty, is to satisfy and discharge such legacy as fully as if an annuity had been purchased equal in amount to the annuity directed to be purchased (*ibid.*).

(c) *Bayley v. Bishop* (1803), 9 Ves. 6, *per* GRANT, M.R., at p. 11.

(d) *Legacy Duty Act*, 1796 (36 Geo. 3, c. 52), s. 11.

(e) *Ibid.*, s. 12.

(f) *Re Greenwood's Estate and Effects* (1869), 21 L. T. 25.

(g) *Crow v. Robinson* (1862), 4 De G. F. & J. 337, C.A.

different rates of duty, those who are entitled for life only or other temporary interest are chargeable in respect of the bequest as if the annual produce of it had been given by way of annuity (*h*).

If any other partial interest is given, or arises out of the property to be enjoyed in succession, the duty on the interest is to be charged as in the case of partial interests charged on property given otherwise than to different persons in succession (*h*).

Every person who becomes absolutely entitled to such legacy is chargeable with the duty as if the legacy had come to him immediately on the death of the person by whom it was given to be enjoyed in succession (*h*).

Where any legacy is given so that different persons will become entitled to it in succession, the duty is to be charged upon it as if given to be enjoyed in succession, whether the persons entitled to it take it under the will and the dispositions contained therein, or in default of such dispositions, and as entitled by intestacy (*i*).

333. Where any legacy is given to or for the benefit of any persons in joint tenancy, some of whom are chargeable with legacy duty and others are either not chargeable at all or are chargeable with duty at a different rate (*j*), the duty where chargeable is payable in proportion to the respective interests of the legatees in the bequest; and should any of the legatees so chargeable become entitled by survivorship, or by severance of the joint tenancy, to any larger interest in the property, they are to be charged with the same duty as if the property to which they so become entitled had been given to them in the first instance (*k*).

334. Where any legacy is given subject to a contingency which may defeat the gift, and whereupon it may go to some other person, the bequest (unless chargeable as an annuity) is to be charged as an absolute bequest to the person who takes it subject to the contingency (*l*).

335. Any legacy which is subjected to a power of appointment in favour of persons specially named or described as objects of the power is to be charged with duty as property given to different persons in succession (*m*). In charging the duty not only the persons who take previous or subject to the power of appointment, but also those who take under or in default of any such appointment, when and as they take respectively, are in respect of their several interests to be charged with the same duty and in the same manner as if those interests had been given to them respectively, in and by the will containing the power, in the same order as will take place under and by virtue of the power of appointment, or in default of execution of it, as the case may be (*n*).

SECT. 5.
Value
Chargeable.

Legacies in
joint tenancy

Legacies
subject to
a contingency.

Legacies
subject to
powers of
appointment.

(*h*) Legacy Duty Act, 1796 (36 Geo. 3, c. 52), s. 12.

(*i*) *Ibid.*, s. 15.

(*j*) See *A.-G. v. Bacchus* (1823), 11 Price, 547, Ex. Ch.; *A.-G. v. Burnie* (1830), 3 Y. & J. 531. In both cases the legatees were tenants by entireties.

(*k*) Legacy Duty Act, 1796 (36 Geo. 3, c. 52), s. 16.

(*l*) *Ibid.*, s. 17.

(*m*) See *ibid.*, s. 12.

(*n*) *Ibid.*, s. 18.

SECT. 5.
Value
Chargeable.

Where any property is given for any limited interest, and a general and absolute power (o) of appointment is also given to any person to whom the property would not belong in default of appointment, the property, upon the execution of the power, is to be charged with the same duty and in the same manner as if the property had been immediately given to the person having and executing the power, after allowing any duty already paid in respect of it (p).

Where any property is given with such general power of appointment to persons who would be entitled to the property in default of appointment, the property is to be charged with duty as if it had been given to those persons absolutely in the first instance without such power of appointment (p).

Money
 directed to be
 applied in
 purchase of
 real estate.

336. Any personal estate, directed to be applied in the purchase of real estate, is to be charged with duty as personal estate, except where it is so given as to be enjoyed by different persons in succession, in which case each person entitled to it in succession is to pay duty in the same manner as if the personal estate had not been directed to be applied in the purchase of real estate, unless it has been actually so applied before the duty accrues (q).

If, however, before the personal estate, or some part of it, has been actually so applied, any person, including a tenant in tail in possession (r), although a minor (s), becomes entitled (t) to an estate of inheritance (a) in possession in the real estate to be purchased with it, or with so much of it as has not been applied in the purchase of real estate (b), the same duty is to be charged as if that person had become absolutely entitled to it as personal estate by virtue of any bequest of it as such (c).

(o) A power of appointment exercisable only by will, and from the benefit of which certain persons were excluded, is a general and absolute power of appointment within the meaning of this section—i.e., as distinguished from a power of appointment for the benefit of persons specially named or described (*Platt v. Routh* (1841), 3 Beav. 257; affirmed, *sub nom. Drake v. A.-G.* (1843), 10 Cl. & Fin. 257, 288, H. L.).

(p) *Legacy Duty Act*, 1796 (36 Geo. 3, c. 52), s. 18.

(q) *Ibid.*, s. 19.

(r) *Macfarlane v. Lord Advocate*, [1894] A. C. 291.

(s) *A.-G. v. Twyford* (1849), 9 Hare, 730, n., 732, n., referred to in *Trevor's Taxes on Succession*, 4th ed., p. 113. The person claiming to be tenant in tail was a minor (*Burke's Peerage* (1907), p. 572), but the fact is not alluded to in the report.

(t) This expression means "will become entitled if real estate is purchased, or as and when purchased" (*Macfarlane v. Lord Advocate*, *supra*, per Lord HERSCHELL, L.C., at p. 304). A person can become entitled upon his own death without issue (*Kenlis (Lord) v. Hodgson*, [1895] 2 Ch. 458, per KEKEWICH, J., at p. 465).

(a) The expression "an estate of inheritance" in the *Legacy Duty Act*, 1796 (36 Geo. 3, c. 52), s. 19, has the ordinary meaning of an estate which does not terminate with the life of the possessor (*Macfarlane v. Lord Advocate*, *supra*).

(b) *Macfarlane v. Lord Advocate*, *supra*. Money expended in building a house upon land does not come within the words "purchase of real estate" (*ibid.*, per Lord HERSCHELL, L.C., at p. 306).

(c) *Legacy Duty Act*, 1796 (36 Geo. 3, c. 52), s. 19; *De Lancey v. R.* (1872) L. R. 7 Exch. 140, 142, Ex. Ch.

337. The legacy duty on any legacy or residue satisfied otherwise than by payment of money or application of specific effects, or released for consideration, or compounded for less than its value, is to be charged according to the value of the property taken in satisfaction (*d*), or as consideration for the release or composition (*e*).

If, however, any legacy is given in satisfaction of any other legacy, or title to any residue, or part of residue, of any personal estate remaining unpaid, the duty is not to be paid on both subjects, but on the one yielding the largest duty (*f*).

SECT. 5.
Value
Chargeable.

Legacies etc.
compounded
for.

SUB-SECT. 2.—Deductions.

338. The legacy duty payable in respect of the residue of the personal estate of a deceased person is to be calculated upon the value remaining after deducting his debts and funeral expenses and any legacies and other charges first payable thereout (*g*).

Deductions
allowed.

SECT. 6.—Collection of the Duty.

SUB-SECT. 1.—The Duty.

339. Legacy duty is a stamp duty, and the Commissioners (*h*) are to provide proper stamps for denoting the rate per cent. (*i*).

The duty is a
stamp duty.

The Commissioners are required to appoint receivers of the duty, and to keep accounts of all payments, with proper references in alphabetical order, according to the surname of the testator, or intestate, in respect of whose personal estate the payments have been made (*k*).

Commis-
sioners are to
appoint
receivers of
duties and
keep accounts
etc.

SUB-SECT. 2.—When the Duty is payable.

340. Legacy duty is, except where otherwise provided (*l*), to be paid upon retainer, delivery, payment, or other satisfaction or discharge whatsoever, of any legacy or residue, or any part thereof, respectively, to which any person is entitled (*m*). In other words, the duty is payable when the legacy is paid, and not when the title to it accrues (*n*).

The duty is
to be paid
when the
legacy is
paid.

(*d*) According to its then value (*A.-G. v. Cavendish* (*Lord G.*) (1810), Wight. 82, per MACDONALD, C.B., at p. 93).

(*e*) Legacy Duty Act, 1796 (36 Geo. 3, c. 52), s. 23. This section contemplates an extra-judicial compromise of the legacy, but it equally applies where the compromise has taken place with reference to a legacy which has been the subject of a decree, and where the decree gives only partial effect to the claim of the legatee (*Lord Advocate v. Freckleton's Judicial Factor* (1894), 21 R. (Ct. of Sess.) 743, per Lord ADAM, at p. 747).

(*f*) Legacy Duty Act, 1796 (36 Geo. 3, c. 52), s. 23.

(*g*) Stamp Act, 1815 (55 Geo. 3, c. 184), s. 2, Sched., Part III.

(*h*) *I.e.*, the Commissioners of Stamps, afterwards the Commissioners for Stamps and Taxes (Land Tax Act, 1834 (4 & 5 Will. 4, c. 60), s. 8; repealed by Inland Revenue Regulation Act, 1890 (53 & 54 Vict. c. 21), s. 40), and now the Commissioners of Inland Revenue (Inland Revenue Board Act, 1849 (12 & 13 Vict. c. 1), s. 1; repealed and replaced by Inland Revenue Regulation Act, 1890 (53 & 54 Vict. c. 21), ss. 1, 39, 40).

(*i*) Legacy Duty Act, 1796 (36 Geo. 3, c. 52), s. 3 (repealed by Statute Law Revision Act, 1872 (35 & 36 Vict. c. 63)).

(*k*) Legacy Duty Act, 1796 (36 Geo. 3, c. 52), s. 4.

(*l*) See pp. 250—252, *post*.

(*m*) Legacy Duty Act, 1796 (36 Geo. 3, c. 52), s. 6.

(*n*) *Re Hillas* (1850), 2 Ir. Jur. 36, per LEBNOY, B., at p. 36. The duty,

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Collection of the Duty.

What amounts to a retainer.

In order that there may be a retainer, the executor must be discharged (o).

There is a retainer where the executor pays a fund into court, whether under an order of the court with a view to the investment of the fund under the protection of the court, either for persons declared to be entitled in succession under the will (p), or for a life tenant and, subject to the life interest, for other persons who had contingent interests, and might eventually become entitled (q), or to the credit generally of an action for the administration of the estate (r).

There is, however, no retainer for the benefit of the legatee who may become entitled after the death of a life tenant, where the executor keeps the fund in his own hands as trustee for the purposes of the will (s).

Satisfaction of legacy without payments. Payments from time to time.

341. A legacy may be satisfied without payment, as, e.g., where a testator bequeaths a sum of money charged upon real estate to the owner of the real estate (t).

Where the duty in respect of any benefit given by any will is to be charged upon the sums of money or effects applied from time to time as separate and distinct legacies, the general rule as to the time of payment of the duty applies (a), and so also where *interim* distributions of an estate are made (b).

Legacy to purchase an annuity.

The duty on a legacy given to purchase an annuity is to be paid at the same time as in the case of other pecuniary legacies (c).

however, must be considered as appropriated for the Crown from the time when the legacy is payable (*Thomas v. Montgomery* (1827), 3 Russ. 502, per Lord LYNDEHURST, L.C., at p. 510). In a sense, it legally vests in Government at the death (*A.-G. v. Cavendish* (Lord G.) (1810), Wight. 82, per MACDONALD, C.B., at p. 94). As to the remission of legacy duty and interest thereon, see p. 182, *ante*.

(o) *A.-G. v. Wood* (1828), 2 Y. & J. 290, per ALEXANDER, C.B., at p. 301.

(p) *Hill v. Atkinson* (1816), 3 Price, 399.

(q) *Coombe v. Trist* (1835), 1 My. & Cr. 69; see also *A.-G. v. Wood* (1828), 2 Y. & J. 290, per ALEXANDER, C.B., at p. 301.

(r) *A.-G. v. Loscombe* (1860), 5 H. & N. 564.

(s) *A.-G. v. Manners* (*Lady L.*) (1815), 1 Price, 411; *A.-G. v. Wood* (1828), 2 Y. & J. 290; *A.-G. v. Hancock* (1837), 2 M. & W. 563, 595. In all these cases it was uncertain who would become entitled on the life tenant's death. *Quare*, however, whether the result is not the same where it is certain who will be so entitled. *Semble*, where property is given to several persons in succession, it is, to the extent of their respective interests, paid and satisfied to them in turn, and not the less so to the person absolutely entitled because one or more payments to owners of limited interests may already have taken place (*A.-G. v. Hancock*, *supra*, per Lord ABINGER, C.B., at p. 596). The words "satisfied" and "discharged" mean when the legacy is "paid," and are synonymous to those ("retained" or "delivered") which precede them (*A.-G. v. Wood*, *supra*, per ALEXANDER, C.B., at pp. 299 *et seq.*). A legacy has not been delivered, retained, satisfied, or discharged, when the money is in the hands of the executor and trustee, and he is liable for it to the person beneficially entitled to the legacy (*ibid.*, at p. 301). Compare, *contra*, *Hill v. Atkinson* (1816), 3 Price, 399, per Lord ELDON, at p. 401; disapproved, *A.-G. v. Wood*, *supra*, per ALEXANDER, C.B., at p. 300; *A.-G. v. Wood*, *supra*, *semble*, per HULLOCK, B., at pp. 301, 302.

(t) *A.-G. v. Melcalfe* (1851), 6 Exch. 26; see also *Re Taylor's Estate* (1853), 8 Exch. 384.

(a) Legacy Duty Act, 1796 (36 Geo. 3, c. 52), s. 11.

(b) See p. 252, *post*; Legacy Duty Act, 1796 (36 Geo. 3, c. 52), s. 28.

(c) *Ibid.*, s. 10.

342. The duty on a legacy given to be enjoyed by persons in succession, all chargeable at the same rate, is to be paid upon payment etc. by the executor to any trustee, or other person, to whom the legacy is payable or paid in trust for the persons entitled in succession, and if not so paid is to be paid upon receipt, by any persons so entitled, of any produce of the capital of the property, according to the amount of the capital of which the produce is so received (*d*).

The duty on the capital of a legacy given to be enjoyed in succession by persons who are chargeable at different rates of duty is payable when the person who becomes absolutely entitled to the legacy receives it or begins to enjoy the benefit of it (*e*), which may be at his own death (*f*).

The duty in respect of any legacy given by way of annuity is to be paid by four equal payments, the first before or on completing the payment of the first year's annuity, and the remaining three at yearly intervals before or on completing the payments of the three succeeding years' annuity respectively (*g*).

The duty in respect of an annuity payable out of another legacy is payable in the same manner as other annuities (*h*). So also is the duty in respect of temporary interests in a legacy given to be enjoyed by persons in succession, some of whom are chargeable with no duty, or who are chargeable at different rates (*i*).

The like rule holds in the case of temporary interests in any personal estate directed to be applied in the purchase of real estate to be enjoyed by persons in succession, and not actually so applied (*k*).

The duty in respect of a partial interest given or arising out of property enjoyed in succession is to be paid in the same manner as in like cases of partial interests charged on property not so enjoyed (*l*).

Articles not yielding income, which are given to be enjoyed by different persons in succession, are, when they are actually sold or disposed of, or come to any person having power to sell or dispose of them, or having an absolute interest in them, chargeable with legacy duty as if they had been originally given absolutely (*m*).

In the case, however, of objects which appear to the Treasury to

SECT. 6.
Collection
of the Duty.

Legacy to
be enjoyed in
succession.

Annuities and
temporary or
partial
interests.

Specific
articles.

(*d*) Legacy Duty Act, 1796 (36 Geo. 3, c. 52), ss. 12, 13.

(*e*) *Ibid.*, s. 12.

(*f*) *Kenlis (Lord) v. Hodgson*, [1895] 2 Ch. 458, *per* KEREWICH, J., at p. 465.

(*g*) Legacy Duty Act, 1796 (36 Geo. 3, c. 52), s. 8.

(*h*) *Ibid.*, s. 9.

(*i*) *Ibid.*, s. 12.

(*k*) *Ibid.*, s. 19. *Seem*, the Crown will, on an equitable extension of this section, restrict the claim to a diminished annuity during the second, third, and fourth years, giving effect to any investments made in land in the course of those years (*Advocate-General v. Stair (Earl)* (1850), Scotch Exchequer, referred to in *Trevor's Taxes on Succession*, 4th ed., pp. 118, 119).

(*l*) Legacy Duty Act, 1796 (36 Geo. 3, c. 52), ss. 12, 13.

(*m*) *Ibid.*, s. 14; compare *Lord Advocate v. Hamilton (Duke)* (1891), 29 Sc. L. R. 213 (chattels settled on a person for life, and to him absolutely, if testator's debts were paid off in his (the legatee's) lifetime; he paid off, or assumed liability for, the debts, and was held liable for legacy duty on the chattels).

SECT. 6. be of national, scientific, historic, or artistic interest, the duty is only chargeable when the property is sold (n).
Collection of the Duty.

SUB-SECT. 3.—By whom the Duty is payable.

(1) *The Accountable Persons.*

Liability of executor.

343. Legacy duty is, except where otherwise provided, to be accounted for and paid by the person (hereafter called the executor) having or taking the burden of the execution of the will or other testamentary instrument, or the administration of the personal estate of any person deceased (o).

Crown debt (1) from the executor ;

If the executor retains for his own benefit, or for the benefit of any other person, any legacy or residue, or any part thereof, respectively, which he is entitled to retain, either in his own right or in the right or for the benefit of any other person, and upon which any legacy duty is chargeable, not having first paid such duty, the duty is a debt from him to the Sovereign ; and it is so if he delivers, pays, or otherwise howsoever satisfies or discharges any legacy etc. to which any other person is entitled, and upon which legacy duty is chargeable, without receiving or deducting the duty. And in the last-named case the duty is also a debt to the Sovereign from the person to whom delivery etc. of the legacy etc. is made (p).

(2) from the legatee.

Power to executor to discharge legacies on payment of duty accrued.

344. The executor may from time to time pay, deliver, or otherwise dispose of any legacy, or any part thereof, or distribute any part of the residue of any personal estate, on payment, from time to time, of the proportion of the duty accruing in respect of the part of the personal estate so administered (q).

General powers.

Where personal estate is appointed by will, in pursuance of a general power contained in a settlement, the executor of the will is the proper person to administer it (r), and is primarily liable for the payment of the legacy duty.

Annuities.

Where an annuity of a certain amount is directed to be purchased, the payment of legacy duty upon the sum necessary to purchase the annuity, calculated in accordance with the provisions

(n) Finance (1909-10) Act, 1910 (10 Edw. 7, c. 8), s. 63. The death must be after the 29th April, 1909 (*ibid.*).

(o) Legacy Duty Act, 1796 (36 Geo. 3, c. 52), s. 6. The executor is only made liable for the benefit of Government, and not on his own account ; he is no more than surety for the legatee, and his case falls within the principles applied to the case of sureties (*Hales v. Freeman* (1819), 1 Brod. & Bing. 391, *per* PARK, J., at p. 390), that is, his principal becomes liable to him for whatever he has paid (*ibid.*, *per* RICHARDSON, J., at p. 400).

(p) Legacy Duty Act, 1796 (36 Geo. 3, c. 52), s. 6 ; *Re Sammon* (1838), 3 M. & W. 381, *per* PARKE, B., at p. 386. In *Re Pigott* (1833), 1 Cr. & M. 827, the court, in exercise of its discretion under the stat. (1802) 42 Geo. 3, c. 99, s. 2 (repealed by the Crown Suits etc. Act, 1865 (28 & 29 Vict. c. 104), s. 53), declined to order the surviving executor of the sole executor of the sole executor of a testator to account for legacy duty, he having only interfered in the estate of his own testator to sign necessary documents, and no assets of the original testator ever having come to his hands.

(q) Legacy Duty Act, 1796 (36 Geo. 3, c. 52), s. 26.

(r) *Re Philbrick's Settlement* (1865), 11 Jur. (N. S.) 558 ; *Hayes v. Oatley* (1872), L. R. 14 Eq. 1 ; *Re Hoskin's Trusts* (1877), 6 Ch. D. 281, C. A.

for that purpose, discharges the person paying or satisfying the legacy, as well as the legatee himself, from all other demands in respect of the legacy duty payable thereon (s).

The legacy duty on any legacy given by way of annuity, and made payable out of another legacy, is to be paid by the person entitled to the legacy charged with the annuity (t).

The legacy duty payable on any legacy given to be enjoyed in succession by different persons liable to the same rate of duty is to be paid by the executor (a).

Where, however, the duty is chargeable at different rates the executor is chargeable with the duties in succession, unless the property bequeathed has been transferred to trustees, including any new or substituted trustees (b), in which case such trustees or their representatives are chargeable with the duties (a).

So also where any partial interest is given or arises out of any such property, and the partial interest is satisfied or paid by the persons enjoying the property, those persons are chargeable with the duty on the partial interest (a).

The persons so chargeable with the duty are debtors to the Sovereign in like manner as the executor (a).

The legacy duty on articles not yielding income, and given to be enjoyed by different persons in succession, is to be paid by and is to become the debt of any person for whose benefit the things are sold, or who has power to sell or dispose of them, or who has an absolute interest in them, but is not to be a charge upon any person by reason of his having assented as executor to the bequest (c).

Where the articles are given as heirlooms to be enjoyed with settled real estate, and tenant for life and remainderman in tail join to disentail and re-settle the real estate and assign the articles to trustees, to the intent that they may continue to be enjoyed as heirlooms therewith, the persons who at the moment when the interest actually vests in possession have the right to call for the property are the persons who have an absolute interest in it and are liable for the duty (d).

Where any legacy (not chargeable by way of annuity) is given subject to a contingency which may defeat the gift, and the contingency afterwards happens, and the legacy goes to a person liable to a higher rate of duty than the duty already paid, such person is to pay the difference (e).

345. Where a pecuniary (f) or specific (g) legacy is satisfied without the legacy duty having been deducted or received, the

SECT. 6.
Collection
of the Duty

Legacies
enjoyed by
persons in
succession.

Crown
debtors

Settled
articles not
yielding
income.

Legacy
subject to
contingency.

Legacy
paid without

(s) Legacy Duty Act, 1796 (36 Geo. 3, c. 52), s. 10.

(t) *Ibid.*, s. 9.

(a) *Ibid.*, s. 13.

(b) *Re Jones's Trust* (1852), 21 L. J. (CH.) 566.

(c) Legacy Duty Act, 1796 (36 Geo. 3, c. 52), s. 14. As to objects of national, scientific, historic, or artistic interest, see p. 251, *ante*.

(d) *A.-G. v. Bruce*, [1901] 2 K. B. 391, 399, following Lord CRANWORTH, L.J., in *Bryan v. Mansion* (1857), 3 Jur. (N. S.) 473.

(e) Legacy Duty Act, 1796 (36 Geo. 3, c. 52), s. 17.

(f) *Foster v. Ley* (1835), 2 Bing. (N. C.) 269.

(g) *Bate v. Payne* (1849), 13 Q. B. 900.

SECT. 6.

Collection of the Duty.

duty having
been
deducted.

executor may recover from the legatee, or a purchaser from the legatee (*h*), the amount he is subsequently called upon to pay for duty on account of the legacy. This right of recoupment is not affected by the fact that payment to the legatee was made by order of the court (*i*), or that a deed of release and indemnity to the executor, to which he was a party, recited, without fraud or deception on his part, that he had retained the amount of the duty (*k*), or that in the case of a legacy given by way of annuity the legacy duty was not deducted, as it should have been, from the first four yearly payments of the annuity (*l*), and this notwithstanding that the legatee has parted with the annuity. The purchaser of a legacy is, however, not liable for the duty in respect of a separate legacy bequeathed by the same will to the same legatee (*m*).

Where the duty has been paid by the legatee to the agent of the executor, and the agent has misappropriated it, the executor cannot recover the amount from the legatee (*n*).

In adminis-
tration action,
court to
provide for
payment
of duty.

346. Where an action is instituted in any court (*o*) concerning the administration of the personal estate of any person dying testate or intestate, or any part of such estate, in which any direction is given touching payment of any legacy, or residue, or any part thereof, the court, in giving directions concerning the same, is to provide for the due payment of legacy duty; and in taking any account of the personal estate, or otherwise acting concerning it, the court is to take care that no allowance is made for any legacy etc. without due proof of the legacy duty having been paid (*p*).

The court is charged with the duty of seeing that all duties on every transmission from the testator to the person obtaining payment through the action before the court are paid; but is not bound to follow the legacy till its present beneficial owner is found and see that all duties due by him are paid (*q*).

The court, moreover, is not bound to provide for future duties (*r*).

(*h*) *Jennings v. Bond* (1845), 8 I. Eq. R. 755, *per* SUGDEN (afterwards Lord ST. LEONARDS), L.C., at p. 760; *Nisbett's Trustees v. Learmonth* (1845), 8 Dunl. (Ct. of Sess.) 69. *Secus, semble*, where the executor himself sells (*Farwell v. Seale* (1849), 3 De G. & Sm. 359).

(*i*) *Foster v. Ley* (1835), 2 Bing. (N. C.) 269.

(*k*) *Brooke v. Haymes* (1868), L. R. 6 Eq. 25. The sum retained by the executor in this case proved to be only a part of the legacy duty payable.

(*l*) *Hales v. Freeman* (1819), 1 Brod. & Bing. 391 (annuity assigned with a covenant that it was free from incumbrance; action against legatee).

(*m*) *Bignold v. Giles* (1858), 28 L. J. (CH.) 238; *A.-G. v. Giles* (1860), 5 H. & N. 255.

(*n*) *Horn v. Coleman* (1856), 2 Jur. (N. S.) 1127.

(*o*) Including the county courts (County Courts Act, 1888 (51 & 52 Vict. c. 43), s. 56; County Courts Act, 1903 (3 Edw. 7, c. 42), s. 3. See title COUNTRY COURTS, Vol. VIII., pp. 428 *et seq.*

(*p*) Legacy Duty Act, 1796 (36 Geo. 3, c. 52), s. 25. See Supreme Court Funds Rules, 1905, rr. 20, 52 (*b*), 66 (duties generally); Trustee Act, 1893 (56 & 57 Vict. c. 53), ss. 42, 50; County Court Rules, 1903, Ord. 2, r. 14 (legacy duty, succession duty, and estate duty).

(*q*) *Ewing's Trustees v. Mathieson* (1906), 44 Sc. L. R. 12, 13.

(*r*) *Re Bowes, Strathmore v. Vane*, [1907] W. N. 198 (settled fund paid out to trustees to be held upon trusts). Where life interest released, and fund paid out to beneficiary, compare note (*n*), p. 225, *ante*.

Although the court has to provide for the payment of the duty, the executor, being a party to the action, must see that the duty is paid (*s*), and, notwithstanding that the action is still pending, must account for the duty in respect of any legacies which he has satisfied (*t*).

SECT. 6.
Collection
of the Duty.

347. The executor is required, previously to retaining for his own use any legacy, or residue, or any part thereof, to which he is entitled, and which is chargeable with legacy duty upon retainer, to transmit to the Commissioners a note containing the particulars of the personal property intended to be retained, and the amount or value thereof, and of the duty payable; and the Commissioners are to assess the duty accordingly. Upon payment of the duty the Commissioners are to give a receipt for it duly stamped (*u*).

Transmission
of particulars
to Commis-
sioners before
retainer of
legacy.

No accountable person is to satisfy or compound for any legacy, or any residue, or any part thereof respectively, in respect of which the duty is payable, without taking a receipt (*b*) or discharge in writing for the same. The receipt etc. is to be dated, and is to disclose the name of the deceased person under whose will etc. the title to the legacy etc. accrues, the name of the person to whom the receipt etc. is given, and the name of the legatee or successor, and also the amount or value of the legacy etc. for which the discharge is given, and the amount and rate of duty payable and allowed thereon (*c*).

Stamped
receipts.

No such receipt etc. is to be received in evidence, or is to be available in any manner, unless duly stamped; and no evidence as to any payment etc. of any legacy etc. is to be given without production of the receipt etc. duly stamped, unless the actual payment of the legacy duty, as, *e.g.*, by a certificate on behalf of the Commissioners that the duty has been paid (*d*), is first given in evidence (*e*).

Stamped receipts are not required for payments of annuities, or for legacies chargeable with duty as annuities, except the several payments which complete the payments for each of the first four years during which such annuity is payable, or in respect of which such legacy or bequest is chargeable with duty as an annuity (*e*).

(*s*) *Bowra v. Rhodes* (1862), 10 W. R. 747. Solicitors should also assist the court in seeing that payment of the duty is provided for (*Bryan v. Munson* (1857), 3 Jur. (N. S.) 473, *per* Lord ORANWORTH, L.C., at p. 474).

(*t*) *Re Sammon* (1838), 3 M. & W. 381.

(*u*) Legacy Duty Act, 1796 (36 Geo. 3, c. 52), s. 35; see note (*f*), p. 256, *post*.

(*b*) The Commissioners may provide printed forms (Legacy Duty Act, 1796 (36 Geo. 3, c. 52), s. 5).

(*c*) Legacy Duty Act, 1796 (36 Geo. 3, c. 52), s. 27.

(*d*) *Howe (Earl) v. Lichfield (Earl)* (1867), 2 Ch. App. 155. A copy of the entry in the books of the Commissioners of the payment of the duty is to be admitted as evidence thereof (Legacy Duty Act, 1796 (36 Geo. 3, c. 52), s. 27; *Harrison v. Borwell* (1839), 10 Sim. 380). Where, on application for payment out of court of a legacy on which duty had been paid, a certificate had been refused, because the general residuary account had not been filed, notice was ordered to be given to the Commissioners that the fund would be paid out within seven days unless cause to the contrary was shown by them (*Re Marsham* (1863), 9 L. T. 533).

(*e*) Legacy Duty Act, 1796 (36 Geo. 3, c. 52), s. 27.

SMOR. 6. Every receipt etc. for a legacy etc. must be transmitted to the office appointed by the Commissioners to be stamped, and the duty must be paid within twenty-one days of the date thereof; and the proper officer is to write a dated receipt for the duty upon the receipt etc. and enter the amount in a book, and the receipt etc. is to be stamped with a stamp denoting the rate of duty (*f*).

Collection of the Duty.

Every receipt etc. for any legacy etc. so duly stamped is to be free from all other stamp duties upon receipts or discharges for money (*g*).

(2) *Limitation of Personal Liability.*

Liability ceasing after a specified period.

348. Under a testamentary document admitted to probate, or under letters of administration, no person is liable for payment of any legacy duty after the expiration of six years from the date of settlement of the account in respect of which the duty is payable, provided that such account was in all respects a full and true account, and contained all material facts for the ascertainment of the rate and amount of duty; and no trustee, executor, or administrator is, after the expiration of such six years, liable for the duty, if it is proved to the satisfaction of the Commissioners that the account rendered was correct to the best of his knowledge, information, and belief (*h*).

Discharge of executor etc. from duty on distribution of fund.

When an executor, administrator, or trustee, has given notice, in writing to the Commissioners for any claim to legacy duty or succession duty in respect of any fund in his hands which he intends to distribute, and has delivered to the Commissioners all particulars which they may require in order to ascertain the existence and extent of any such claim, he is at liberty to distribute the fund amongst the parties entitled thereto, after satisfaction of any claims to duty made by the Commissioners, and is entitled to receive from them a certificate discharging him from his liability to any duty in respect of the fund (*i*).

The certificate does not, however, in any way affect the liability of any person other than the person in whose favour it is expressed to be given (*i*).

SUB-SECT. 4.—*Out of what Property the Duty is payable.*

The duty is payable out of the legacy itself.

349. Legacy duty is chargeable upon (*k*), and, apart from express direction (*l*), is to be deducted from (*m*), or retained out of (*n*), or paid out of (*o*), or raised and paid out of (*p*), the legacy or residue

(*f*) Legacy Duty Act, 1796 (36 Geo. 3, c. 52), s. 29. The machinery provided by this section is now for the most part obsolete. The receipt should be sent by post, addressed to the Secretary of the Estate Duty Office, when it will be examined, and if satisfactory a formal assessment of the duty and any interest payable will be made, and, upon payment of the amount assessed, the form, duly stamped and receipted, will be returned to the sender.

(*g*) Legacy Duty Act, 1796 (36 Geo. 3, c. 52), s. 41.

(*h*) Customs and Inland Revenue Act, 1889 (52 & 53 Vict. c. 7), s. 14.

(*i*) Customs and Inland Revenue Act, 1880 (43 Vict. c. 14), s. 12.

(*k*) Legacy Duty Act, 1796 (36 Geo. 3, c. 52), ss. 6, 8, 11, 12, 14, 17—19, 21.

(*l*) *Ibid.*, s. 21.

(*m*) *Ibid.*, ss. 6, 10, 13, 24.

(*n*) *Ibid.*, ss. 9, 13; Legacy Duty Act, 1805 (45 Geo. 3, c. 28), s. 5.

(*o*) Legacy Duty Act 1796 (36 Geo. 3, c. 52), ss. 11, 12, 17.

(*p*) *Ibid.*, s. 19.

in respect of which it is payable, or, in the case of specific effects, is to be received (*q*) from the legatee in exchange for them.

Where a legacy is compounded for, the legacy duty, apart from express stipulation to the contrary, comes out of the amount of the composition (*r*), although it is otherwise where the amount is the agreed price for a release of all claims (*s*).

350. The duty is a Government charge (*t*) on the legacy etc. itself (*a*), and not on the estate generally (*b*). It is, however, not an incumbrance (*b*), properly so called (*c*), although it is a burden (*d*) upon the legacy, apart from express stipulation to the contrary (*e*), and follows it, in the absence of express contract (*f*), in the hands of everyone who acquires a right to it (*g*), whether it was acquired in possession (*h*) or reversion (*i*).

SECT. 6.
Collection
of the Duty.

The duty
follows the
legacy.

The legacy duty payable in respect of a bequest etc. to one person cannot be deducted from the assets comprised in a bequest etc. to another person (*k*). Nor can the unpaid duty in respect of a life interest be paid out of the capital to which another legatee is entitled (*l*). Even where separate legacies under a will are bequeathed to the same legatee, there is no lien upon one legacy for the duty on the other legacy (*m*); and the same rule holds with regard to separate parts of one and the same legacy (*n*).

(*g*) Legacy Duty Act, 1796 (36 Geo. 3, c. 52), ss. 6, 24.

(*r*) *Fischer v. Seafield (Earl)* (1825), 4 Sh. (Ct. of Sess.) 192, *per* the Lord Ordinary (MEADOWBANK), at p. 194. In the actual case, the legatee agreed to give a full and ample discharge, and such discharge, to be available in law, must be duly stamped and at the expense of the legatee (*ibid.*, *per* the Lord President (HOPE), at p. 196).

(*s*) *Greville v. Greville* (No. 2) (1859), 27 Beav. 596.

(*t*) *Bliss v. Putnam* (1843), 7 Beav. 40, *per* Lord LANGDALE, M.R., at p. 41.

(*a*) *Warbrick v. Varley* (No. 1) (1861), 30 Beav. 241, *per* ROMILLY, M.R., at p. 242.

(*b*) *Noel v. Henley (Lord)* (1819), 7 Price, 241, *per* RICHARDS, C.B., at p. 253.

(*c*) *Re Repington, Wodehouse v. Scobell*, [1904] 1 Ch. 811, *per* FARWELL, J., at p. 814.

(*d*) *Fischer v. Seafield (Earl)* (1825), 4 Sh. (Ct. of Sess.) 192, *per* the Lord Ordinary (MEADOWBANK), at p. 196; *Nisbett's Trustees v. Learmonth* (1845), 8 Dunl. (Ct. of Sess.) 69, 74, 75, 76. A "burden" in the sense here used is an obligation on a person as owner of the legacy (compare Green's Encyclopædia of Scots Law, Vol. II., p. 239).

(*e*) *Fischer v. Seafield (Earl)*, *supra*.

(*f*) *Re Repington, Wodehouse v. Scobell*, *supra*.

(*g*) *Bryan v. Manson* (1857), 3 Jur. (N. S.) 473; *Bliss v. Putnam*, *supra*; *Nisbett's Trustees v. Learmonth*, *supra*; *A.-G. v. Bruce*, [1901] 2 K. B. 391; *Re Repington, Wodehouse v. Scobell*, *supra*. A covenant for further assurance does not bind the assignor to indemnify the assigned legacy against legacy duty (*Re Repington, Wodehouse v. Scobell*, *supra*).

(*h*) *Bliss v. Putnam*, *supra*; *Nisbett's Trustees v. Learmonth*, *supra*.

(*i*) *Bryan v. Manson*, *supra*; *A.-G. v. Bruce*, *supra*; *Re Repington, Wodehouse v. Scobell*, *supra*.

(*k*) *Wright v. Barnewall* (1849), 13 Jur. 1041; see also *Hicks v. Keat* (1840), 3 Beav. 141.

(*l*) *Bowra v. Rhodes* (1862), 10 W. R. 747.

(*m*) *Bignold v. Giles* (1858), 28 L. J. (OH.) 238; *A.-G. v. Giles* (1860), 5 H. & N. 255. See also *Re Currie, Bjorkman v. Kimberley (Lord)* (1888), 57 L. J. (OH.) 743, cited note (*o*), p. 317, *post*.

(*n*) *Re Repington, Wodehouse v. Scobell*, *supra*.

SECT. 6.
Collection
of the Duty.

Provision of
duty by
court.

Where a legacy is given free of duty, the duty, apart from express direction, is payable out of the same property as the legacy (o).

351. Whenever any action is pending in any court for the administration of any property chargeable with legacy duty, the court is to provide, out of any property in its possession and control, for the payment of duty to the Commissioners (p).

SUB-SECT. 5.—Remission of Duty and Interest.

Power to
remit duty
and interest.

352. The Commissioners and the Treasury, respectively, have, as already stated (q), certain powers to remit legacy duty and interest thereon.

SUB-SECT. 6.—Commutation of Duty and Composition of Claims.

Power to
commute.

353. The Commissioners may, upon application of the accountable persons, commute, for a certain sum to be presently paid, the legacy duty presumptively payable in respect of any interest in expectancy upon the determination of a life or other temporary interest in possession in a legacy, or residue, provided that any duty payable upon the life etc. interest has been satisfied (r). For assessing the amount of duty payable, the Commissioners are to set a present value upon the presumptive duty, regard being had to any contingencies affecting the liability to the duty, and interest being reckoned at the rate of 3 per cent. (s), and upon receipt of the certain sum the Commissioners are to give a discharge for the duty accordingly (r).

Power to
compound.

The Commissioners, upon application of the person acting in the execution of the will of any deceased person, and upon delivery to them of an account showing the amount of the estate and effects in respect of which legacy duty is payable, and the names or description of class of the persons entitled in possession or expectancy, and their degrees of consanguinity to the testator, may assess the duty upon the amount shown by the account at such a sum by way of composition as, having regard to the circumstances, appears to be proper, and may accept payment of the duty so assessed in full discharge of all claims for legacy duty under the will (t). If the Commissioners are of opinion that the application should receive the assent of any person, they are to refuse to entertain the application until the assent has been given (t). This power is distinct from the Commissioners' power, already stated (a), to compound for death duties generally (b).

(o) *Noel v. Henley (Lord)* (1819), 7 Price, 241, 253; see also *Re Fermoy (Lord)* (1890), fully stated, MacCarthy's Leading Cases in Land Purchase Law, at p. 55.

(p) Succession Duty Act, 1853 (16 & 17 Vict. c. 51), s. 53.

(q) See p. 182, *ante*.

(r) Customs and Inland Revenue Act, 1880 (43 Vict. c. 14), s. 11.

(s) *I.e.*, the rate of discount for the time being allowed by the Commissioners in respect of succession duty paid in advance (*ibid.*).

(t) Customs and Inland Revenue Act, 1881 (44 & 45 Vict. c. 12), s. 43.

(a) See p. 181, *ante*.

(b) There is a power in the Legacy Duty Act, 1796 (36 Geo. 3, c. 52), s. 33, to compound for legacy duty, in certain circumstances, under the authority of the court. This provision is, however, in practice obsolete.

SECT. 7.—*Interest, Penalties, and Proceedings.*

SUB-SECT. 1.—*Interest.*

354. The provision with regard to the payment of interest on estate duty, already stated (c), applies also to legacy duty (d).

SUB-SECT. 2.—*Penalties.*

355. If the executor retains to his own use any legacy etc. to which he is entitled, but neglects to pay the legacy duty (if any) within fourteen days after it ought to be paid, he is liable to forfeit and pay treble the value of the duty chargeable (e).

Any person accountable for the payment of legacy duty who pays, delivers, or otherwise disposes of, or in any manner satisfies or discharges, or compounds for any legacy given by a will or testamentary instrument, or the residue, or any part of the residue, of the personal estate of a deceased person, to or for the benefit of any person entitled to it, without taking a written receipt or discharge, and causing the same to be stamped within the time allowed, and any person receiving or taking the benefit of the legacy etc. without giving a written receipt or discharge for it expressing that the duty payable in respect of it has been allowed or paid to the person to whom the receipt or discharge is given, and dated on the day of signing, is subject to a penalty of 10 per cent. on the amount or value of such legacy etc. (f).

A receipt or discharge not presented for payment of the duty and stamping within twenty-one days after its date may be stamped thereafter on payment of the duty and a penalty of 10 per cent. on the duty (g).

If, however, the receipt or discharge was signed out of Great Britain, and is brought to be stamped within twenty-one days after its being received in Great Britain, the Commissioners may remit any penalty that may have been incurred thereon (h).

Persons paying too little legacy duty for any legacy etc., upon satisfying the Commissioners upon oath or affirmation that the payment was made by mistake and without any intention to defraud, may (if no action be instituted concerning the same) have the mistake rectified, on application to the Commissioners within three calendar months from the time that the mistake was made, and on payment of the difference of duty, together with 10 per cent. on the difference by way of penalty (i).

Persons paying or satisfying any legacy or residue, or any part

SECT. 7.
**Interest,
Penalties,
and Pro-
ceedings.**

Retainer by
executor.

Paying or
receiving
legacies
without
stamped
receipts.

Duty not
paid within
twenty-one
days of the
date of
signing the
receipt.

Mistakes in
paying duty
rectified.

(c) See p. 225, *ante*.

(d) Finance Act, 1896 (59 & 60 Vict. c. 28), s. 18 (2). If an executor, through negligence, pays too high a rate of duty, he must pay interest to the legatee, upon the amount of duty overpaid, for the period between the payment of the duty and the repayment of the amount overpaid (*Shaw v. Turbett* (1862), 14 I. Ch. R. 476, C. A.).

(e) Legacy Duty Act, 1796 (36 Geo. 3, c. 52), s. 35.

(f) *Ibid.*, s. 28.

(g) *Ibid.*, s. 29; Probate and Legacy Duties Act, 1808 (48 Geo. 3, c. 149), s. 44.

(h) Probate and Legacy Duties Act, 1808 (48 Geo. 3, c. 149), s. 44.

(i) Legacy Duty Act, 1796 (36 Geo. 3, c. 52), s. 30.

**SECT. 7.
Interest,
Penalties,
and Pro-
ceedings.**

of residue, or receiving the same, contrary to the provisions of the Legacy Duty Act, 1796 (*k*), who, within twelve calendar months after the offence has been committed, discover the other persons offending, so that the persons so discovered are thereupon convicted, are indemnified and discharged from all penalties incurred for any offence under the Act (*l*).

**Altering
receipts.**

A penalty of £500 is incurred by any person who makes any alteration in any assessment or receipt for the duty after it has been signed by the officer appointed to do so, or who publishes as true such altered assessment etc. with intent to defraud the Sovereign or any other person (*m*).

**Waiver of
penalties by
payment of
duty with
interest.**

The acceptance or recovery by the Commissioners of arrears of duty, with interest thereon, is an absolute waiver of the penalties (if any) which may have been incurred under the Legacy Duty Acts (*n*).

**Persons
swearing
falsely guilty
of perjury.**

Persons convicted of wilfully and corruptly swearing, affirming, or alleging falsely, upon any oath or affirmation, with intent to defraud the Sovereign of any legacy duty, or with intent to charge any person with any greater or other duty than he should be charged with, are liable to the same pains and penalties as if they were convicted of perjury (*o*).

SUB-SECT. 3.—Proceedings.

**Legatees
refusing to
accept
legacies after
deduction
of duty.**

356. If any accountable person offers to pay any pecuniary legacy etc., deducting the duty payable thereon, or offers to deliver, or otherwise dispose of, any specific legacy or specific property, part of any residue, to or for the benefit of the person entitled thereto, or to any trustee for such person, upon payment of the duty upon it, and the person entitled to it, or the trustee for such person, refuses to accept the offer and to give a proper release and discharge for the legacy etc. offered to be so paid etc., then, although no actual tender be made, if any action is afterwards instituted for such legacy etc., the court may order all costs, charges, and expenses attending the same to be paid by the person so refusing to accept the offer, or to join in the release etc., or to order such costs etc. to be deducted out of the legacy etc., together with the duty upon it, as the court sees fit (*p*). In actions instituted for the payment of any legacy, where the party sued may wish to stop proceedings on payment etc. of the bequest, after deducting or receiving the duty, the court, on application in a summary way, may make such order for payment etc. of such legacy etc., and for payment of duty and costs etc., as seems just (*p*).

(*k*) Legacy Duty Act, 1796 (36 Geo. 3, c. 52).

(*l*) *Ibid.*, s. 31.

(*m*) *Ibid.*, s. 39.

(*n*) Inland Revenue Act, 1868 (31 & 32 Vict. c. 124), s. 9. As to the mitigation, recovery, and appropriation of penalties, see the Legacy Duty Act, 1796 (36 Geo. 3, c. 52), ss. 43, 44; Inland Revenue Regulation Act, 1890 (53 & 54 Vict. c. 21), ss. 22 (2), 33 (1), 35 (1), (2). As to the reward, in certain circumstances, of informers out of penalties recovered, see the Legacy Duty Act, 1796 (36 Geo. 3, c. 52), s. 44; and as to the general power to reward informers, see the Inland Revenue Regulation Act, 1890 (53 & 54 Vict. c. 21), s. 32.

(*o*) Legacy Duty Act, 1796 (36 Geo. 3, c. 52), s. 38; see title CRIMINAL LAW AND PROCEDURE, Vol. IX., p. 490.

(*p*) Legacy Duty Act, 1796 (36 Geo. 3, c. 52), s. 24.

357. In cases of specific legacies, and where the residue of any personal estate consists of property not reduced into money during the administration of the estate (*q*), the executor or other accountable person may set a value thereon and offer to pay the duty according to such value, or may require the Commissioners to appoint a person to set such value, at the expense of the person by whom the duty ought to be paid; and the Commissioners may accept the duty offered to be paid upon the value set by the accountable person, without such appraisement, if they think fit (*r*). If, however, the Commissioners are not satisfied with the estimate of value upon which the duty is offered, they may appoint a person to appraise the effects and to set a value thereon, and they are to assess the duty upon that value, and are to require the same to be paid (*r*).

If any dispute arises between the legatee etc. and the accountable person with respect to the value of the legacy etc. or the duty to be paid upon it, the duty is to be assessed by the Commissioners on reference to them by either party for that purpose, and if the value of the property is in dispute the Commissioners are to cause an appraisement to be made at the expense of the person by whom the duty ought to be paid and to assess the duty accordingly (*s*).

358. If any person accountable for or chargeable with legacy duty required by the Commissioners to deliver an account, makes default in doing so, the Commissioners may sue out of the King's Bench Division a writ of summons (*t*).

It is so also where the Commissioners make an assessment of legacy duty, and the duty is not paid, and there is no notice of disputing the liability to assessment (*a*).

SECT. 7.
**Interest,
Penalties,
and Pro-
ceedings.**

Mode of
ascertaining
duty on
property not
reduced into
money.

Summary
proceedings
for account
and payment
of duty.

Summary
proceedings
for payment
of assessed
duty.

SECT. 8.—*Repayment of Overpaid Duty.*

359. If at any time after payment of legacy duty any debt is recovered against the estate, or any loss happens, by reason of which, or for any other just cause, any legatee etc. is obliged to refund any legacy etc. received or retained by him, or any part thereof, the Commissioners, upon due proof on oath, to their satisfaction, of the amount refunded, and that by reason thereof there has been an overpayment of duty, are to adjust the amount of the overpaid duty, and to repay the same or to allow the same in future payments (*b*).

Repayment
of duty
where legacy
refunded.

(*q*) *A.-G. v. Dardier* (1883), 11 Q. B. D. 16, *per* POLLOCK, B., at p. 19; see also *A.-G. v. Smith*, [1893] 1 Q. B. 239, C. A.

(*r*) Legacy Duty Act, 1796 (36 Geo. 3, c. 52), s. 22. In the event of dispute between the accountable person and the Commissioners, there is a power to the accountable person to appeal to the Commissioners of Land Tax (*ibid.*). This provision is, however, obsolete.

(*s*) *Ibid.* There is a similar power of appeal to the Commissioners of Land Tax (*ibid.*), which provision is, however, also obsolete.

(*t*) Crown Suits etc. Act, 1865 (28 & 29 Vict. c. 104), s. 55; see title CROWN PRACTICE, Vol. X., p. 19.

(*a*) *Ibid.*, s. 56; see title CROWN PRACTICE, Vol. X., p. 19.

(*b*) Legacy Duty Act, 1796 (36 Geo. 3, c. 52), s. 34. As to proceedings by petition of right under the Petitions of Right Act, 1860 (23 & 24 Vict. c. 34), if the Commissioners decline to repay, see title CROWN PRACTICE, Vol. X., pp. 26—35.

SECT. 8.
Repayment of Overpaid Duty.

Repayment of duty if grant made void and duty not payable.

If the authority under or by colour of which any person has administered any part of the estate or effects of any deceased person is void, or is repealed (c), or is declared void, and before the avoidance etc. such person has paid any legacy duty which is not allowed to him out of the estate by reason that such duty was not really due or payable, the Commissioners, upon proof satisfactory to them, are to repay to him or his representatives the amount of the duty so paid (d).

In case, however, such duty ought to have been paid by the rightful executor or administrator of such deceased person, the payment in respect of the said duty is to be valid and effectual, and is to be allowed in account with them as payments made in the due course of administration (e).

Repayment of duty on an annuity determined upon any other contingency than death.

Where an annuity is determinable upon any other contingency than death, and the contingency happens, and the value of the annuity, upon the application of the person who paid the duty, is calculated according to the term for which it endured, the amount of any abatement of duty is to be paid to the person entitled (f).

Part V.—Succession Duty.

SECT. 1.—*The Imposition of the Duty.*

The extent of the charge

360. Succession duty (g) is leviable, except where, upon the same acquisition of the same property, legacy duty is charge-

(c) In the case of a revoked probate, it is immaterial whether the decree of the court was obtained by consent or not; see p. 244, *ante*.

(d) Legacy Duty Act, 1796 (36 Geo. 3, c. 52), s. 37.

(e) *Ibid.* The person who made the payment is not to be molested etc. in respect of such payment (*ibid.*).

(f) Legacy Duty Act, 1796 (36 Geo. 3, c. 52), s. 8.

(g) Succession Duty Act, 1853 (16 & 17 Vict. c. 51), ss. 1—18, 20—46, 49—55; Crown Suits etc. Act, 1865 (28 & 29 Vict. c. 104), Part V.; Customs and Inland Revenue Act, 1880 (43 Vict. c. 14), ss. 11, 12; Customs and Inland Revenue Act, 1881 (44 & 45 Vict. c. 12), ss. 36, 41; Customs and Inland Revenue Act, 1888 (51 & 52 Vict. c. 8), ss. 21, 22 (Part IV.); Customs and Inland Revenue Act, 1889 (52 & 53 Vict. c. 7), ss. 10, 12—15; Finance Act, 1894 (57 & 58 Vict. c. 30), ss. 5, 13, 15, 16, 18, 22 (1) (g), 22 (2) (a), 24, Sched. I.; Finance Act, 1896 (59 & 60 Vict. c. 28), s. 13; Finance Act, 1900 (63 & 64 Vict. c. 7), s. 14; Finance Act, 1907 (7 Edw. 7, c. 13), s. 13; Finance (1909-10) Act, 1910 (10 Edw. 7, c. 8), ss. 56 (1), 58, 61 (5), 63, 64. The Succession Duty Act, 1853 (16 & 17 Vict. c. 51), speaks in common parlance, and does not use terms of art (*L. G. v. Middleton (Lord)* (1858), 3 H. & N. 125, *per* BRAMWELL, B., at p. 140); and is to be construed according to the popular use of the language employed (*Braybrooke (Lord) v. A.-G.* (1861), 9 H. L. Cas. 150, *per* Lord CAMPBELL, L.C., at p. 165, stating the result of *Saltoun (Lord) v. Advocate-General* (1860), 3 Macq. 659, H. L.). The Act was so framed as to embrace estates both in Scotland and in England, and, therefore, notwithstanding the great differences between the tenure of property in the two countries, a construction must be found which would sustain the Act as applying either to an English or a Scottish estate, and the same words must regulate the construction of the Act in both cases (*Zetland (Earl) v. Lord Advocate* (1878), 3 App. Cas. 505, *per* Lord HATHERLEY, at p. 511, on the authority of *Saltoun (Lord) v. Advocate-General*, *supra*, at pp. 671, 678, 684, 686). Decisions on the Act (at least of the H. L.) affecting Scottish entailed estate are, therefore, an authority with regard to English entailed estate.

The following further statutes deal with succession duty in Scotland and

able (*h*), and save as expressly provided (*i*), according to the value, ascertained in the prescribed manner (*k*), in respect of every "succession" (*l*) upon death (*m*), whether conferred by disposition or through devolution by law (*n*).

The death must be after the 18th May, 1853 (*o*).

SECT. 1.

The Imposition of the Duty.

SECT. 2.—*The Succession.*SUB-SECT. 1.—*Property.*

361. A "succession" is any property which, in its own nature (*p*), is chargeable with duty under the Succession Duty Act, 1853 (*q*).

"Property" means real and personal property (*r*).

"Real property" includes all freehold, copyhold, customary, leasehold and other hereditaments, corporeal or incorporeal, in the United Kingdom, and all estates therein (*s*).

"Personal property" does not include leaseholds (*t*), but it includes money payable under any engagement (*a*), and all other property which is not "real property" (*b*).

An annuity (*c*) or a capital sum (*d*) secured, *e.g.*, by covenant (*e*) or bond (*f*), is money payable under an engage-

Meaning of
(1) "Succession";
(2) "Property";
(3) "Real property."
(4) "Personal property."

Money payable under an engagement.

Ireland:—Succession Duty Act, 1853 (16 & 17 Vict. c. 51), s. 47; Probate Duty Act, 1861 (24 & 25 Vict. c. 92), s. 1.

(*h*) Succession Duty Act, 1853 (16 & 17 Vict. c. 51), s. 18.

(*i*) See pp. 276—282, *post*.

(*k*) See pp. 286—292, *post*.

(*l*) The word "succession" was adopted for the purpose of denoting any property passing upon death from one person to another by virtue of any gift or descent, or of any contract not being a *bond fide* contract of purchase (*Floyer v. Bankes* (1863), 3 De G. J. & Sm. 306, *per* Lord WESTBURY, L.C., at p. 311).

(*m*) Succession Duty Act, 1853 (16 & 17 Vict. c. 51), ss. 2, 10.

(*n*) It is clear that the terms "disposition" and "devolution" must have been intended to comprehend and exhaust every conceivable mode by which property can pass, whether by act of parties or by act of the law (*Northumberland (Duke) v. A.-G.*, [1905] A. C. 406, *per* Lord MACNAUGHTEN, at p. 410).

(*o*) Succession Duty Act, 1853 (16 & 17 Vict. c. 51), s. 51.

(*p*) *A.-G. v. Sefton (Earl)* (1865), 11 H. L. Cas. 257, *per* Lord CHELMSFORD, at p. 275.

(*q*) Succession Duty Act, 1853 (16 & 17 Vict. c. 51), s. 1.

(*r*) *Ibid.*

(*s*) *Ibid.* It includes heritable property in Scotland, but not money secured on such property (*ibid.*), even where the securities are conceived in favour of heirs excluding executors. It includes, also, estates *pur autre vie* which devolve to the heir as special occupant, but presumably not any such estates which are applicable by law as personal estate (see p. 235, *ante*).

(*t*) Prior to 19th May, 1853, leasehold property of a personal nature was chargeable as personal property with legacy duty, but by the Succession Duty Act, 1853 (16 & 17 Vict. c. 51), s. 19, no person is to be chargeable under the then existing Legacy Duty Acts with duty, not then already due, in respect of any leasehold hereditaments of any testator or deceased person as belonging to the personal estate of such testator etc.

(*a*) A mere covenant, bond, or contract to pay money is not a disposition of "property" in the ordinary sense, although it might be if on the death of the person himself, because in that case it gives a right against his assets (*Fryer v. Morland* (1876), 3 Ch. D. 675, *per* JESSER, M.R., at pp. 685, 686).

(*b*) Succession Duty Act, 1853 (16 & 17 Vict. c. 51), s. 1. It includes money secured on heritable property in Scotland (*ibid.*).

(*c*) *Re Mickelthwait* (1855), 11 Exch. 452.

(*d*) *Lord Advocate v. Roberts' Trustees* (1858), 20 Dunl. (Ot. of Sess.) 449; see also *A.-G. v. Montefiore* (1888), 21 Q. B. D. 461 (covenant to transfer stocks).

(*e*) *Re Mickelthwait*, *supra*; *A.-G. v. Montefiore*, *supra*.

(*f*) *Lord Advocate v. Roberts' Trustees*, *supra*.

SECT. 2.
The
Succession.
 Legacies out
 of real estate.

ment, as also are moneys payable under a policy of life insurance (g).

362. Any legacy payable or having effect, or being satisfied out of, or charged upon, a deceased person's real estate is chargeable as a succession to personal property (h); and it is so where the legacy is payable etc. out of any real estate, or the rents or profits thereof, which the deceased person had any right or power to charge or affect with the payment of money (h). And the position is the same where the legacy is payable etc. out of or upon any moneys to arise from the sale or mortgage or other disposition of any such real estate, or any part of it (h). The legacy may be given by way of annuity or in any other form (h).

The interest, generally, of any person (i) entitled in moneys

(g) Succession Duty Act, 1853 (16 & 17 Vict. c. 51), ss. 1, 17; *Fryer v. Morland* (1876), 3 Ch. D. 675, *per* JESSEL, M.R., at p. 685; see also *A.-G. v. Bumsted* (1893), 37th Report of the Commissioners of Inland Revenue, Appendix, li., decided on the authority of *A.-G. v. Yelverton* (1861), 7 H. & N. 306. As to policies in the Customs Annuity and Benevolent Fund, established under stat. (1816) 56 Geo. 3, c. lxxiii., see *A.-G. v. Rowsell* (1844), 36 Ch. D. 67, n.; *A.-G. v. Abdy* (1862), 1 H. & C. 266; *Re Pocock's Policy* (1871), 6 Ch. App. 445; *Re Maclean's Trusts* (1874), L. R. 19 Eq. 274; *Re Phillips' (William) Insurance* (1883), 23 Ch. D. 235, O. A.; *Urquhart v. Butterfield* (1887), 37 Ch. D. 357, O. A.

(h) Customs and Inland Revenue Act, 1888 (51 & 52 Vict. c. 8), s. 21 (2). The death must be after the 30th June, 1888 (*ibid.*). In cases not governed by this Act, legacy duty is chargeable (see note (i), p. 233, *ante*). Apart from this Act, a legal rentcharge created by will is chargeable with legacy duty (*A.-G. v. Jackson* (1831), 2 Cr. & J. 101; *Stow v. Davenport* (1833), 5 B. & Ad. 359; see also *A.-G. v. Wade*, [1910] 1 K. B. 703): but an annuity charged upon real estate by will is only liable to legacy duty where it is charged upon the real estate of a person not the annuitant himself; it is not chargeable where the real estate in truth belongs to the annuitant with a limitation on its enjoyment (*Shirley v. Ferrers (Earl)* (1842), 1 Ph. 167; *Re De Houghton, De Houghton v. De Houghton*, [1896] 1 Ch. 855, O. A., *per* A. L. SMITH, L.J., at p. 865).

(i) Even where the death was on or before the 30th June, 1888, provided that the interest is not chargeable with duty under the Legacy Duty Acts in force in 1853. Legacy duty is payable, in cases governed by those Acts, where a will contains an express direction to sell in all events, even although the property is taken *in specie* (*A.-G. v. Holford* (1815), 1 Price, 426; *Williamson v. Advocate-General* (1843), 10 Cl. & Fin. 1, H. L.), or where the purposes fail (*A.-G. v. Lomas* (1873), L. R. 9 Exch. 29). If converting into money is the fair meaning, though a power only is given, the power is regarded as imperative, and legacy duty is payable (*Advocate-General v. Ramsay's Trustees* (1823), 2 Cr. M. & R. 224, n.; *Advocate-General v. Blackburn's Trustees* (1847), 10 Dunl. (Ct. of Sess.) 166; *Weir v. Lord Advocate* (1865), 3 Macph. (Ct. of Sess.) 1006). Where, however, the power is not imperative, but is to be exercised for the convenience and benefit of the parties, conversion in the sense of the statute does not take place, and legacy duty is not payable (*Re Evans* (1835), 2 Cr. M. & R. 206). And where there is a clear and express trust to convert into money, with a power to retain shares of the real estate for the benefit of the parties, the direction is only imperative, and legacy duty is only payable, in respect of the part sold, notwithstanding that the unsold part is directed to be treated as personal property (*A.-G. v. Mangles* (1839), 5 M. & W. 120). So also, where there is an authority which, in a given state of circumstances, becomes absolute, to convert real estate into money, and distribute it as such, legacy duty is payable (*A.-G. v. Simcox* (1848), 1 Exch. 749). And where the testator gives his trustees an absolute discretion whether to sell or not, legacy duty is or is not payable according to whether they sell or not (*Advocate-General v. Hamilton* (1856), 18 Dunl. (Ct. of Sess.) 636). Where an option is given to a legatee to buy the testator's real estate, or to take it as part of his share of the estate, and he takes

to arise from the sale of real property, under any trust for that purpose, is deemed to be personal property chargeable with succession duty (*k*). Where, however, the moneys are subject to any trust for reinvestment in the purchase of other real property to which such person would not be absolutely entitled, they are deemed to be real property (*k*).

The interest of any person entitled in personal property subject to any trust for investment in the purchase of real property to which such person would be absolutely entitled is, in so far as not chargeable with duty under the Legacy Duty Acts in force in 1853 (*l*), chargeable with succession duty as personal property (*m*). But if such person would not be absolutely entitled, the personal property is chargeable with succession duty as real property (*n*).

SECT. 2.
The
Succession.

Personal
property to
be invested
in real
property.

SUB-SECT. 2.—Successions under Dispositions.

363. Every disposition (*n*) of property, by reason whereof (*o*) any person becomes beneficially (*p*) entitled (*q*) to an interest in

What
constitutes
a succession

it accordingly, no legacy duty is payable (*Lord Advocate v. Meiklam* (1860), 22 Dunl. (Ct. of Sess.) 1427); although it is otherwise where the testator devises his real estate to a beneficiary, and gives another person the option to purchase it from that beneficiary, in which case, if the option is exercised, the purchase-money is chargeable (*A.-G. v. Wyndham* (1862), 1 H. & C. 563). Where the moneys to arise under a direction for sale are to be invested in other real estate, and the trustees sell, but do not reinvest, legacy duty is not payable (*Heal v. Knight* (1853), 8 Exch. 839, n.). And it is so, also, where there is a power to sell, and a direction to invest in the purchase or mortgage of other real estate, and the trustees sell and elect to reinvest in other real estate, but in fact do not so reinvest (*Miles v. Jennings* (1853), 8 Exch. 830). Where a sale takes place under the general jurisdiction of the court, no claim for legacy duty arises, notwithstanding that the will contains a power to sell (*Hobson v. Neale* (1853), 17 Beav. 178); see also *Advocate-General v. Smith* (1854), 1 Macq. 760, H. L., per Lord St. LEONARDS, at pp. 764, 765, where the general principle is laid down.

(*k*) Succession Duty Act, 1853 (16 & 17 Vict. c. 51), s. 29.

(*l*) See p. 248, *ante*.

(*m*) Succession Duty Act, 1853 (16 & 17 Vict. c. 51), s. 30.

(*n*) The term "disposition" extends to all modes of disposition, whether by will or deed or settlement *inter vivos* (*A.-G. v. Fitzjohn* (1857), 2 H. & N. 465, per WATSON, B., at p. 473), and, in strictness, includes a sale (*Northumberland (Duke) v. A.-G.*, [1905] A. C. 406, per Lord MACNAGHTEN, at p. 411; compare Succession Duty Act, 1853 (16 & 17 Vict. c. 51), ss. 7, 17). Whenever any person obtains by the death of another any benefit under an arrangement, that benefit is liable to duty (*A.-G. v. Middleton (Lord)* (1858), 3 H. & N. 125, per POLLOCK, C.B., at p. 137). Where, however, a testator by his will creates a trust for the payment of debts, and subject thereto gives property to a beneficiary, and, by a private Act of Parliament, an immediate benefit is secured to the beneficiary, the duration of the trust being correspondingly extended, no claim for duty arises in respect of the immediate benefit (*Lord Advocate v. Jamieson* (1886), 23 Sc. L. R. 510).

(*o*) "By reason whereof" is a more comprehensive phrase than "by virtue whereof" (*Lord Advocate v. Constable's Trustees* (1880), 17 Sc. L. R. 611, per Lord SHAND, at p. 618).

(*p*) *I.e.*, not as a trustee (*Wilcox v. Smith* (1857), 4 Drew. 40, per KINDERSLEY, V.-C., at p. 51), or merely legally (*Re Peyton* (1861), 7 H. & N. 265, per BRAMWELL, B., at p. 297; *A.-G. v. Charlton* (1877), 2 Ex. D. 398, C. A., per BRAMWELL, L.J., at p. 407); and see note (*q*), p. 293, *post*; compare, however, *Fryer v. Morland* (1876), 3 Ch. D. 675, per JESSEL, M.R., at p. 683 (means "in possession"); see also *Northumberland (Duke) v. A.-G.*, [1905] A. C. 406, per Lord MACNAGHTEN, at p. 411, and note (*n*), p. 267, *post*.

(*q*) *I.e.*, wholly entitled (*Lord Advocate v. Fleming*, [1897] A. C. 145, per Lord HALSBURY, L.C., at p. 152).

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under a
disposition.

possession (*r*) in any property, or the income thereof, upon the death of any person, is deemed to confer on the person so entitled a succession (*s*).

A person may become entitled either immediately upon death or after any interval (*t*), either certainly or contingently, and either originally or by way of substitutive limitation (*a*).

Any disposition of property which is made to take effect at a period ascertainable only by reference to death is deemed to confer a succession upon the person in whose favour it is made (*b*).

If under a disposition the person entitled may become so upon alternative events, one of which is death, and he in fact becomes entitled upon death, the other possibilities are to be disregarded (*c*).

The right to the property, in point of title, as distinguished from possession, may have been acquired before the commencement of the Succession Duty Act, 1853 (*d*).

The death may be the cause, and is not necessarily the occasion, of the person becoming entitled to possession (*e*), and may be that of a person whose interest in possession was derived under another disposition (*f*).

Entailed
property
re-settled.

364. In the case of entailed property, where under a disentailing assurance a joint general power of appointment is conferred upon tenant for life and remainderman, and the power is exercised by way of a re-settlement of the property, the re-settlement, by the ordinary rule of law, is to be read into the instrument creating the power, and, except where the transaction is in effect a mere *inter vivos* transfer to another person of the expectant succession or some part

(*r*) *Northumberland (Duke) v. A.-G.*, [1905] A. C. 406, *per* Lord DAVEY, at p. 419; see also *A.-G. v. Littledale* (1871), L. R. 5 H. L. 290, *per* Lord WESTBURY, at p. 301.

(*s*) Succession Duty Act, 1853 (16 & 17 Vict. c. 51), s. 2.

(*t*) A new trustee, appointed after the death of a former trustee, who is entitled to remuneration for his services under a direction in the settlement, does not take the same as a succession upon the death of the former trustee (*A.-G. v. Eyres*, [1909] 1 K. B. 723).

(*a*) Succession Duty Act, 1853 (16 & 17 Vict. c. 51), s. 2.

(*b*) *Ibid.*, s. 8.

(*c*) *A.-G. v. Noyes* (1881), 8 Q. B. D. 125, C. A.

(*d*) *Wilcox v. Smith* (1857), 4 Drew. 40; *A.-G. v. Fitzjohn* (1857), 2 H. & N. 465; *A.-G. v. Middleton (Lord)* (1858), 3 H. & N. 125; *Braybrooke (Lord) v. A.-G.* (1861), 9 H. L. Cas. 150, *per* Lord CAMPBELL, L.C., at p. 165; *Lord Advocate v. Constable's Trustees* (1880), 17 Sc. L. R. 611; *Wolverton (Baron) v. A.-G.*, [1898] A. C. 535, *per* Lord HERSCHELL, at p. 547.

(*e*) *A.-G. v. Gell* (1865), 3 H. & C. 615 (death, during a period of accumulation, of a person who, if he had survived, would have succeeded as tenant for life); *Ring v. Jarman* (1872), L. R. 14 Eq. 357 (ditto, where deceased person would have succeeded as absolute owner).

(*f*) *Re Jenkinson* (1857), 24 Beav. 64 (arrangement between life tenant and remainderman by which a sum was secured to a third person to be raised out of the settled property at the life tenant's death); *A.-G. v. Yelverton* (1861), 7 H. & N. 306 (ditto, where the sum was not raisable until the death of the survivor of the life tenant and a succeeding life tenant); *A.-G. v. Gardner* (1863), 1 H. & C. 639 (devise to a third person of a reversionary interest expectant on the death of a tenant for life under a deed of settlement).

of it (*g*), the succession upon the death of the tenant for life, whether consisting of the property itself (*h*) or of charges upon it (*i*), is deemed to be conferred by such instrument as a new disposition.

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SUB-SECT. 3.—Successions through Devolution by Law.

365. Every devolution (*k*) by law (*l*) of any beneficial interest in property, or the income thereof, upon the death of any person to any other person, is deemed to confer on such other person a succession (*m*).

What constitutes a succession through devolution by law.

SUB-SECT. 4.—The Successor.

366. The "successor" is the person entitled to the succession (*n*), and may be a body corporate, a company, or a society (*o*).

Meaning of "successor."

If any succession, or a part of it (*p*), before the successor becomes entitled to it, or to the income of it, in possession, becomes vested by alienation—that is, by transfer *inter vivos*, whether for value or not (*q*)—or by any title (*r*) not conferring a new succession (*s*), in any other person, and such other person becomes

Where an expectant succession is alienated.

(*g*) A succession once established, no manipulation of the parties afterwards can get rid of it (*Northumberland (Duke) v. A.-G.*, [1905] A. C. 406, *per* Lord HALSBURY, L.C., at p. 409), nor can another succession, by the act of the successor, be substituted for it (*Wolverton (Baron) v. A.-G.*, [1898] A. C. 535, *per* Lord HERSCHELL, at p. 548). There is no warrant in the statute for a new succession duty being leviable upon the same property where no new death has created the right to such succession (*ibid.*, *per* Lord HALSBURY, L.C., at p. 544); see also *A.-G. v. Ployer* (1862), 9 H. L. Cas. 477, *per* Lord CRANWORTH, at pp. 490, 491 (portions are in substance a part of the inheritance, and the circumstance of their arising under a power can make no difference).

(*h*) *Braybrooke (Lord) v. A.-G.* (1861), 9 H. L. Cas. 150, 168.

(*i*) *A.-G. v. Cecil* (1870), 39 L. J. (EX.) 201; explained, *Wolverton (Baron) v. A.-G.*, *supra*, *per* Lord HERSCHELL, at p. 556.

(*k*) Property devolves when it passes from a person dying to a person living (*Parr v. Parr* (1833), 1 My. & K. 647, *per* LEACH, M.R., at p. 648).

(*l*) Devolution by law applies to the case where the property would devolve on the party by the ordinary rules of legal succession or of right if the law were left to its own course uncontrolled (*Saltoun (Lord) v. Advocate-General* (1860), 3 Macq. 659, H. L., *per* the Lord President (McNEILL), at p. 670); see also *Zetland (Earl) v. Lord Advocate* (1878), 3 App. Cas. 505, *per* Lord SELBORNE, at p. 520; and title DESCENT AND DISTRIBUTION, Vol. XI., p. 4.

(*m*) Succession Duty Act, 1853 (16 & 17 Vict. c. 51), s. 2.

(*n*) *Ibid.* The person who in terms of a disposition would have taken on the death of a tenant for life, but who dies before him, and transmits the succession, is, in a certain limited sense, a successor (*A.-G. v. Littledale* (1871), L. R. 5 H. L. 290, *per* Lord WESTBURY, at p. 301).

(*o*) Succession Duty Act, 1853 (16 & 17 Vict. c. 51), s. 1.

(*p*) *Wolverton (Baron) v. A.-G.*, *supra*.

(*q*) *Northumberland (Duke) v. A.-G.*, [1905] A. C. 406, *per* Lord DAVEY, at p. 417. Such a transfer is not a "new succession" (*Wolverton (Baron) v. A.-G.*, *supra*). If, however, the transferor is a remainderman in tail who has dis-entailed, and he dies in the lifetime of the tenant for life, *semble*, the case is one of new succession and not of alienation (*A.-G. v. Cecil*, *supra*; explained, *Wolverton (Baron) v. A.-G.*, *supra*, *per* Lord HERSCHELL, at p. 556).

(*r*) *E.g.*, an assignment in bankruptcy (*Wolverton (Baron) v. A.-G.*, *supra*, *per* Lord HERSCHELL, at p. 555); see also *Northumberland (Duke) v. A.-G.*, *supra*, *per* Lord DAVEY, at p. 417.

(*s*) A new succession can only be conferred by a new disposition or devolution

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The Succession.

Where tenant for life and remainderman join to transfer settled real property in possession.

entitled in possession, he, and not the person originally entitled, is, to the extent to which the succession is alienated, the "successor" (t).

Where tenant for life and remainderman, by any form of conveyancing (a), join in an *inter vivos* transfer of settled real property, as an estate in possession, there is an alienation of the remainderman's expectant succession, and, on the death of the original life tenant, the alienee is the successor (b). If the alienee in the meantime creates a new succession, as, e.g., by himself dying possessed of the property, the person upon whom it is so conferred, if he is in beneficial possession at the death of the original life tenant, is also the successor upon whom the original succession is conferred (c).

SUB-SECT. 5.—*The Predecessor.*

Meaning of (1) "Predecessor";

367. The "predecessor" (d) is the settlor (e), disponent, testator, obligor, ancestor (f), or other person (g), from whom the interest of the successor is derived (h), and, as in the case of the successor, may be a body corporate, a company, or a society (i).

(2) "Joint predecessors."

Where a succession is derived from more than one predecessor (k), and the proportional interest derived from each of them is not distinguishable, the successor is to be deemed to have derived his succession in equal proportions from each predecessor, unless the Commissioners agree with the successor as to the duty payable (l).

by law to take effect on death, and, conversely, every derivative title by reason of death confers a new succession (*Northumberland (Duke) v. A.-G.*, [1905] A. C. 406, *per* Lord DAVEY, at p. 417). If an alienee were to die before becoming entitled in possession, his devisee or heir would be a person holding by a title conferring a new succession (*ibid.*).

(t) Succession Duty Act, 1853 (16 & 17 Vict. c. 51), s. 15; *Northumberland (Duke) v. A.-G.*, *supra*, *per* Lord MACNAGHTEN, at p. 413; *Wolverton (Baron) v. A.-G.*, [1898] A. C. 535.

(a) *Northumberland (Duke) v. A.-G.*, *supra*, *per* Lord DAVEY, at p. 416.

(b) *Ibid.*, *per* Lord MACNAGHTEN, at p. 413.

(c) *Northumberland (Duke) v. A.-G.*, *supra*.

(d) There must be a predecessor (*A.-G. v. Abdy* (1862), 1 H. & C. 266, *per* POLLOCK, C.B., at p. 294).

(e) The "settlor" must be a settlor out of whose estate the succession is derived (*A.-G. v. Floyer* (1862), 9 H. L. Cas. 477, *per* Lord CRANWORTH, at p. 492).

(f) The word "ancestor" does not mean, even technically, a lineal ancestor only (*Zetland (Earl) v. Lord Advocate* (1878), 3 App. Cas. 505, *per* Lord SELBORNE, at p. 520), but is properly assignable to the person who really preceded in the estate (*ibid.*, *per* Lord HATFIELD, at p. 518).

(g) The words "or other person" seem to have been put into the Act only *ex abundanti cautela* (*ibid.*, *per* Lord SELBORNE, at p. 520); see also *Saltoun (Lord) v. Advocate-General* (1860), 3 Macq. 659, H. L., *per* Lord WENSLEYDALE, at p. 684.

(h) Succession Duty Act, 1853 (16 & 17 Vict. c. 51), s. 2. The word "derive" is here used in the sense of "having its source or origin from" (*Saltoun (Lord) v. Advocate-General*, *supra*, *per* Lord CHILMSFORD, at p. 688).

(i) Succession Duty Act, 1853 (16 & 17 Vict. c. 51), s. 1.

(k) See note (r), p. 269, *post*.

(l) Succession Duty Act, 1853 (16 & 17 Vict. c. 51), s. 13; and compare *A.-G. v. Baker* (1859), 4 H. & N. 19; *Braybrooke (Lord) v. A.-G.* (1861), 9 H. L. Cas.

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368. Where the succession is conferred by a disposition, the person who had the right to dispose of the property is the predecessor (*m*).

It is immaterial what motives or valuable considerations moved him to make the disposition (*n*).

If, however, the disposition can be treated as of money for which a person is creditor on the estate of another person, the creditor, and not the owner of the estate, is the predecessor, even if the owner joins in the settlement (*o*).

Where a person buys property for valuable consideration in money or money's worth, and, instead of taking a conveyance to himself direct, takes a conveyance by way of settlement on persons in succession, the purchaser, from whom the title is derived, and not the vendor, is the predecessor from whom the succession on the life tenant's death is derived (*p*).

The predecessor, therefore, is not necessarily the person by whom on its face a settlement may be regarded as made (*q*).

The right of disposition may have been acquired in consideration of the release of a claim of right (*r*), or as

Under a disposition the person who had the right to dispose is predecessor.

150; *A.-G. v. Floyer* (1862), 9 H. L. Cas. 477; *A.-G. v. Riall*, [1906] 2 I. R. 122. It is essential to the application of s. 13 that the persons should be predecessors (*A.-G. v. Riall*, *supra*, per PALLES, C.B., at p. 130).

(*m*) The "predecessor" is the person who provides the property, and who is the instrument of settling it (*A.-G. v. Biggs*, [1907] 2 I. R. 400, per KENNY, J., at p. 415).

(*n*) *Re Ramsay's Settlement* (1861), 30 Beav. 75 (settlement by husband (predecessor) in favour of step-children, in consideration of marriage and of life interest in wife's property; see per ROMILLY, M.R., at p. 84).

(*o*) *Re Jenkinson* (1857), 21 Beav. 64 (see note (*f*), p. 266, *ante*); explained, *A.-G. v. Floyer*, *supra*, per Lord CRANWORTH, at p. 491; *A.-G. v. Yelverton* (1861), 7 H. & N. 306 (see note (*f*), p. 266, *ante*); *A.-G. v. Deane* (1861), 5 L. T. 122. *Semble*, *secus*, where no consideration whatever is paid to the owner of the estate (*Re Jenkinson*, *supra*, per ROMILLY, M.R., at p. 72). A tenant for life is not purchaser of the right to appoint portions under a power given to him by the remainderman in tail, merely by reason that, on a re-settlement, the remainderman became entitled to an annuity during the life tenant's lifetime (*A.-G. v. Floyer*, *supra*, at p. 491).

(*p*) *A.-G. v. Floyer*, *supra*, per Lord CRANWORTH, at p. 489; *Fryer v. Morland* (1876), 3 Ch. D. 675, per JESSEL, M.R., at p. 684.

(*q*) *A.-G. v. Baker* (1859), 4 H. & N. 19 (settlement, by releasee of sum payable, to direction of releasor (predecessor), in consideration of release of a claim of right); *A.-G. v. Maule* (1886), 56 L. T. 611 (marriage settlement of a "gift" to be settled, paid by father (predecessor) to the trustees, on terms of repayment if the marriage did not take place); *A.-G. v. Biggs*, [1907] 2 I. R. 400 (marriage settlement of "portion" paid by step-father (predecessor) to the trustees, without express reservation of his estate until the marriage—a dedication to the trusts of the settlement, per KENNY, J., at p. 415). Compare, *contra*, *A.-G. v. Riall*, *supra* (the settlor of a policy was held to be the predecessor, although the subsequent premiums were paid by a third person; a policy is liable to succession duty by reason of its disposition or devolution, and not by its being kept up for the benefit of another, per PALLES, C.B., at p. 134); and, *semble*, if a person makes an absolute gift to another person, and leaves him to settle it, although the gift was made with a view to its being settled, the settlor, and not the donor, is the predecessor (*A.-G. v. Maule*, *supra*, per HAWKINS, J., at p. 615).

(*r*) *A.-G. v. Baker*, *supra*. Where it is doubtful which of two claimants is entitled to property, and both concur in settling it, they are joint predecessors.

SECT. 2.

The
Succession.
—
Powers of
appointment.

part of a family arrangement in substitution for a precarious interest (*s*).

369. A person who exercises a general power of appointment over property, taking effect upon a death after the 18th May, 1853, is the predecessor from whom the interest of the appointee upon any subsequent death is derived (*t*).

Where, however, the power is limited, whenever it took effect, the person creating the power is the predecessor (*a*).

Re-settlement
of entailed
property.

370. In the case of entailed property, where tenant for life and remainderman join in a disentailing assurance and re-settle the property, the remainderman is predecessor under the new disposition, both as to his own succession on the life tenant's death (*b*) and as to the interests of all the persons coming after him in the re-settlement (*c*), whether such persons succeed directly on the life tenant's death, the remainderman having previously died (*d*), or on the remainderman's subsequent death, he having survived the life tenant (*e*). And the same rule holds good with regard to charges upon the property by way, *e.g.*, of jointure or portion (*f*).

The remainderman in tail is also the predecessor where the re-settlement is made under a joint general power of appointment conferred by a disentailing assurance upon the tenant for life and a third person (*g*), and not the less so if such substituted general power takes effect upon death (*h*).

Devolution
by law.

Where the succession is conferred through devolution by law, it is derived, in the case of an estate in fee simple in possession, from the last owner of the fee (*i*), even where such owner took by descent (*k*), and in the case of an estate tail from the last preceding

see p. 268, *ante*), but where one or the other is entitled only one is predecessor *ibid.*, per POLLOCK, C.B., at p. 30).

(*s*) *A.-G. v. Dowling* (1880), 6 Q. B. D. 177, C. A.; see title FAMILY ARRANGEMENTS.

(*t*) *A.-G. v. Upton* (1866), L. R. 1 Exch. 224: *secus*, where the power took effect upon a death on or before the 18th May, 1853 (*Re Barker* (1861), 7 H. & N. 109; *A.-G. v. Mitchell* (1881), 6 Q. B. D. 548), in which case the person creating the power is predecessor. See also note (*g*), p. 272, *post*.

(*a*) Succession Duty Act, 1853 (16 & 17 Vict. c. 51), s. 4.

(*b*) *A.-G. v. Sibthorp* (1858), 3 H. & N. 421; *Braybrooke (Lord) v. A.-G.* (1861), 9 H. L. Cas. 150; *A.-G. v. Floyer* (1862), 9 H. L. Cas. 477.

(*c*) *A.-G. v. Floyer* (1862), 9 H. L. Cas. 477, per Lord CRANWORTH, at p. 489.

(*d*) *A.-G. v. Smythe* (1862), 9 H. L. Cas. 497.

(*e*) *A.-G. v. Floyer*, *supra*.

(*f*) *A.-G. v. Floyer*, *supra*; *A.-G. v. Cecil* (1870), 39 L. J. (EX.) 201, explained, *Wolverton (Baron) v. A.-G.*, [1898] A. C. 535, per Lord HERSHELL, at p. 556.

(*g*) *Charlton v. A.-G.* (1879), 4 App. Cas. 427.

(*h*) *Ibid.*, per Lord CAIRNS, L.C., at p. 439 (a joint power in a family settlement is not equivalent in substance to joint property in the two donees).

(*i*) *Zeland (Earl) v. Lord Advocate* (1878), 3 App. Cas. 505, per Lord BLACKBURN, at p. 523. *Quære*, whether the result is not the same where the estate in fee simple was not in possession.

(*k*) If the last owner was seised in fee, it does not matter how he became so (*Re de Lancey* (1869), L. R. 4 Exch. 345, per CLEASBY, B., at p. 351).

heir in possession under the entail (*l*), and equally so if such owner or possessor was a minor, or for any other reason was incompetent to alienate the property (*m*).

The predecessor in the case of devolution by law is, therefore, not necessarily the person from whom descent as purchaser must be traced under the Inheritance Act, 1833 (*n*).

If by a disposition property is settled upon a person named or designated by description as first of a line of inheritance and his heirs in tail, and in default upon other persons named etc. and their heirs in tail, respectively, by way of substitution, the persons named etc. derive their interests from the maker of the disposition (*o*), the others by devolution from the last preceding heir in possession under the entail (*p*). Where, however, the person named etc. under the substitutive limitation dies before becoming entitled in possession, and his heir in tail becomes so entitled, such heir in tail derives his interest from the maker of the disposition as predecessor (*q*).

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Succession

SUB-SECT. 6.—*Special Modes of conferring Successions.*

371. An *inter vivos* gift of a policy of insurance on the life of any person, unless the donee helps to create the property by continuing to pay the premiums after the assignment of the policy (*r*), confers, upon the assured's death, a succession on the donee in respect of the policy moneys derived from the donor as predecessor (*s*).

Inter vivos
gift of a
policy.

Where a person who under a disposition is already life tenant in possession of personal property becomes entitled upon a death, by virtue of the same disposition, to an absolute interest in possession in the capital of the property, either the property itself (subject to an allowance of the value of the life interest (*a*)) or the increase of benefit (*b*) is a succession (*c*) derived from the maker of the disposition as predecessor.

Enlargement
of interest
in property.

(*l*) *Zetland (Earl) v. Lord Advocate* (1878), 3 App. Cas. 505, at p. 521; see also *Saltoun (Lord) v. Advocate-General* (1860), 3 Macq. 659, II. L., *inter alia*, per Lord CAMPBELL, L.C., at p. 673; *Lord Advocate v. Graham* (1884), 22 Sc. L. R. 209.

(*m*) *Zetland (Earl) v. Lord Advocate*, *supra*, per Lord SELBORNE, at p. 519.

(*n*) 3 & 4 Will. 4, c. 106.

(*o*) *Saltoun (Lord) v. Advocate-General*, *supra* (person named); *Lord Advocate v. McCulloch* (1895), 32 Sc. L. R. 266 (person designated etc.).

(*p*) *Lord Advocate v. Gordon* (1872), 10 Macph. (Ct. of Sess.) 1015; see also *Zetland (Earl) v. Lord Advocate*, *supra*.

(*q*) *Breadalbane (Earl) v. Lord Advocate* (1870), 8 Macph. (Ct. of Sess.) 835.

(*r*) *Lord Advocate v. Fleming*, [1897] A. O. 145; see also *A.-G. v. Riall*, [1906] 2 I. R. 122, per FALLES, C.B., at p. 131.

(*s*) Succession Duty Act, 1853 (16 & 17 Vict. c. 51), ss. 1, 2, 17.

(*a*) *A.-G. v. Robertson*, [1893] 1 Q. B. 293, C. A., per Lord ESHER, M.R., at p. 301. The allowance would be under the Succession Duty Act, 1853 (16 & 17 Vict. c. 51), s. 38, and would be not by way of indulgence, but in terms (*ibid.*); compare note (*e*), p. 291, *post*.

(*b*) *A.-G. v. Robertson*, *supra*, per LINDLEY, L.J., at p. 301.

(*c*) *Secus*, where the increase of benefit is due to something outside the

SECT. 2.**The Succession.**

Joint tenants
taking by
survivorship.

Where "property" is vested in persons jointly by any title not conferring on them a "succession," any beneficial interest in the property accruing to any of them by survivorship upon death is deemed to be a succession derived from the deceased person as predecessor (*d*).

Where, however, persons take a "succession" jointly, they are to pay the duty, if any is chargeable, in proportion to their respective interests in the succession, and any beneficial interest in such succession accruing to any of them by survivorship is deemed to be a new succession derived from the predecessor from whom the joint title was derived (*e*).

General
powers of
appointment
taking effect
upon death,
if exercised.

Where under a disposition a person (*f*) has a general power of appointment over property taking effect (*g*) upon death, he is, in the event of his making any appointment, deemed to be entitled at the time of exercising such power to the property or interest thereby appointed as a succession derived from the donor of the power as predecessor (*h*).

Extinction of
determinable
charges.

Where any "property" is subject to a charge, estate, or interest (*i*), determinable by the death of any person, or at any period ascertainable only by reference to death, the increase of benefit accruing upon the extinction or determination of such charge etc. is deemed to be a succession accruing to the person or persons then entitled beneficially to the property, or the income of it, according to his or their respective estates or interests in it, or beneficial enjoyment of it, and the person from whom the successor or successors derive title to the property so charged is deemed to be the predecessor (*k*).

disposition, which has caused the acceleration of the succession before the time intended by the maker of the disposition (*A.-G. v. Robertson*, [1893] 1 Q. B. 293, C. A., *per* LOPES, L.J., at p. 303).

(*d*) Succession Duty Act, 1853 (16 & 17 Vict. c. 51), s. 3.

(*e*) *Ibid.*

(*f*) Not two or more persons jointly, who, in a family settlement, are intended to be a check on one another, without the idea of any beneficial interest (*Charlton v. A.-G.* (1879), 4 App. Cas. 427, 439).

(*g*) *Semble*, the words "taking effect" refer to the words "general power," and not to "disposition of property," and to the power coming into operation, and not to the appointment under it taking effect (*Re Lovelace* (1859), 4 De G. & J. 340, C. A., *per* TURNER, L.J., at p. 351; see also *Re Barker* (1861), 7 H. & N. 109; *Re Waillop's Trust* (1864), 1 De G. J. & Sm. 656, C. A.; *A.-G. v. Upton* (1866), L. R. 1 Exch. 224; *A.-G. v. Mitchell* (1881), 6 Q. B. D. 548; compare *Charlton v. A.-G.*, *supra*, *per* Lord SELBORNE, at pp. 445, 447; see also note (*f*), p. 270, *ante*.

(*h*) Succession Duty Act, 1853 (16 & 17 Vict. c. 51), s. 4.

(*i*) *E.g.*, dower (*Harding v. Harding* (1861), 2 Giff. 597), widow's jointure, rentcharges, and annuities (*Lord Advocate v. Macdonald* (1862), 24 Dunl. (Ct. of Sess.) 1175).

(*k*) Succession Duty Act, 1853 (16 & 17 Vict. c. 51), s. 5; *A.-G. v. Noyes* (1881), 8 Q. B. D. 125, C. A., *per* JESSEL, M.R., at p. 139. This section does not apply (1) where the charge etc. has been created by the successor himself upon or out of property in possession when the charge etc. was created, and (2) where a person was entitled as on the 19th May, 1853, to the immediate reversion in any real property expectant upon the determination of any lease for life or for years determinable on life, and the lease has determined in his lifetime (*ibid.*, s. 6).

SECT. 2.

The Succession.

Dispositions accompanied by reservation of benefit.

372. Where any disposition of property, not being a *bonâ fide* sale, and not conferring an interest expectant on death on the person in whose favour it is made, is accompanied by the reservation or assurance of, or contract for, any benefit to the grantor (*l*), or any other person, for any term of life, or for any period ascertainable only by reference to death, the disposition is deemed to confer, at the time appointed for the determination of the benefit, an increase in beneficial interest in the property, as a succession equal in annual value to the yearly amount or value of the benefit so reserved etc., on the person in whose favour the disposition is made (*m*).

Where any disposition of property purports to take effect presently, or under such circumstances as not to confer a succession, but, by the effect or in consequence of any engagement, secret trust, or arrangement, capable of being enforced in a court of law or equity, the beneficial ownership of the property does not *bonâ fide* pass according to the disposition, but in fact devolves to any person on or with reference to death, such person is deemed to acquire the property so passing as a succession derived from the person making the disposition (*n*).

Dispositions to evade duty.

If a disposition is declared by a court of competent jurisdiction to have been fraudulent and made for the purpose of evading the duty, the court may declare that a succession has been conferred on such person at such time and to such an extent as it thinks just, the succession being deemed to be derived from the maker of the disposition as predecessor (*o*).

SUB-SECT. 7.—*Domicil and Situs.*

373. In order that property may constitute a succession, it has been said that the successor must become entitled thereto by virtue of the laws of this country (*p*), and that this requirement will be regarded as having been satisfied where the property is found to be legally vested in a person subject to the jurisdiction of the British courts, and the title to the beneficial interest in the property is regulated and capable of being enforced by the laws of this country, even although the operation of the instrument creating the title may be to some extent governed by foreign law (*q*).

Test of liability to the duty in relation to domicil and nationality, and to situation of the property.

(*l*) *Lord Advocate v. M'Kersies* (1881), 19 Sc. L. R. 438; *A.-G. v. Johnson*, [1903] 1 K. B. 617, O. A.

(*m*) Succession Duty Act, 1853 (16 & 17 Vict. c. 51), s. 7. The object of this section is to prevent a man conveying the fee, reserving a life interest (*Fryer v. Morland* (1876), 3 Ch. D. 675, *per* JESSEL, M.R., at p. 687).

(*n*) Succession Duty Act, 1853 (16 & 17 Vict. c. 51), s. 8. A disposition of property reserving to the disponent an interest for life or a term of years is not within this section (*A.-G. v. Noyes* (1881), 8 Q. B. D. 125, C. A.; see p. 266, *ante*).

(*o*) Succession Duty Act, 1853 (16 & 17 Vict. c. 51), s. 8.

(*p*) *Wallace v. A.-G.*, *Jeves v. Shadwell* (1865), 1 Ch. App. 1, *per* Lord CRANWORTH, L.C., at p. 9.

(*q*) *A.-G. v. Jewish Colonization Association*, [1901] 1 K. B. 123, C. A., *per* STIRLING, L.J., at p. 142. An alternative test, embodying, however, the same principle, is a manifestation of intention on the part of the settlor, gathered from all the circumstances, that the property is to be brought under the protection of British law (*ibid.*, *per* COLLINS, L.J., at pp. 136, 137). It is immaterial where the property is physically situated (*ibid.*, *per* COLLINS, L.J., at p. 137).

SECT. 2.

The Succession.

British real property.

Foreign immovable property to be sold, and British settlement of proceeds.

374. Real property in this country which devolves upon death is liable to succession duty, irrespective of the domicile of the deceased owner (*r*); but foreign immovable property, devolving as such, does not, in any circumstances, fall within the charge of the duty (*s*).

Where, however, the owner of immovable property situate abroad vests such property in trustees, in circumstances which create a British settlement (*t*), with an absolute direction to the trustees to convert the property into money and to hold the proceeds arising from the sale upon trusts, under which such proceeds devolve upon death, the settlement is of equitable personal property, and a succession consisting of a British *chose in action* is conferred, even where, at the time of the life tenant's death, the immovable property, by virtue of a power to postpone the sale of it, remains unsold (*a*).

British personal property owned by foreigner.

375. The personal property of a person domiciled abroad which is locally situate in this country is not, any more than the personal property locally situate abroad of which he dies possessed, liable to succession duty upon his death (*b*), any more than it is to legacy duty (*c*).

British settlement thereof under will.

Where, however, a person so domiciled by his will directs the creation of a British settlement (*d*) of personal property,

The courts of equity in England have always been accustomed to compel the performance of contracts and trusts as to subjects which are not either locally or *ratione domicilii* within their jurisdiction (*A.-G. v. Johnson*, [1907] 2 K. B. 885, *per* BRAY, J., at p. 894, on the authority of Lord SELBORNE, L.C., in *Ewing v. Orr Ewing* (1883), 9 App. Cas. 31, at p. 40); see title CONFLICT OF LAWS, Vol. VI., p. 218, *et passim*.

(*r*) *Re Wallop's Trust* (1864), 1 De G. J. & Sm. 656, C. A., *per* TURNER, L.J., at p. 671. And it is so, also, with regard to legacies thereof (*Advocate-General v. Grant* (1825), Scotch Exchequer, cited 12 Cl. & Fin. at p. 16).

(*s*) Succession Duty Act, 1853 (16 & 17 Vict. c. 51), s. 1.

(*t*) See note (*d*), *infra*.

(*a*) *A.-G. v. Johnson*, *supra*, at p. 895, following *A.-G. v. Sudeley (Lord)*, [1896] 1 Q. B. 354, C. A., *per* LOFFES, L.J., at p. 363; and *Re Smyth, Leach v. Leach*, [1898] 1 Ch. 89, *per* ROMER, J., at p. 94. The settlement in this case was created under a direction in the will of a testator domiciled in this country, but *semble* (see note (*d*), *infra*), the result would be the same however the settlement, if British, was created.

(*b*) *Wallace v. A.-G., Jeves v. Shadwell* (1865), 1 Ch. App. 1, overruling *Re Capdevielle* (1864), 2 H. & C. 985.

(*c*) See p. 238, *ante*.

(*d*) If a person taking a distributive part of a foreign estate comes to this country and invests it upon trusts, it assumes the character of a British settlement and British property; and that settlement, so made, undoubtedly becomes subject to the rules of British law, under which the property is held, by virtue of which it is enjoyed, and under which it will be ultimately administered (*A.-G. v. Campbell* (1872), L. R. 5 H. L. 524, *per* Lord WESTBURY, at pp. 530, 531).

Where property is in the hands of a British trustee the presumption is that it is British, and the burden lies on those who say it is not (*A.-G. v. Jewish Colonization Association*, [1901] 1 K. B. 123, C. A., *per* COLLINS, L.J., at p. 134). In the various reported cases on this subject, the instrument, whether directing the creation of the settlement or creating it, and whether will or deed, seems to have been in British form, and in the English language, although

whether at the time of his death it is locally situate in this country (*e*) or abroad (*f*), and the testator's directions are actually complied with (*g*), succession duty becomes chargeable in respect of such property upon the death of a life tenant under the settlement (*h*).

SECT. 2.
The
Succession.

376. Where a person, whether domiciled in this country (*i*) or abroad (*j*), by an *inter vivos* disposition creates a British settlement (*k*) of personal property, whether locally situate in this

British
settlement
of personal
property
under deed.

in some cases such form and language were also the form and language of the place of the settlor's domicile abroad.

Where, however, a person claims under an instrument which has to be construed by the law of a foreign country, it may be that he is to be considered as not claiming under the law of this country (*Wallace v. A.-G.*, *Jeres v. Shadwell* (1865), 1 Ch. App. 1, by inference from the remarks of Lord CRANWORTH, L.C., at p. 9, approving *Re Lovelace* (1859), 4 De G. & J. 340, C. A., and *Re Wallop's Trust* (1864), 1 De G. J. & Sm. 656, C. A.; *A.-G. v. Jewish Colonization Association*, [1901] 1 K. B. 123, C. A., per STIRLING, L.J., at p. 139).

Where a will is expressed in the technical terms of the law of a country where the testator is not domiciled, the will is to be construed with reference to the law of that country (Dicey, *Conflict of Laws*, 2nd ed. (1908), p. 679; approved, *A.-G. v. Jewish Colonization Association*, *supra*, per STIRLING, L.J., at p. 142).

The trustees, or a majority of them, in the various reported cases, were resident, although not invariably shown to be domiciled, in this country.

In *A.-G. v. Jewish Colonization Association*, *supra*, the trustee was a British registered company, the administrative council of which held its meetings and carried on its operations abroad, but which, nevertheless, was a *persona* incapable of existence except as a creature of British law (*ibid.*, per COLLINS, L.J., at p. 136), and which, while it might acquire a foreign residence and domicile, so as to be capable of being sued in a foreign country, must be capable, as long as it existed, of being sued in the country of its origin (*ibid.*, per STIRLING, L.J., at p. 141).

(*e*) *Duncan's Trustee v. M'Cracken* (1888), 25 Sc. L. R. 551; see also *Re Smith's Trusts* (1864), 10 L. T. 598; *Re Badart's Trusts* (1870), L. R. 10 Eq. 288.

(*f*) *A.-G. v. Campbell* (1872), L. R. 5 H. L. 524 (direction, by will of testator domiciled abroad, to British trustees to invest in British securities); *Thompson v. Birch*, [1876] W. N. 177, reversed, *ibid.*, 278, C. A. (British trustees, with no such direction to them, but fund paid into court in this country; per BACON, V.-C., if the testator had been domiciled abroad (which, on appeal, he was held not to be) the duty would have been payable). It has been said, moreover, that where there is any fund standing in this country in the names of trustees, in Consols or other property which has a *quasi*-local settlement, as Consols undoubtedly have, all the dividends having to be received in this country, and the persons who have to be dealt with in respect of it being persons residing in this country, that fund is subject to the duty (*A.-G. v. Campbell*, *supra*, per Lord HATHERLEY, L.C., at p. 528).

(*g*) *Lyall v. Lyall* (1872), L. R. 15 Eq. 1 (at the time of the life tenant's death the foreign property had not been remitted by the foreign executors to the British trustees, and the duty was held not to be payable); see also *Re Smith's Trusts*, *supra*, per STUART, V.-C., at p. 599 (there is a difference where the trustees of the fund are other than the trustees of the foreign will).

(*h*) *Semble*, the duty is payable even if the property is locally situate abroad at the time of the life tenant's death, provided that the British settlement has been actually created.

(*i*) *Re Cigala's Settlement Trusts* (1878), 7 Ch. D. 351.

(*j*) *Lyall v. Lyall*, *supra*; *Lord Advocate v. Gibson* (1882), 20 Sc. L. R. 161; *A.-G. v. Felce* (1894), 10 T. L. R. 337; *A.-G. v. Jewish Colonization Association*, *supra*.

(*k*) See note (*d*), p. 274, *ante*.

SECT. 2.
The
Succession.

Exercise
by person
domiciled
abroad of
general
testamentary
power over
personal
property
subject to
British
settlement.
Domicil of
person
entitled, and
nationality
of him or
settlor.

country (*l*) or abroad (*m*), succession duty is chargeable upon the death of a life tenant under the settlement, even though the property may then be locally situate abroad (*n*).

377. Where a person domiciled abroad has not an absolute interest in, but merely a general testamentary power of appointment over, personal property forming the subject of a British settlement (*n*), whether created by *inter vivos* disposition (*o*) or under a direction in a will (*p*), and the power is exercised, the property is chargeable with succession duty upon the appointor's death, when the appointees become beneficially entitled in possession.

378. It is immaterial, whatever the other circumstances, whether the person entitled upon the death is domiciled in this country or abroad (*q*), and whether he or the settlor was a British subject or an alien (*r*).

SECT. 3.—Exceptions from the Charge of Duty.

SUB-SECT. 1.—Interests surrendered, destroyed, or transmitted.

Interest
surrendered,
destroyed,
or trans-
mitted.

379. No person is chargeable with succession duty in respect of any interest surrendered by him, or extinguished, before the 19th May, 1853 (*s*).

(*l*) See cases cited in note (*j*), p. 275, *ante*.

(*m*) *Re Cigala's Settlement Trusts* (1878), 7 Ch. D. 351; *A.-G. v. Jewish Colonization Association*, [1901] 1 K. B. 123, C. A.

(*n*) See note (*d*), p. 274, *ante*. *Semble*, the duty is payable whether the property is locally situate in this country or abroad at the time of the appointor's death.

(*o*) *Re Lovelace* (1859), 4 De G. & J. 340, C. A.; approved, *Wallace v. A.-G.*, *Jeves v. Shadwell* (1865), 1 Ch. App. 1, *per* Lord CRANWORTH, L.C., at p. 9.

(*p*) *Re Wallop's Trust* (1864), 1 De G. J. & Sm. 656, C. A.; approved, *Wallace v. A.-G.*, *Jeves v. Shadwell*, *supra*, *per* Lord CRANWORTH, L.C., at p. 9. The result is the same notwithstanding that the general power of appointment has taken effect upon a death after the 18th May, 1853, so that on making the appointment, the appointor is, under the Succession Duty Act, 1853 (16 & 17 Vict. c. 51), s. 4, deemed to be entitled, at the time of exercising such power, to the property appointed (*Re Wallop's Trust*, *supra*).

(*q*) *Re Lovelace*, *supra*; *Re Badart's Trusts* (1870), L. R. 10 Eq. 288; *Lyall v. Lyall* (1872), L. R. 15 Eq. 1; *Re Cigala's Settlement Trusts*, *supra*; *Lord Advocate v. Gibson* (1882), 20 Sc. L. R. 161; *A.-G. v. Felce* (1894), 10 T. L. R. 337; *A.-G. v. Jewish Colonization Association*, *supra*.

(*r*) Where a person, whether a British subject or an alien, becomes entitled to property under a British settlement, vested in British trustees, he is liable to pay succession duty, whether the settlement was made by a British subject or an alien, whether it was made by deed or will, and wherever the property is locally situate (*Lyall v. Lyall*, *supra*, *per* ROMILLY, M.R., at p. 10, stating the effect of the decision of the H. L. in *A.-G. v. Campbell* (1872), L. R. 5 H. L. 524); see also *Re Lovelace*, *supra*, *per* TURNER, L.J., at p. 352; *Lord Advocate v. Gibson*, *supra*, *per* the Lord Ordinary (M'LAREN), at p. 162. In the following cases the settlor was an alien:—*Re Badart's Trusts*, *supra* (long resident, however, in this country); *A.-G. v. Felce*, *supra*; *A.-G. v. Jewish Colonization Association*, *supra*.

(*s*) Succession Duty Act, 1853 (16 & 17 Vict. c. 51), s. 18.

Where, under a paramount power, the title to property is divested and destroyed, any presumptive claim to succession duty under the title so destroyed is defeated also (*t*).

Where the interest of a successor in personal property has, before it has fallen into possession, passed by reason of death to another successor or successors, only one duty is payable in respect of the interest when it falls into possession (*a*).

SECT. 3.
Exceptions
from the
Charge
of Duty.

SUB-SECT. 2.—Where the Successor is also the Predecessor.

380. A successor is not chargeable with duty upon a succession taken under a disposition made by himself, provided that the property was in possession when the disposition was made; and no person is to be charged with duty upon the termination of any charge, estate, or interest created by himself provided that the property was in possession when the charge etc. was created (*b*).

Succession
in certain
cases derived
from the
successor
himself.

SUB-SECT. 3.—Where Money Consideration given.

381. There is no succession, as between vendor and purchaser, in respect of property the right to possess which arises upon death under a contract *bonâ fide* made for valuable consideration in money or money's worth (*c*).

Possession
on death
under
contract for
value in
money etc.

(*t*) *A.-G. v. Silborne (Earl)*, [1902] 1 K. B. 388, 401, C. A. (a joint general power of appointment which enabled the donees to create estates which could not be derived from those vested in them by default of appointment). If the estates that can be created under the power, and those limited in default of appointment are co-extensive, *quære*, an acceleration within the meaning of the Succession Duty Act, 1853 (16 & 17 Vict. c. 51), s. 15 (*ibid.*, *per* COLLINS, M.R., at p. 397). There may be cases in which a power of appointment ought to be regarded as a superadded mode of disposition of the property which is subject to the power (*ibid.*, *per* STIRLING, L.J., at p. 400). Compare also *Re Warner's Settled Estates*, *Warner to Steel* (1881), 17 Ch. D. 711, *per* JESSETT, M.R., at p. 713; and see p. 294, *post*.

(*a*) Succession Duty Act, 1853 (16 & 17 Vict. c. 51), s. 14. As to a legacy charged upon etc. real estate, which, in the case of a person dying on or after the 1st July, 1888, is chargeable with succession duty as a succession to personal property (Customs and Inland Revenue Act, 1888 (51 & 52 Vict. c. 8), s. 21 (2)), compare *A.-G. v. Cleave* (1873), 31 L. T. 86, where, at p. 90, BRAMWELL, B., expressed great doubt whether, even supposing the legacy before the court could be dealt with as a succession under s. 14, the Crown would not be entitled to two duties.

(*b*) Succession Duty Act, 1853 (16 & 17 Vict. c. 51), s. 12.

(*c*) *Floyer v. Bankes* (1863), 3 De G. J. & Sm. 306, *per* Lord WESTBURY, L.C., at p. 311; *Fryer v. Morland* (1876), 3 Ch. D. 675, 682; *Lord Advocate v. Fife (Earl)* (1883), 21 Sc. L. R. 151. As to what is not a sale conferring exception from duty, see *Floyer v. Bankes*, *supra* (release of possible future dower out of non-existing estates; *secus*, *semble*, where the right was presently existing (*Lord Advocate v. Sidgwick* (1877), 14 Sc. L. R. 522, *per* the Lord President (INGLIS), at p. 526)); *De Rechberg v. Beeton* (1888), 38 Ch. D. 192 (purchase of reversionary property by trustees of will out of trust estate); *A.-G. v. Johnson*, [1903] 1 K. B. 617, C. A. (payment of sum to a charity in consideration of life annuity of 5 per cent. to payer, and to his wife if she survived him). See also Succession Duty Act, 1853 (16 & 17 Vict. c. 51), s. 17 (bonds or contracts made *bonâ fide* for valuable consideration in money etc. for payment of money etc. upon the death of any other person, and moneys payable under policies of life insurance to assured or his assignees, do not confer successions; but *secus* as to any disposition or devolution thereof, if otherwise such as to confer a succession). The exception from duty in s. 17 does not apply only to cases in which the

SECT. 3. The valuable consideration need not represent the exact value which the subsequent casualty of an early death may show the right to the property to have had (*d*).
Exceptions from the Charge of Duty. Where the consideration is partial, and becomes payable upon the death, the succession is diminished by the amount of the consideration so payable (*e*).

The exception is excluded altogether where the valuable consideration given does not consist solely of money or money's worth (*f*).

Marriage. Marriage, although a valuable consideration, is not a consideration in money or money's worth, and property the right to possess which upon death arises under a contract in consideration of marriage is not excepted from duty, even in favour of persons coming directly within that consideration (*g*). The result is the same where, on a marriage, mutual obligations for the payment of money upon death are entered into (*h*).

Leases at rack rent. **382.** No succession duty is payable in respect of the increase accruing to a successor upon the determination of a lease, provided that, at its date (*i*), it purported to be a lease at rack rent (*k*). If anything more than the rent reserved by the lease, beyond what is ordinarily involved in the relation of landlord and tenant, is contracted to be given, unless it can be shown on the face of the lease that such additional contract could not be a burden on the lessee, the lease does not purport to be at a rack rent (*l*).

SUB-SECT. 4.—Where other Death Duty chargeable and exempted.

Where the principal value of estate does not exceed £1,000. **383.** Succession duty is not chargeable under the will or intestacy of a deceased person, where the net principal value of the property, real and personal, in respect of which estate duty is payable on his death, exclusive of property settled otherwise than

relation of debtor and creditor subsists (*Cidfield v. Preston* (1862), 3 De G. F. & J. 398, C. A., *per* TURNER, L.J., at p. 419), but no duty can attach in respect of what arises simply and merely from the contract (*ibid.*, at p. 418), as, e.g., the benefit under a tontine (*ibid.*). Where a father subscribes to a tontine in the name of his son, there is an immediate advancement, and no succession is created (*ibid.*, at p. 419). As to the essential requisites of a contract which is not to create a succession, see *Floyer v. Bankes* (1863), 3 De G. J. & Sm. 306, *per* Lord WESTBURY, L.C., at p. 313. It has been said that s. 17 was enacted *ex cautela* (*Fryer v. Morland* (1876), 3 Ch. D. 675, *per* JESSEL, M.R., at pp. 685, 686).

(*d*) *Lord Advocate v. Fife (Earl)* (1883), 21 Sc. L. R. 151, *per* the Lord Ordinary (FRASER), at p. 156.

(*e*) *Brown v. A.-G.* (1898), 79 L. T. 572, II. L.

(*f*) *A.-G. v. Rathdonnell* (1893), 32 L. R. Ir. 574, *per* PALLES, C.B., at p. 593.

(*g*) *Floyer v. Bankes*, *supra*, *per* Lord WESTBURY, L.C., at p. 312.

(*h*) *Lord Advocate v. Sildgwick* (1877), 14 Sc. L. R. 522; *A.-G. v. Rathdonnell*, *supra*.

(*i*) *Semble*, leases in which rents are reserved to commence from a future date are excluded from the exception (*A.-G. v. Longford*, [1909] 2 I. R. 436, *per* PALLES, C.B., at p. 442).

(*k*) Succession Duty Act, 1853. (16 & 17 Vict. c. 51), s. 20. A rack rent is a rent of the full value of the tenement or near it (2 Bl. Com. 43).

(*l*) *A.-G. v. Longford*, *supra*, *per* PALLES, C.B., at p. 443.

by his will, does not exceed £1,000, and estate duty has been paid upon such value (*m*).

SMOR. 3.
Exceptions
from the
Charge
of Duty.

384. In the case of successors, whose succession arises through devolution by law before the 30th April, 1909, or, if it arises under a disposition, where the first succession under the disposition arises before that date (*n*), and who are lineal ancestors or lineal issue of the predecessor, or husbands or wives of persons so related, the exemption from succession duty where estate duty has been paid applies generally, without regard to the value of the estate, and whether the property is settled or not (*o*), and, in the case of such successors, where the property is settled, and the estate duty has been paid in respect of it since the date of the settlement, the exemption continues to apply until the death of a person on whose death estate duty would be again payable if the property then passed (*p*).

Exemption from the 1 per cent. or 1½ per cent. rate of succession duty where estate duty paid (1) upon the property itself ;

In the case of any such successor, who dies before becoming entitled in possession, the payment of estate duty in his estate upon the value of his expectant interest in property comprised in a settlement (*q*) satisfies the claim for succession duty under the settlement upon the subsequent death of the life tenant in respect of such interest (*r*).

(2) in the dead reversioner's estate.

385. In cases where, although succession duty under the Succession Duty Act, 1853 (*s*), is payable, notwithstanding that estate duty is also chargeable, the additional succession duty imposed by the Customs and Inland Revenue Act, 1888 (*t*), is not payable (*u*).

Other cases.

No person charged with the duties on legacies and shares

(*m*) Finance Act, 1894 (57 & 58 Vict. c. 30), s. 16 (3). The payment of the fixed duty of 30s. on the affidavit or inventory in conformity with the Customs and Inland Revenue Act, 1881 (44 & 45 Vict. c. 12), s. 33 (*i.e.*, in the case of persons dying before 2nd August, 1894), is to be deemed to be in full satisfaction of any claim to succession duty in respect of the estate or effects (*e.g.*, leaseholds) to which such affidavit etc. relates (Customs and Inland Revenue Act, 1881 (44 & 45 Vict. c. 12), s. 36).

(*n*) Finance (1909-10) Act, 1910 (10 Edw. 7, c. 8), s. 58 (2), (4).

(*o*) Finance Act, 1894 (57 & 58 Vict. c. 30), s. 1, and Sched. I. (3), (5).

(*p*) *Ibid.*, s. 5 (2); as amended by Finance Act, 1898 (61 & 62 Vict. c. 10), s. 13.

(*q*) See p. 197, *ante*.

(*r*) Finance Act, 1894 (57 & 58 Vict. c. 30), s. 1, and Sched. I. (5). If the estate duty is not paid upon the full value of the reversioner's interest in consequence of the deduction of debts etc. in his estate, *semble*, the proportionate claim for succession duty under the settlement revives accordingly (compare *Lord Advocate v. Mackenzie's Trustees* (1905), 42 Sc. L. R. 584). Where the reversioner under the settlement died prior to the 2nd August, 1894, the payment of probate duty, under the Customs and Inland Revenue Act, 1881 (44 & 45 Vict. c. 12), in his estate, in respect of his interest in the personal property, including leasehold property, comprised in such settlement, satisfies the claim for succession duty at 1 or 1½ per cent. under the settlement, upon the life tenant's death, in respect of such interest (*ibid.*, ss. 36, 41; *Re Huygarth's Trusts* (1883), 22 Ch. D. 545).

(*s*) 16 & 17 Vict. c. 51, s. 10.

(*t*) 51 & 52 Vict. c. 8, s. 21 (1).

(*u*) Finance Act, 1894 (57 & 58 Vict. c. 30), s. 1, and Sched. I. (3).

SECT. 3.
Exceptions
from the
Charge
of Duty.

of personal estate (a) under the Legacy Duty Acts in force on the 19th May, 1853 (b), is chargeable with succession duty in respect of the same acquisition of the same property (c).

Succession duty is not payable by any person in respect of a succession who, if it were a legacy bequeathed to him by the predecessor, would be expressly (d) exempted from the payment of duty in respect of it under the Legacy Duty Acts in force on the 19th May, 1853 (e).

SUB-SECT. 5.—Small Successions.

Whole
 succession
 under £100
 in value.

386. Where the whole succession or successions derived from the same predecessor and passing upon any death to any person or persons do not amount in money or principal value to £100, no succession duty is payable in respect of any portion thereof (f).

SUB-SECT. 6.—Property not yielding Income.

Plate etc.
 while enjoyed
 in kind.

387. Where a succession comprises any articles of plate, furniture or other things, not yielding any income, and given to or for the benefit of, or so that they are enjoyed by, different persons in succession, no succession duty is payable while they are so enjoyed in kind only by any person or persons not having any power of selling or disposing of them, so as to convert them into money or other property yielding an income (g).

(a) Where the death of the testator occurred before the 1st July, 1888, such duties would extend to legacies out of real property, or to the proceeds of the sale of real property arising under a trust for, or power of, conversion in his will (Stamp Act, 1815 (55 Geo. 3, c. 184), Sched., Part III.; Revenue Act, 1845 (8 & 9 Vict. c. 76), s. 4).

(b) Succession Duty Act, 1853 (16 & 17 Vict. c. 51), s. 1.

(c) *Ibid.*, s. 18. Accordingly, where, upon the death of a life tenant under a settlement, the property comprised therein, or some portion thereof, passes to the legatees or next of kin of the person originally entitled under the settlement, or his assignee, and there is, therefore, a presumptive claim for succession duty under the settlement and a claim for legacy duty under the dead person's will or intestacy, in respect of the same property, the claim for succession duty on such property is displaced by the claim for legacy duty (*A.-G. v. Littledale* (1871), L. R. 5 H. L. 290, 301; *Wolverton (Baron) v. A.-G.*, [1898] A. C. 535). If the legacy duty is not paid upon the full value of the dead person's interest in consequence of the deduction of debts etc. in his estate, *semble*, the proportionate claim for succession duty under the settlement revives accordingly (compare *Lord Advocate v. Mackenzie's Trustees* (1905), 42 Sc. L. R. 584). If the beneficiary is not expressly "charged" with legacy duty, *semble*, the claim for succession duty is unaffected. As to what is not the same acquisition of the same property, see *A.-G. v. Mitchell* (1881), 6 Q. B. D. 548 (legacy duty paid on death of testator before 1853, and succession duty payable on death, after 1853, of donee of general power exercised by deed).

(d) *A.-G. v. Fitzjohn* (1857), 2 H. & N. 465, 475.

(e) Succession Duty Act, 1853 (16 & 17 Vict. c. 51), s. 18; see Stamp Act, 1815 (55 Geo. 3, c. 184), Sched., Part III.; Legacy Duty Act, 1799 (39 Geo. 3, c. 73), s. 1; and pp. 239–242, *ante*.

(f) Succession Duty Act, 1853 (16 & 17 Vict. c. 51), s. 18. Where the death occurred prior to the 1st June, 1889, and the whole of the property comprised in such succession etc. amounted to £100 or upwards in principal value, any individual succession forming part thereof, the taxable value of which was less than £20, was not liable to succession duty (*ibid.*). The exemption was withdrawn by the Customs and Inland Revenue Act, 1889 (52 & 53 Vict. c. 7), s. 10 (2).

(g) Legacy Duty Act, 1796 (36 Geo. 3, c. 52), s. 14, incorporated in Succession Duty Act, 1853 (16 & 17 Vict. c. 51), s. 32.

In the case of objects which appear to the Treasury to be of national, scientific, historic, or artistic interest, the duty is only chargeable when the property is sold, and then only in respect of the last death on which the property passed (*h*).

No succession duty is payable in respect of an advowson or church patronage comprised in a succession until the same, or some right of presentation, or some other interest in or out of the advowson etc., is disposed of by the successor or in concert with him for money or money's worth (*i*).

No succession duty is payable in respect of timber, trees, or wood growing on land comprised in an estate in respect of which estate duty is payable on the death of a person dying after the 29th April, 1910, until sold (*j*).

Nor, in cases not governed by this provision, is any succession duty payable in respect of the proceeds of the sale of timber etc. comprised in a succession (in cases where the duty is payable annually upon sale moneys) where the sales, after deduction of all necessary outgoings of the year, do not exceed in value £10 net in any one year (*k*).

SECT. 3.
Exceptions
from the
Charge
of Duty.

Advowsons
until
disposed of.

Growing
timber.

Timber sales,
where annual
sale less than
£10 net.

SUB-SECT. 7.—*Money applied to Payment of Duty.*

388. Succession duty is not payable upon money applied to the payment of duty on a succession according to a trust for that purpose (*l*).

Money
applied to
payment
of duty.

SUB-SECT. 8.—*Early Cesser of Limited Interest.*

389. In the case of a successor to real property, of which he is not competent to dispose, who dies within four and a half years of

Real
property.

(*h*) Finance Act, 1896 (59 & 60 Vict. c. 28), s. 20, Finance (1909-10) Act, 1910 (10 Edw. 7, c. 8), s. 63; see also note (*m*), p. 202, *ante*.

(*i*) Succession Duty Act, 1853 (16 & 17 Vict. c. 51), s. 24. A right of presentation cannot now be transferred (Benefices Act, 1898 (61 & 62 Vict. c. 48), s. 1 (1) (b)).

(*j*) Finance (1909-10) Act, 1910 (10 Edw. 7, c. 8), s. 61 (5).

(*k*) Succession Duty Act, 1853 (16 & 17 Vict. c. 51), s. 23. Where the successor is competent to dispose of the property, see note (*k*), p. 288, *post*.

(*l*) *Ibid.*, s. 18. A direction in a will to pay all legacies free of legacy duty does not cover succession duty in respect of a bequest of leaseholds (*Re Johnston, Cockerell v. Essex (Earl)* (1884), 26 Ch. D. 538, 554). A direction to pay out of residue all legacy duty and succession duty in respect of "legacies" and "annuities" does not cover the succession duty in respect of a life interest in real estate (*Re King's Trusts* (1892), 29 L. R. Ir. 401). A direction to pay rent-charges "without any deductions except for legacy duty and income tax" does not cover succession duty where that duty and not legacy duty is chargeable (*Re Rayer, Rayer v. Rayer*, [1903] 1 Ch. 685). A direction to pay a jointure "without any deduction or abatement whatsoever" for "taxes" etc. entitles the jointress to receive the jointure without deduction for succession duty (*Floyer v. Bankes* (1863), 3 De G. J. & Sm. 306, 316). A direction to raise a "net" sum means that the succession duty chargeable in respect of such sum is to be provided out of another part of the appointed property (*Re Saunders, Saunders v. Gore*, [1898] 1 Ch. 17, O. A.). A direction by a testator to pay out of a particular fund the succession duty payable "in consequence of his death" covers the succession duty chargeable on property of which he was tenant for life (*Poulett (Earl) v. Hood* (1866), 35 Beav. 234, 243). See also note (*f*), p. 296, *post*; and p. 240, *ante*.

SECT. 3.
Exceptions
from the
Charge
of Duty.

Personal
property.

becoming entitled to the beneficial enjoyment of the property, so much of the duty as, at the time of his death, has not become payable ceases to be payable (*m*).

It is so, also, in the case of a successor to an annuity out of, or life interest (chargeable by way of annuity) in, personal property, whose interest ceases by the death of any person before four years' payments of the annuity or income have become due and payable (*n*).

SECT. 4.—Rates of Duty.

How rate
determined.

390. The degree of relationship subsisting between the "successor" and the "predecessor" determines the rate of duty chargeable in respect of the succession (*o*).

Rates and
relationship.

391. The rates of succession duty in respect of successions arising through devolution by law before the 30th April, 1909, and in respect of successions arising under dispositions, where the first succession under the disposition arises before that date (*p*), and where the property is chargeable with estate duty, are as follows (*q*):—

Where
succession
arises through
devolution
by law
before
30th April,
1909, or if
under a
disposition,
the first
succession

In the case of lineal issue, or of a lineal ancestor, of the predecessor, there is no succession duty (*r*). In the case of a brother or sister, or of a descendant of a brother or sister, of the predecessor, the rate of succession duty is 3 per cent. In the case of a brother or sister of the father or mother or of a descendant of a brother or sister of the father or mother of the predecessor, the rate is 5 per cent. In the case of a brother or sister of a grandfather or grandmother, or of a descendant of a brother or sister of a grandfather or grandmother, of the predecessor, the rate is 6 per cent. In the case of a

(*m*) Succession Duty Act, 1853 (16 & 17 Vict. c. 51), s. 21. Where the succession is upon a death occurring before the 2nd August, 1894, and the successor is competent, *i.e.*, in point of quantity of interest (*A.-G. v. Hallett* (1857), 2 H. & N. 368), to dispose by will of a continuing interest in the real property, the instalments unpaid at his death do not cease to be payable, but constitute a continuing charge on his interest in the property in exoneration of his other property, and are payable by the owner for the time being of that interest (Succession Duty Act, 1853 (16 & 17 Vict. c. 51), s. 21; Customs and Inland Revenue Act, 1888 (51 & 52 Vict. c. 8), s. 22 (3) (*a*)). A successor is competent to dispose *etc.* if the interest to which he succeeds has in it a potentiality which ripens into a power to dispose by will (*Lilford (Lord) v. A.-G.* (1867), L. R. 2 H. L. 63, 71 (a tenant in tail who disentailed and owned the fee simple at his death)).

(*n*) Succession Duty Act, 1853 (16 & 17 Vict. c. 51), s. 32, embodying Legacy Duty Act, 1796 (36 Geo. 3, c. 52), ss. 8, 12; see p. 242, *ante*.

(*o*) Succession Duty Act, 1853 (16 & 17 Vict. c. 51), s. 10.

(*p*) Finance (1909-10) Act, 1910 (10 Edw. 7, c. 8), s. 58 (4).

(*q*) Succession Duty Act, 1853 (16 & 17 Vict. c. 51), s. 10; Finance Act, 1894 (57 & 58 Vict. c. 30), s. 1, and Sched. I. (3).

(*r*) One per cent. duty is imposed by the Succession Duty Act, 1853 (16 & 17 Vict. c. 51), s. 10, but it is not payable under the will or intestacy of the deceased, or under his disposition or any devolution from him under which respectively estate duty has been paid, or under any other disposition under which estate duty has been paid (Finance Act, 1894 (57 & 58 Vict. c. 30), s. 1, and Sched. I. (5)). And the one per cent. duty is not payable in respect of any succession to property (*e.g.*, leaseholds) according to the value whereof (*i.e.*, in the case of persons dying before the 2nd August, 1894) duty has been paid on the affidavit, or inventory, or account, in conformity with the Customs and Inland Revenue Act, 1881 (44 & 45 Vict. c. 12) (*ibid.*, s. 41).

person in any other degree of collateral consanguinity to the predecessor, or in the case of a stranger in blood (s) to him, the rate is 10 per cent.

SECT. 4.
Rates of
Duty.

Where, however, the property is not chargeable with estate duty, succession duty at 1 per cent., with an additional $\frac{1}{2}$ per cent., making $1\frac{1}{2}$ per cent. together, is chargeable in the case of lineal issue, or of a lineal ancestor, of the predecessor, and in the case of a person more distantly related to the predecessor, or in the case of a stranger in blood to him, an additional $1\frac{1}{2}$ per cent. is chargeable over and above the rates set out in the last paragraph (t).

thereunder
arises before
that date.

392. Where the succession arises through devolution by law on or after the 30th April, 1909, or, if it arises under a disposition,

After
30th April.
1909.

(s) Natural children, not legitimated, even if acknowledged by the father, are chargeable with duty as strangers in blood (*Atkinson v. Anderson* (1882), 21 Ch. D. 100). *Secus, semble*, if legitimated according to the law of the father's domicile (*Re Grey's Trusts, Grey v. Stamford*, [1892] 3 Ch. 88). See also, on this point, note (d), p. 243, *ante*. Prior to the Deceased Wife's Sister's Marriage Act, 1907 (7 Edw. 7, c. 47), this rate was operative in the case of the sister of a deceased wife, with whom the husband had gone through the form of marriage, unless there was such a blood relationship between the successor and the predecessor as to lead to the payment of a lower rate.

(t) The additional duties at the rates of $\frac{1}{2}$ per cent. and $1\frac{1}{2}$ per cent. respectively were imposed by the Customs and Inland Revenue Act, 1888 (51 & 52 Vict. c. 8), s. 21 (1), in respect of every succession referred to in the Succession Duty Act, 1853 (16 & 17 Vict. c. 51), s. 10, and in respect of every legacy which, under s. 21 (2) of the Customs and Inland Revenue Act, 1888 (51 & 52 Vict. c. 8), is a succession to personal property, upon the death of any person dying on or after the 1st July, 1888. The additional duty, however, is not payable upon the interest of a successor in leaseholds passing to him by will or devolution by law, or in property included in an account according to the value whereof duty is payable under the Customs and Inland Revenue Act, 1881 (44 & 45 Vict. c. 12) (proviso to s. 21 (1) of the Customs and Inland Revenue Act, 1888 (51 & 52 Vict. c. 8)), and gifts for charitable purposes were not subject thereto (*Succession Duty Act*, 1853 (16 & 17 Vict. c. 51), s. 16; *Lord Advocate v. Marshall* (1893), 30 Sc. L. R. 599). In the case of successions upon deaths occurring on or after the 1st June, 1889, and before the 1st June, 1896, where estate duty under the Finance Act, 1894 (57 & 58 Vict. c. 30), is not chargeable (compare *ibid.*, s. 1, and Sched. I. (4)), temporary estate duty is payable in addition to the succession duty (Customs and Inland Revenue Act, 1889 (52 & 53 Vict. c. 7), s. 6 (4), (7))—(A) where the value of any succession, chargeable with succession duty, exceeds £10,000, and (B) where the value of any succession to real property under the will or intestacy of any person so dying, chargeable with succession duty, does not exceed £10,000, but such value, together with the value of any other benefit taken by the successor under such will etc., exceeds £10,000 (*ibid.*, s. 6 (1)). The temporary estate duty, however, is not payable as an addition to the succession duty upon the value of leaseholds passing by will or devolution by law, or of property in respect of which temporary estate duty has been paid as an addition to account duty (Customs and Inland Revenue Act, 1889 (52 & 53 Vict. c. 7), s. 6 (3)). In the case of a succession conferred upon a person for life, and afterwards upon others liable to the same rate of succession duty, the temporary estate duty is payable, if the succession exceeds £10,000 in value, notwithstanding that the respective interests of the beneficiaries, taken separately, may not exceed that value respectively (*A.-G. v. Aberdare (Lord)*, [1892] 2 Q. B. 684, 693). The rate of the temporary estate duty is £1 for every full sum of £100, and for any fraction of £100 over any multiple of £100, of the value of the succession (Customs and Inland Revenue Act, 1889 (52 & 53 Vict. c. 7), s. 6 (2)). As to temporary estate duty, generally, see Customs and Inland Revenue Act, 1889 (52 & 53 Vict. c. 7), ss. 6—9.

SECT. 4.
Rates of
Duty.

where the first succession under the disposition arises on or after that date, the rate of duty in the case of lineals is 1 per cent. (*u*); and it is so also in the case of the husband or wife of the predecessor (*u*) (who, prior to that date, were specifically excepted from the duty (*v*)). In the case of other persons, 5 per cent. is substituted for 3 per cent., and 10 per cent. for 5 per cent. and 6 per cent. (*w*).

Exceptions
to 1 per cent.
duty.

The 1 per cent. duty last referred to is not, however, levied: (1) Where the principal value of the property passing on the death of the deceased (*i.e.*, in the case of a succession arising through devolution by law, the person on whose death the succession arises, and in the case of a succession arising under a disposition, the person on whose death the first succession thereunder arises (*a*)), in respect of which estate duty is payable (other than property in which the deceased never had an interest, and property of which the deceased never was competent to dispose, and which on his death passes to persons other than the husband or wife, or a lineal ancestor or descendant of the deceased) does not exceed £15,000, whatever may be the value of the succession (*b*); or (2) where the amount or value of the succession or legacy, together with any other successions, legacies, residue, or share thereof (*c*), derived by the same person from the predecessor, testator, or intestate, does not exceed £1,000, whatever may be the principal value of such property (*d*); or (3) where the person taking the succession is the widow, or a child under twenty-one, of the predecessor, and the amount etc. of the succession etc., together with etc., does not exceed £2,000, whatever etc. (*e*).

Provision as
to married
successors.

393. Any successor who has been married to a person of nearer consanguinity to the predecessor pays the same rate of duty only as such person would have been chargeable with (*f*).

Property
subject to
trusts for
charitable
or public
purposes.

Where property becomes subject to a trust for any charitable or public purposes under any disposition which, if made in favour of an individual, would confer on him a succession, duty at the rate of 10 per cent. (*g*) is payable in respect of the property (*h*).

(*u*) Finance (1909-10) Act, 1910 (10 Edw. 7, c. 8), s. 58 (2), (4). The duty is to be paid notwithstanding any repeal effected by or anything contained in the Finance Act, 1894 (57 & 58 Vict. c. 30) (except s. 16 (3) thereof), or any other Act (Finance (1909-10) Act, 1910 (10 Edw. 7, c. 8), s. 58 (2)). The provision saving *bonâ fide* purchasers and mortgagees, for value in money or money's worth, of an interest in expectancy, before the 30th April, 1909, which obtains in the case of the increased estate duty under the Finance (1909-10) Act, 1910 (10 Edw. 7, c. 8), s. 64 (see p. 205, *ante*), obtains also in the case of the increased succession duty (*ibid.*, s. 64).

(*v*) See note (*c*), p. 280, and note (*t*), p. 242, *ante*.

(*w*) Finance (1909-10) Act, 1910 (10 Edw. 7, c. 8), s. 58 (1), (4). As to purchasers and mortgagees, see note (*u*), *supra*.

(*a*) *Ibid.*, s. 58 (3).

(*b*) *Ibid.*, s. 58 (2) (proviso) (*a*).

(*c*) *Ibid.*, s. 58 (3).

(*d*) *Ibid.*, s. 58 (2) (proviso) (*b*).

(*e*) *Ibid.*, s. 58 (2) (proviso) (*c*).

(*f*) Succession Duty Act, 1853 (16 & 17 Vict. c. 51), s. 11.

(*g*) See note (*t*), p. 283, *ante*.

(*h*) Succession Duty Act, 1853 (16 & 17 Vict. c. 51), s. 16. See titles CHARITIES, Vol. IV., p. 205; CORPORATIONS, Vol. VIII., p. 378.

Where any person takes a succession under a disposition made by himself, then, if at the date of the disposition he was entitled to the property comprised in the succession expectantly on the death of any person dying after the 18th May, 1853, and such person dies during the continuance of the disposition, he is chargeable with duty on his succession at the same rate as he would have been chargeable with if no such disposition had been made (i).

**SECT. 4.
Rates of
Duty.**

Where the successor is also predecessor.

394. Where the interest of any successor in any personal property has, before he has become entitled to it in possession, passed by reason of death to any other successor or successors, the duty is to be at the highest rate which, if every such successor had been subject to duty, would have been payable by any one of them (j).

Transmitted successions in personal property.

If any succession has, before the successor has become entitled to it, or to the income of it, in possession, become vested by alienation, or by any title not conferring a new succession, in any other person, then the duty payable in respect of the succession is to be paid at the same rate as it would have been payable at if no such alienation had been made or derivative title created (k).

Transferred interests.

Where the title to any succession is accelerated by the surrender or extinction of any prior interest, then the duty on the succession is payable in the same manner as it would have been payable if no such acceleration had taken place (l).

Succession accelerated.

If under conflicting titles there are rival claimants to a deceased person's real property, and the claimants agree to a compromise, the liability to succession duty does not follow the compromise, but depends upon the rights of the parties under the title which is permitted to stand (m).

Compromise of conflicting claims.

(i) Succession Duty Act, 1853 (16 & 17 Vict. c. 51), s. 12; and see *A.-G. v. Sibthorp* (1858), 3 H. & N. 424; *Braybrooke (Lord) v. A.-G.* (1861), 9 H. L. Cas. 150; *A.-G. v. Floyer* (1862), 9 H. L. Cas. 477; and compare *Lord Advocate v. Constable's Trustees* (1880), 17 Sc. L. R. 611 (substituted security by new disposition).

(j) Succession Duty Act, 1853 (16 & 17 Vict. c. 51), s. 14. The claim to succession duty under the original title may, however, be defeated by a claim to legacy duty under a derivative title (see note (c), p. 280, *ante*).

(k) *Ibid.*, s. 15. The time of the alienation fixes the rate (*S.-G. v. Law Reversionary Interest Society* (1873), L. R. 8 Exch. 233, *per* OLEASBY, B., at p. 239). Where on the 19th May, 1853, any reversionary "property" expectant on death was vested, by alienation or other derivative title, in any other person than the person who was originally entitled thereto under a disposition or devolution by law, the person in whom such property was vested is chargeable with duty in respect thereof as a succession at the same time and at the same rate as the person originally entitled would have been chargeable with if no such alienation had been made or derivative title created (Succession Duty Act, 1853 (16 & 17 Vict. c. 51), s. 15). Compare *A.-G. v. Rushton* (1864), 2 H. & C. 812 (an heir-at-law treated as alioce of his ancestor in respect of real property expectant on the death of a life tenant; but compare Succession Duty Act, 1853 (16 & 17 Vict. c. 51), s. 5). If the person originally entitled would not have been chargeable with duty, this part of the section is not applicable (*Re Jenkinson* (1857), 24 Beav. 64; *A.-G. v. Yelverton* (1861), 7 H. & N. 306; *A.-G. v. Gardner* (1863), 1 H. & C. 639).

(l) Succession Duty Act, 1853 (16 & 17 Vict. c. 51), s. 15.

(m) *Lord Advocate v. Gordon* (1895), 32 Sc. L. R. 532; *Lord Advocate v. Christie's Trustees* (1905), 12 Scots Law Times, 690. In both cases, a disputed will was, on a compromise with the heir, which was sanctioned by the court,

SECT. 5.

Value Chargeable.

Real property upon deaths after 1st August, 1894, of which the successor is competent to dispose.

Real property taken by corporations etc.

Succession for charitable or public purposes.

Where the duty is chargeable for the successor's life, or for a less period.

SECT. 5.—Value Chargeable.

SUB-SECT. 1.—Gross Value.

395. The value (*n*) for the purpose of succession duty of a succession to real property arising on the death of a person dying after the 1st August, 1894, is, where the successor is competent to dispose of the property within the meaning of the Finance Act, 1894 (*o*), the principal value of the property (*p*), ascertained in the same manner as it would be under the provisions of that Act for the purpose of estate duty (*q*), after deducting the estate duty payable in respect of it on the death, and the expenses (if any) properly incurred of raising and paying the duty (*r*).

Where any body corporate, company, or society become entitled as successors to any real property, the duty in respect of the property is to be assessed upon its principal value (*s*).

Where property becomes subject to a trust for any charitable or public purposes under a disposition which, if made in favour of an individual, would confer on him a succession, the amount or principal value of the property is the value chargeable with duty (*t*).

396. Subject as above and to the exceptions stated later (*u*), the interest of every successor in real property is to be considered to be of the value of an annuity equal to the annual value (*w*) of

allowed to stand. In the first case, the action was against the heir who got the property, and in the second case, against the trustees of the will who parted with it. Ss. 37 and 39 of the Succession Duty Act, 1853 (16 & 17 Vict. c. 51), do not apply, although it would be otherwise as to s. 37, where the duty was paid and the will was afterwards set aside (*Lord Advocate v. Christie's Trustees* (1905), 12 Scots Law Times, *per* the Lord Ordinary (STORMONT DARTING), at p. 693). If the property is personal, and the succession is compounded for etc., the Legacy Duty Act, 1796 (36 Geo. 3, c. 52), s. 23, incorporated in the Succession Duty Act, 1853 (16 & 17 Vict. c. 51), s. 32, applies; see pp. 244, 249, *ante*.

(*n*) The principle underlying the whole statute is that when a person comes into possession of property on a death, the beneficial interest in it which then accrues to him, or the increase of benefit which then accrues to him, is the whole property which he so comes into possession of, and not the difference in value between that property and the value of an estate or interest he may have had in it before he came into possession of it (*A.-G. v. Noyes* (1881), 8 Q. B. D. 123, C. A., *per* LINDLEY, J., at p. 132).

(*o*) See p. 185, *ante*.

(*p*) Finance Act, 1894 (57 & 58 Vict. c. 30), s. 18 (1).

(*q*) *Ibid.*, s. 18 (2); see p. 207, *ante*.

(*r*) *Ibid.*, s. 18 (1).

(*s*) Succession Duty Act, 1853 (16 & 17 Vict. c. 51), s. 27. And it is so, also, where the corporation is successor by alienation (*S.-G. v. Law Reversionary Interest Society* (1873), L. R. 8 Exch. 233, 239).

(*t*) Succession Duty Act, 1853 (16 & 17 Vict. c. 51), s. 16.

(*u*) See pp. 287—289, *post*.

(*w*) The value must be ascertained at the time of the accruer of the succession, and when the property is at that time yielding or capable of yielding annual income the full present actual yearly value of the property in its existing state or mode of enjoyment is the subject of assessment (*A.-G. v. Sefton (Earl)* (1865), 11 H. L. Cas. 257, *per* Lord WESTBURY, L.C., at p. 268). If the succession at the time of accruer neither yields nor is capable of yielding in its existing state any annual income, but yet is saleable, *quære* whether the property which forms the succession has not an annual value within the meaning of the Act, namely, a value equal to interest at 3 per cent. on the sum that might have been

such property, after making such allowances as are hereinafter mentioned (x), and payable from the date of his becoming entitled to it in possession, or to the receipt of the income or profits of it, during the residue of his life, or for any less period during which he is entitled to it (y), valued according to the tables provided for that purpose (z).

This rule applies equally to a purchaser or mortgagee to whom, before the 2nd August, 1894, an interest in expectancy, within the meaning of the Finance Act, 1894 (a), in real property, was *bonâ fide* sold or mortgaged for full consideration in money or money's worth (b), notwithstanding that he may become beneficially entitled in possession upon a death after that date, and may be competent to dispose of the property (c).

397. Where a successor, upon a death after the 1st August, 1894, succeeds to agricultural property, within the meaning of the Finance Act, 1894 (d), where there is no expectation of an increased income from the property, its annual value for the purpose of succession duty is to be arrived at in the same manner (e) as, under the provisions of that Act, for the purpose of estate duty (f).

Where an advowson or church patronage is comprised in a succession, and it, or some right of presentation, or some other interest in or out of it, is disposed of by or in concert with the successor for money or money's worth, the successor is chargeable with duty upon the amount or value of the money etc. (g).

Where an estate in respect of which estate duty is payable on the death of a person dying after the 28th April, 1910, comprises land on which timber, trees, or wood are growing, succession duty is payable on the sale moneys (if any) of such timber etc. as in the case of estate duty (h).

SECT. 5.
Value
Chargeable.

Where
interest in
expectancy
sold etc.
before 2nd
August, 1894.

Annual value
of purely
agricultural
property.

Advowsons
and church
patronage.

Rule as to
timber.

realised if the property had been sold at the time of the accruing of the succession (*ibid.*); so, also, *per* Lord CHELMSFORD (*ibid.*, at pp. 278, 279). See also *Lord Advocate v. Buccleuch (Duke)* (1888), 25 Sc. L. R. 249 (unlet shootings have an annual value).

(x) See p. 289, *post*.

(y) The successor, although entitled in fee simple, is, in such cases, charged only on an annuity commensurate with his personal enjoyment (*Northumberland (Duke) v. A.-G.*, [1905] A. C. 406, *per* Lord DAVEY, at p. 416).

(z) Succession Duty Act, 1853 (16 & 17 Vict. c. 51), ss. 21, 31, and Sched. This rule applies also where the successor is competent to dispose of the property, if the succession arose on a death before the 2nd August, 1894.

(a) See p. 186, *ante*.

(b) Finance Act, 1894 (57 & 58 Vict. c. 30), s. 21 (3); see p. 196, *ante*.

(c) The age of such purchaser or mortgagee at the date when he becomes entitled in possession forms the basis for calculating the life interest value (*Northumberland (Duke) v. A.-G.*, [1905] A. C. 406, *per* Lord DAVEY, at p. 419).

(d) Finance Act, 1894 (57 & 58 Vict. c. 30); see p. 208, *ante*.

(e) See p. 208, *ante*.

(f) Finance Act, 1894 (57 & 58 Vict. c. 30), s. 18 (2).

(g) Succession Duty Act, 1853 (16 & 17 Vict. c. 51), s. 24. *Semble*, the duty is only chargeable in the event of a sale, even where the succession arose on a death after the 1st August, 1894, and the successor is competent to dispose of it, within the meaning of the Finance Act, 1894 (57 & 58 Vict. c. 30); see pp. 202, 281, *ante*.

(h) Finance (1909-10) Act, 1910 (10 Edw. 7, c. 8), s. 61 (5); see p. 213, *ante*.

SECT. 5.

Value
Chargeable.

Subject to the above, where growing (i) timber, trees or wood, not being coppice of underwood (j), are comprised in a succession (k), duty is to be paid upon the successor's interest in the net moneys received from any sales (l) of it in those cases in which, after deducting all necessary outgoings (m) for the year, the net moneys exceed the sum of £10 in any one year (n).

The rateable value to the poor of the land itself is not separately chargeable with duty as forming part of the annual value of the succession (o). But where there is any rent or value derived from the land, other than that which arises from the sale of wood, it is liable to duty as part of the annual value of the succession (p).

Fine received
upon renewal
of lease.

Where a successor, entitled to any real property subject to any lease by reason whereof he is not presently entitled to the full enjoyment of it, has not paid duty in respect of the full yearly value of the property, he is chargeable with duty upon his interest in any fine or other consideration received during his life for the renewal of any such lease or the grant of any reversionary lease of the property (q).

Property
producing
yearly
fluctuating
income.

The yearly value of any manor, opened (r) mine, or other real property of a fluctuating yearly income, is either to be calculated upon the average profits or income derived from it, after deducting all necessary outgoings, during such a number of preceding years as shall be agreed upon for this purpose between the Commissioners and the successor, before the first payment of duty on the succession becomes due, or, if no such period is agreed upon, then the principal value of the property is to be ascertained, and its annual value is to be considered to be equal to interest calculated at the rate of 3 per cent. per annum on the amount of the principal value (s).

Real property
subject to a
trust for

In the case of moneys to arise from the sale of real property

(i) *H. M. Advocate v. Ailsa (Marquis)* (1881), 19 Sc. L. R. 28, *per* the Lord Ordinary (CURRIEHILL), at p. 29.

(j) Coppice of underwood is capable of being regularly cut, and of yielding an income not necessarily fluctuating (*ibid.*).

(k) *Seemle*, if the duty is chargeable upon the principal value of the property comprised in the succession, the value of any timber, trees or wood growing on the property would be included in such value, and further claims for duty on the sales of timber would not arise.

(l) The duty on timber is, however, imposed from the death, and not upon the happening of the contingency of a sale (*Re Leconfield, Wyndham v. Leconfield* (1904), 90 L. T. 399, 402, C. A.).

(m) The amount of the outgoings is a matter of fact (*H. M. Advocate v. Ailsa (Marquis)*, *supra*, *per* the Lord Ordinary (CURRIEHILL), at p. 30).

(n) Succession Duty Act, 1853 (16 & 17 Vict. c. 51), s. 23.

(o) *H. M. Advocate v. Ailsa (Marquis)*, *supra*.

(p) *Ibid.*, *per* the Lord President (INGLIS), at p. 32, and *per* Lord SHAND, at p. 33.

(q) Succession Duty Act, 1853 (16 & 17 Vict. c. 51), s. 25. *Seemle*, this provision does not apply where duty is chargeable upon the principal value of the property.

(r) Unopened mines are excepted from the operation of the Succession Duty Act, 1853 (16 & 17 Vict. c. 51), s. 26 (*A.-G. v. Sefton (Earl)* (1865), 11 H. L. Cas. 257, *per* Lord WESTBURY, L.C., at p. 268).

(s) Succession Duty Act, 1853 (16 & 17 Vict. c. 51), s. 26.

which, in the circumstances previously stated (*t*), are deemed to be real property, each successor's interest therein is considered to be of the value of an annuity, payable during his life, or for any less period during which he is entitled, equal in amount to the annual produce of the actual trust property at the time of his becoming entitled in possession, whether it is then the real property subject to the trust or direction for sale, or any property purchased in substitution for it, or any intermediate investment of the produce of the sale of the original property (*a*).

The same rule is to be observed in the case of personal property which, in the circumstances likewise previously stated (*b*), is chargeable with succession duty as real property, whether the actual trust property is the real property directed to be purchased, or any intermediate investment of the personal property directed to be invested in such purchase (*c*).

Where personal property is comprised in a succession, certain provisions in the Legacy Duty Act, 1796 (*d*), are, where they have any application (*e*) to such personal property, to be applied as if it were a legacy bequeathed by the predecessor to the successor, and were subject to the provisions in question (*f*).

The value of an annuity, or of any interest chargeable with duty as an annuity, is to be calculated according to the tables provided for that purpose (*g*).

Where any disposition of property which is accompanied by the reservation etc. of a benefit to the grantor etc. is deemed to confer a succession (*h*), the increase of beneficial interest in the property is deemed to be equal in annual value to the yearly amount or yearly value of the benefit reserved etc. (*i*).

SECT. 5. Value Chargeable.

conversion and for reinvestment of proceeds in purchase of other real property.

Personal property subject to a trust for investment in real property.

Succession to personal property to be assessed as if it were a legacy.

How annuities to be valued.

Disposition of property with reservation of benefit.

SUB-SECT. 2.—Deductions.

398. In estimating the annual value of lands used for agricultural purposes, houses, buildings, tithes, tithes, rentcharges, and other property yielding or capable of yielding income not of a

Necessary outgoings.

(*t*) See p. 265, *ante*.

(*a*) Succession Duty Act, 1853 (16 & 17 Vict. c. 51), s. 29.

(*b*) See p. 265, *ante*.

(*c*) Succession Duty Act, 1853 (16 & 17 Vict. c. 51), s. 30.

(*d*) 36 Geo. 3, c. 52, ss. 8, 10, 11, 12, 14, 23; see pp. 245 *et seq.*, *ante*.

(*e*) *A.-G. v. Noyes* (1881), 8 Q. B. D. 125, C. A., *per* JESSEL, M.R., at p. 138.

(*f*) Succession Duty Act, 1853 (16 & 17 Vict. c. 51), s. 32; compare *Cuddon v. Cuddon* (1876), 4 Ch. D. 583, 585 (succession to persons successively all liable to the same rate of duty).

(*g*) Succession Duty Act, 1853 (16 & 17 Vict. c. 51), ss. 31, 32, and Sched. The tables state the value of an annuity of £100 for a single life of various ages from birth to ninety-five years (Table I.); for the joint continuance of two such lives (Table II.); and for any number of years not exceeding ninety-five (Table III.). There are also rules for inferring the value of such an annuity held on the longest of two lives; on the joint continuance of three lives; and on the longest of three lives. And there is a further rule for valuing annuities for more than three lives; and for a longer term of years than ninety-five, or in perpetuity.

(*h*) See p. 273, *ante*.

(*i*) Succession Duty Act, 1853 (16 & 17 Vict. c. 51), s. 7. In the case of personal property, the duty, *semble*, is assessable upon the capital (*A.-G. v. Johnson*, [1902] 1 K. B. 416, *per* PHILLIMORE, J., at p. 427; the decision was reversed, [1903] 1 K. B. 617, C. A.); compare p. 286, *ante*.

SECT. 5
Value
Chargeable.

fluctuating character, an allowance is to be made of all necessary outgoings (*k*), that is, of permanent charges which are made on the occupier of the land, or falling entirely on the land (*l*), and which are intrinsically necessary (*m*).

Incum-
brances.

399. In estimating the value of a succession, no allowance (*n*) is to be made in respect of any incumbrance (*o*) upon it created or incurred (*p*) by the successor, not made in execution of a prior special power of appointment (*q*).

Mortgage by
tenant for
life and
remainder-
man.

A mortgage created under a joint general power of appointment in a disentailing assurance executed by tenant for life in possession and remainderman in tail, is an incumbrance created by the successor, the tenant in tail, out of his own interest, and, as such, is incapable of being deducted against the succession (*r*). Allowance is, however, to be made in respect of all other incumbrances, and also in respect of any moneys which the successor may, previously to his possession, have laid out in substantial repairs or permanent improvement of real property comprised in his succession (*s*).

Where there
is a prior
principal
charge.

Upon any successor becoming entitled to real property, of which he is not competent to dispose, within the meaning of the Finance Act, 1894 (*t*), and the property is subject to any prior principal charge, an allowance is to be made to him in respect only of the yearly sums payable by him, by way of interest or otherwise, on the charge as reducing the annual value *pro tanto* of the real property (*a*).

(*k*) Succession Duty Act, 1853 (16 & 17 Vict. c. 51), s. 22.

(*l*) *E.g.*, repairs, poor rates, highway, sewer and county rates, town rates, drainage rates, and the like (*Re Elwes* (1858), 3 H. & N. 719, *per* WATSON, B., at p. 726), *i.e.*, if in fact payable by the successor.

(*m*) *Re Cowley (Earl)* (1866), L. R. 1 Exch. 288, *per* BRAMWELL, B., at p. 294. Income tax is not a "necessary outgoing" (*Re Elwes, supra*; *A.-G. v. Lorton (Lord)* (1861), 11 I. C. L. R. 429); nor is fire insurance (*A. G. v. Lorton (Lord)*, *supra*); nor are the expenses of an agent (*Re Elwes, supra*; *A.-G. v. Lorton (Lord)*, *supra*); and the intervention of trustees creates no difference (*Re Cowley (Earl)*, *supra*). In cases, however, governed by the Finance Act, 1894 (s. 7 & 58 Vict. c. 30), s. 7 (5) (proviso), and 18 (2), a limited allowance for expenses of management is to be made.

(*n*) Succession Duty Act, 1853 (16 & 17 Vict. c. 51), s. 34. As to an allowance which may be made, see *Re O'Neill (Lord)* (1886), 20 L. R. Ir. 73 (payments to sinking fund, out of income of settled real property, suspended during lifetime of life tenant, and allowance made on his death for arrears).

(*o*) Portions are a part of the inheritance (*A.-G. v. Floyer* (1862), 9 H. L. Cas. 477, *per* Lord CRANWORTH, at p. 490). As to an allowance for a jointure treated as a new succession, see *Re Peyton* (1861), 7 H. & N. 265, but see *per* MARTIN, B., at p. 305.

(*p*) *Semble*, the word "incurred" was used to embrace charges caused otherwise than by the direct act of the owner (*Re O'Neill (Lord)*, *supra*, *per* PAILES, C.B., at p. 89).

(*q*) *I.e.*, a power existing prior to the disposition made by the successor (*Re Peyton, supra*, *per* MARTIN, B., at p. 305).

(*r*) *Ibid.*; *A.-G. v. Lorton (Lord)* (1861), 11 I. C. L. R. 429; see also *Re Hamilton's Estate* (1905), 39 I. J. T. 272.

(*s*) Succession Duty Act, 1853 (16 & 17 Vict. c. 51), s. 34.

(*t*) See p. 185, *ante*. If the death was before the 2nd August, 1894, it is immaterial whether the successor was competent to dispose or not; compare note (*y*), p. 287, *ante*.

(*a*) Succession Duty Act, 1853 (16 & 17 Vict. c. 51), s. 34.

400. No allowance is to be made in respect of any contingent incumbrance on the succession, but in the event of the incumbrance taking effect as an actual burden on the successor's interest, he is entitled to a return of a proportionate amount of the duty so paid by him in respect of the amount or value of the incumbrance when taking effect (*b*).

Nor is any allowance to be made in respect of any contingency upon the happening of which the property may pass to some other person, but, in the event of the property so passing, the successor is entitled to a return of so much of the duty paid by him as will reduce it to the amount which would have been payable by him if the duty had been assessed in respect of the actual duration or extent of his interest (*c*).

401. If a successor, or any person on his behalf, upon becoming entitled to any copyhold or other real property, is subject to any fines, casualties of superiority, compositions, reliefs, or charges incident to the tenure of the property, and due in respect of his succession, the amount of the fines etc. is to be allowed to him as a deduction from the assessable value of his interest in the property (*d*).

Where any successor, upon taking a succession, is bound to relinquish or be deprived of any other property, which he may have acquired by any title not conferring a succession on him, and which passes from him to some other person, such allowance as may be just is to be made to him, upon the computation of the assessable value of his succession, in respect of the value of such property (*e*).

402. Where the donee of a general power of appointment becomes chargeable with duty in respect of the property appointed

SECT. 5.
Value
Chargeable.

Contingent
incum-
brances.

Contingencies
on which the
property may
pass to
another
person.

Fines etc.
payable upon
admission to
copyholds etc.

Relinquished
property.

Exercise of
general
powers.

(*b*) Succession Duty Act, 1853 (16 & 17 Vict. c. 51), s. 35.

(*c*) *Ibid.*, s. 36, and see Table III. in the Schedule.

(*d*) *Ibid.*, s. 28.

(*e*) *Ibid.*, s. 38, amended by Customs and Inland Revenue Act, 1889 (52 & 53 Vict. c. 7), s. 10 (1). For examples of deductions allowable under the Succession Duty Act, 1853 (16 & 17 Vict. c. 51), s. 38, where the succession was conferred upon a death occurring prior to the 1st June, 1889, see *Re Micklethwait* (1855), 11 Exch. 452 (cesser of annuity under personal covenant, on successor becoming entitled to real property under another title); *Braybrooke (Lord) v. A.-G.* (1861), 9 H. L. Cas. 150 (cesser of annuity secured to remainderman, on a disentail before 1853, during joint lives of himself and the life tenant); *Inland Revenue Commissioners v. Harrison* (1874), L. R. 7 H. L. 1 (ditto, after 1853); *Le Marchant v. Inland Revenue Commissioners* (1875), L. R. 10 Exch. 292 (ditto, but income to remainderman, during joint lives, of capital sum raisable at life tenant's death); *A.-G. for Ireland v. Kenmare (Lord)* (1881), referred to in *Trevor's Taxes on Succession*, 4th ed., p. 202 (annuity to life tenant, and rents, subject thereto, to remainderman, during the joint lives); *A. G. v. Robertson*, [1893] 1 Q. B. 293, C. A. (enlargement of life interest into absolute interest, *per* Lord ESHER, M.R., at p. 301; but compare, *per* LINDLEY, L.J., at p. 301, *semble*, the succession is the increase of benefit); compare, *contra*, *Lord-Advocate v. Glasgow (Earl)* (1875), 12 Sc. L. R. 215 (cesser of annuity not secured on the property, which would have ceased although the annuitant had not succeeded, and might have continued although he had succeeded); *Re Cooper and Allen's Contract for Sale to Harlech* (1876), 4 Ch. D. 802 (cesser of life interest, where life tenant and remainderman had sold property as an interest in possession).

SECT. 5.
Value
Chargeable.

by him under the power, he is allowed to deduct from the duty so payable any duty he has already paid in respect of any limited interest taken by him in the property (*f*).

SECT. 6.—Collection of the Duty.

SUB-SECT. 1.—The Duty.

The duty is a stamp duty.

403. Succession duty is to be considered as a stamp duty, and the Commissioners are to provide proper stamps for denoting the rate per cent. (*g*).

Payment in kind.

Land may be transferred in satisfaction of succession duty (*h*), as in the case of estate duty (*i*).

Duty to be entered in a book and a stamped receipt to be given.

Whenever any payment of succession duty is made, it is to be entered in a book to be kept by the Commissioners for this purpose, and the officer appointed by the Commissioners is to give a receipt for it in such form as they think fit, and stamped with the proper stamp for denoting the rate of duty (*j*).

Certificates of payment of duty to be issued.

A certificate of the payment of duty, in such form as they may think fit (*k*), is to be delivered by the Commissioners to any person interested in any property affected by the duty, on applying for it for any reasonable purpose approved by the Commissioners (*l*).

SUB-SECT. 2.—When the Duty is payable.

Duty to be paid upon the successor becoming entitled in possession.

404. The duty is to be paid at the time when the successor, or any person in his right or on his behalf, becomes entitled in possession to his succession, or to the receipt of the income and profits of it, except that in the case of an annuity, or property made chargeable as an annuity, the duty is payable by instalments (*m*).

Duty on personalty.

Where personal property is comprised in a succession, the duty upon it is to be paid as if it were subject to certain provisions of the Legacy Duty Act, 1796 (*n*).

Duty on realty.

405. Where a succession to real property arises (*o*) on the death of a person dying after the 1st August, 1894, and the successor is

(*f*) Succession Duty Act, 1853 (16 & 17 Vict. c. 51), s. 33.

(*g*) *Ibid.*, s. 9.

(*h*) Finance (1909-10) Act, 1910 (10 Edw. 7, c. 8), s. 56 (1).

(*i*) See p. 212, *ante*.

(*j*) Succession Duty Act, 1853 (16 & 17 Vict. c. 51), s. 51.

(*k*) The Commissioners cannot be compelled to give a certificate in any particular form (*Howe (Earl) v. Lichfield (Earl)* (1866), L. R. 1 Eq. 641, *per* Lord ROMILLY, M.R., at p. 647; affirmed (1867), 2 Ch. App. 155).

(*l*) Succession Duty Act, 1853 (16 & 17 Vict. c. 51), s. 51.

(*m*) *Ibid.*, s. 20; Customs and Inland Revenue Act, 1888 (51 & 52 Vict. c. 8), s. 21 (2); Finance Act, 1894 (57 & 58 Vict. c. 30), s. 18 (1). In the case of objects which appear to the Treasury to be of national, scientific, historic, or artistic interest, the rule as to estate duty applies also to succession duty; see p. 214, *ante*.

(*n*) Succession Duty Act, 1853 (16 & 17 Vict. c. 51), s. 32, and see p. 289, and note (*d*) thereon, *ante*. As to a succession conferred upon persons in succession all chargeable with the same rate of duty, see *Cuddon v. Cuddon* (1876), 4 Ch. D. 583, 585.

(*o*) A succession arises when the death occurs (*A.-G. v. Robertson*, [1893] 1 Q. B. 293, C. A., *per* Lord ESHER, M.R., at p. 299); although the creation of

competent to dispose of the property, the duty is payable by eight equal yearly or sixteen half-yearly instalments, with interest at the rate of 3 per cent. per annum, and the first instalment is payable, and the interest begins to run, at the expiration of twelve months after the date on which the successor became entitled in possession to his succession or to the receipt of the income and profits of it (*p*).

Where, however, the successor is not so competent to dispose, the duty is to be paid (1) by eight equal half-yearly instalments, the first of which is to be paid at the expiration of twelve months next after the successor becomes entitled to the beneficial (*q*) enjoyment of the real property in respect of which the duty is payable, and the seven following instalments at intervals of six months each to be computed from that date (*r*); or (2), at the option of the successor (*s*), by two equal moieties, of which the first moiety (*t*) is to be paid by four equal yearly instalments, the first of the instalments to be paid at the expiration of twelve months next after the successor becomes entitled to the beneficial enjoyment of the real property in respect of which the duty is payable, and the three following instalments at yearly intervals to be computed from that date; and the second moiety is to be paid on the day for payment of the last instalment of the first moiety, or, if not so paid, is to be paid by four equal yearly instalments, with interest at the rate of 3 (*u*) per cent. per annum from such last-mentioned day on so much of the second moiety as for the time being remains unpaid, and the first of the instalments, with the interest, is to be paid at the expiration of twelve months from that day (*a*).

SECT. 6.
Collection
of the Duty.

Successor
(1) com-
petent to
dispose;
(2) not
competent
to dispose.

406. Where property becomes subject to a trust for any charitable or public purposes in such a manner as to confer a succession, the duty chargeable upon it is payable upon the property becoming subject to the trusts (*b*).

Charitable
or public
purposes.

Where duty is chargeable in respect of the proceeds of the Timber.

the succession on a life tenant's death is not postponed until the death (*Wolverton (Baron) v. A.-G.*, [1898] A. C. 535, *per* Lord HERSCHELL, at p. 547).

(*p*) Finance Act, 1894 (57 & 58 Vict. c. 30), ss. 6 (8), 18 (1). After the expiration of the period of twelve months, the provisions with respect to discount (see p. 295, *post*) do not apply (*ibid.*, s. 18 (1)).

(*q*) *I.e.*, not as a trustee (*A.-G. v. Sefton (Earl)* (1865), 11 H. L. Cas. 257, *per* Lord WENSLEYDALE, at p. 271, and *per* Lord CHELMSFORD, at p. 276); see also note (*p*), p. 265, *ante*.

(*r*) Succession Duty Act, 1853 (16 & 17 Vict. c. 51), s. 21. This rule applies also where the successor is competent to dispose of the property, if the succession arose on a death before the 2nd August, 1894.

(*s*) This option applies where the successor becomes entitled to his succession upon a death after the 30th June, 1888 (Customs and Inland Revenue Act, 1888 (51 & 52 Vict. c. 8), s. 22 (1)).

(*t*) In the event of the successor availing himself of the option, he is entitled to tender the duty in advance and receive discount thereon at such rate and subject to such regulations as the Treasury may prescribe (*ibid.*, sub-s. (2)); see p. 295, *post*.

(*u*) Finance Act, 1896 (59 & 60 Vict. c. 28), s. 18 (2). Before the 1st July, 1896, the rate of interest was 4 per cent. (Customs and Inland Revenue Act, 1888 (51 & 52 Vict. c. 8), s. 22 (1) (*b*)).

(*a*) Customs and Inland Revenue Act, 1888 (51 & 52 Vict. c. 8), s. 22 (1) (*b*).

(*b*) Succession Duty Act, 1853 (16 & 17 Vict. c. 51), s. 16. *Semble*, the whole of the duty is payable in a lump sum, and not by instalments.

SECT. 6. sale of timber, trees or wood, comprised in an estate in respect of which estate duty is payable on the death of a person dying after the 28th April, 1910, it is to be accounted for and paid as and when the monies are received (c). In other cases, it is to be accounted for and paid yearly (d).

Advowson or church patronage. If an advowson or church patronage is comprised in a succession, and it, or some right of presentation or some other interest in or out of it, is disposed of so as to become liable to duty, the duty becomes payable at the time of the disposal (e).

Prior charge, estate, or interest not created by successor himself. **407.** If there is any prior charge, estate, or interest, not created by the successor himself, upon or in the succession, by reason of which the successor is not presently (f) entitled to the full enjoyment or value of it, the duty in respect of the increased value accruing upon the determination of the charge etc., if not previously paid, compounded for, or commuted, is to be paid (g) at the time of the determination (h).

Where successor not in possession of whole succession. If a successor has not obtained the whole of his succession at the time when the duty becomes payable, he is chargeable only with duty on the value of the property or benefit from time to time obtained by him (i).

Where succession alienated. **408.** If any succession, before the successor becomes entitled to it, or to the income of it in possession, has become vested by alienation or by any title not conferring a new succession in any other person, then the duty payable in respect of the succession is to be paid at the same time that it would have been payable if no alienation had been made or derivative title created (j).

Where succession accelerated. Where the title (k) to any succession has been accelerated by the surrender or extinction of any prior interest, the duty on the succession is payable at the same time and in the same manner (l) that it would have been payable if no acceleration had taken place (m).

An advance is an acceleration. An advance to an expectant successor, under a power or otherwise, during the lifetime and with the consent of the tenant for life, amounts to an acceleration (n).

(c) Finance (1909-10) Act, 1910 (10 Edw. 7, c. 8), s. 61 (5).

(d) Succession Duty Act, 1853 (16 & 17 Vict. c. 51), s. 23.

(e) *Ibid.*, s. 24; see note (i), p. 281, *ante*.

(f) *I.e.*, at the date when the original succession is conferred (compare *A.-G. v. Robertson*, [1893] 1 Q. B. 293, 300, O. A.).

(g) *I.e.*, becomes due (*A.-G. v. Sefton (Earl)* (1865), 11 H. L. Cas. 257, *per* Lord CHELMSFORD, at p. 276).

(h) Succession Duty Act, 1853 (16 & 17 Vict. c. 51), s. 20. This section refers to a particular charge created (*Re Elwes* (1858), 3 H. & N. 719, *per* WATSON, B., at p. 729).

(i) Succession Duty Act, 1853 (16 & 17 Vict. c. 51), s. 37.

(j) *Ibid.*, s. 15.

(k) Possession may be accelerated although the title is not (*A.-G. v. Robertson*, *supra*, *per* LINDLEY, J., at p. 302).

(l) Compare *Northumberland (Duke) v. A.-G.*, [1905] A. C. 406, *per* Lord DAVEY, at p. 418.

(m) Succession Duty Act, 1853 (16 & 17 Vict. c. 51), s. 15.

(n) *Re Drury Lowe's Marriage Settlement, Ex parte Sitwell* (1888), 21 Q. B. D. 466; compare note (t), p. 277, *ante*.

There is no acceleration where tenant for life in possession and remainderman in tail disentail and re-settle, and an immediate annuity out of the property is secured to the remainderman (o).

SECT. 6.
Collection
of the Duty.

409. The Commissioners have power, in any special cases in which they may think it expedient so to do, to enlarge the time for payment of any duty (p).

Duty
deferred, or
received in
advance.

The Commissioners also have power to receive any duty tendered to them in advance, and to allow discount thereon at such rate as may from time to time be directed by the Treasury (q).

SUB-SECT. 3.—*By whom the Duty is payable.*

(1) *The Accountable Persons.*

410. Succession duty is a debt due to the Sovereign from the successor (r).

Crown
debtor.

Where the interest of any successor in any personal property has, before he has become entitled to it in possession, passed by reason of death to another successor or successors, and only one duty is payable in respect of the interest, the duty is due from the successor who first becomes entitled to the succession in possession (s).

Liability on
transmitted
successions
in personal
property.

The following persons, besides the successor, are personally accountable to the Sovereign for the duty payable in respect of any succession, but to the extent only of the property or funds actually received or disposed of by them respectively—that is to say, every trustee, guardian, committee, tutor or curator, or husband in whom respectively any property, or its management, subject to such duty, is vested, and every person in whom it is vested by alienation or other derivative title at the time of the succession becoming an interest in possession (t).

What
persons,
besides the
successor,
are account-
able for
the duty.

All such persons are authorised to compound or pay in advance or commute any duty (a).

Advance
payment.

In the event of the non-payment of the duty, every accountable person is a debtor to the Sovereign in the amount of the unpaid duty for which he is so accountable (b).

Liability of
accountable
persons.

Any liability of any successor or accountable person is not lessened or affected by the provisions conferring, in certain cases (c), relief upon purchasers for valuable consideration and mortgagees (d).

The term "trustee" includes an executor and administrator, and

Definition
of trustee.

(o) *Inland Revenue Commissioners v. Harrison* (1874), L. R. 7 H. L. 1; see, also, *A.-G. v. Robertson*, [1893] 1 Q. B. 293, C. A., *per* LORES, L.J., at p. 303.

(p) Succession Duty Act, 1853 (16 & 17 Vict. c. 51), s. 39.

(q) *Ibid.*, s. 40. The rate is 3 per cent. per annum.

(r) *Ibid.*, s. 42.

(s) *Ibid.*, s. 14.

(t) *Ibid.*, s. 44.

(a) *Ibid.*

(b) *Ibid.*

(c) See p. 301, *post*.

(d) Customs and Inland Revenue Act, 1889 (52 & 53 Vict. c. 7), s. 12 (3).

SECT. 6.

Collection of the Duty.

Executor who satisfies covenant debt.

Extrinsic circumstances of which purchaser had no notice.

Legacies out of real estate.

any person having or taking on himself the administration of property affected by an express or implied trust (e).

Where an executor, in pursuance of a covenant, satisfies a covenant debt, he is not, in his capacity as such executor, accountable to the Sovereign for any succession duty which may be payable in connection with the death of the covenantor in respect thereof (f).

No *bonâ fide* purchaser of property for valuable consideration under a title not appearing to confer a succession is subject to any succession duty with which the property may be chargeable by reason of any extrinsic circumstances of which he had not had notice at the time of such purchase (g).

The succession duty in respect of a legacy charged upon or made payable out of any real estate, or out of any moneys to arise by the sale of any real estate, is to be accounted for and paid by the trustee to whom the real estate, out of which the legacy is paid or satisfied, is devised, or, if there is no trustee, by the person entitled to the real estate (h), or by the person empowered or required to pay or satisfy the legacy (i).

Notice of succession to be given, and a return of property to be made.

411. Persons accountable for the payment of duty in respect of any succession, or some of them, are to give notice to the Commissioners, or their officers, of their liability to the duty, and are, at the same time, to deliver to the Commissioners etc. a full and true account of the property for the duty whereon they are respectively accountable—(1) in the case of personal property, at the time of the first payment, delivery, retainer, satisfaction, or other discharge of it, or any part of it, to or for the successor or any person in his right; and (2) in the case of real property, when any duty in respect of it first becomes payable (k).

The account is to disclose the value of the property described in it, and of the deductions claimed, together with the names of the successor and predecessor, and their relation to each other, and all such other particulars as are necessary or proper for enabling the Commissioners fully and correctly to ascertain the duties due (l).

Account to be verified by production of books and documents.

Every accountable person who delivers any account or estimate of the property comprised in any succession is, if required by the Commissioners, to produce before them such books and documents

(e) Succession Duty Act, 1853 (16 & 17 Vict. c. 51), s. 1.

(f) In such a case any duty falls to be accounted for by the covenantee, e.g., the trustee of a settlement, out of the fund itself, even though the covenant was to pay a definite sum "free from all deductions whatsoever" (*Re Higgins, Day v. Turnell* (1885), 31 Ch. D. 142, 146, C. A.).

(g) Succession Duty Act, 1853 (16 & 17 Vict. c. 51), s. 52.

(h) *A.-G. v. Jackson* (1831), 2 Cr. & J. 101 (rentcharge); *Stow v. Davenport* (1833), 5 B. & Ad. 359 (ditto, free of duty).

(i) Compare Legacy Duty Act, 1805 (45 Geo. 3, c. 28), ss. 5, 7.

(k) Succession Duty Act, 1853 (16 & 17 Vict. c. 51), s. 45. Trustees' costs of preparing and rendering the account of the succession of a tenant for life of settled real estate are payable by the tenant for life (*Cowley (Earl) v. Wellesley* (1866), 35 Beav. 635, 642).

(l) Succession Duty Act, 1853 (16 & 17 Vict. c. 51), s. 45.

in his custody or control, so far as the same relate to such account or estimate, as may be capable of affording any necessary information for the purpose of ascertaining the property and the duty payable upon it (*m*). The Commissioners may also, without payment of any fee, inspect and take copies of any public book (*m*). All such information, however, is to be deemed confidential, and the Commissioners are not to disclose it, or the contents of any document or book, to any person, except for the purpose of the Succession Duty Act, 1853 (*m*).

SECT. 6.
**Collection
of the Duty.**

If the Commissioners are satisfied with the account or estimate as originally delivered, or with any amendments that may be made in it upon their requisition, they may assess the duty on the footing of the account or estimate (*n*).

Duty to be
assessed by
the Commis-
sioners.

The Commissioners are also, at the request of any successor, or of any person claiming in his right, to accept or cause to be made so many separate assessments of the duty payable in respect of the interest of the successor in any separate properties, or in defined portions of the same property, as shall be reasonably required (*o*).

Separate
assessments
may be made
for separate
properties.

If, however, the Commissioners are dissatisfied with the account or estimate as delivered, they are empowered, subject to appeal, to assess the duty on the footing of the account and upon such estimate as they may place thereon (*p*), or to cause an account or estimate to be taken by any person or persons to be appointed by themselves for that purpose, and to assess the duty on the footing of such last-mentioned account or estimate, subject to appeal (*q*).

Procedure
by Commis-
sioners where
account
unsatis-
factory.

If the duty so assessed exceeds the duty assessable according to the return which has been made to the Commissioners, and with which they have been dissatisfied, and if there is no appeal against the assessment, the Commissioners may, at their discretion, having regard to the merits of each case, charge the whole or any part of the expenses incident to the taking of the last-mentioned account or estimate on the interest of the successor in respect of which the duty is due, in increase of the duty, and recover such duty so increased forthwith accordingly (*q*).

Commis-
sioners' expenses in
taking fresh
account may
be charged
upon the
interest of
the successor.

(2) *Limitation of Personal Liability.*

412. The limitation of personal liability to duty, under a testamentary document admitted to probate, or under letters of administration, after a specified lapse of time from the date of the settlement of the account in respect of which duty is payable, which, in certain circumstances, obtains in the case of legacy duty (*r*), obtains also in the case of succession duty (*s*).

Relief after
lapse of
time from
settlement
of account,
(1) where
representa-
tion
obtained;

(*m*) 16 & 17 Vict. c. 51, s. 49.

(*n*) *Ibid.*, s. 45.

(*o*) *Ibid.*, s. 43.

(*p*) Customs and Inland Revenue Act, 1889 (52 & 53 Vict. c. 7), s. 10 (3).

(*q*) Succession Duty Act, 1853 (16 & 17 Vict. c. 51), s. 45.

(*r*) See p. 256, *ante*.

(*s*) Customs and Inland Revenue Act, 1889 (52 & 53 Vict. c. 7), s. 14.

SECT. 6.
Collection
of the Duty.

(2) under
a document
not admitted
to probate.

Any person, moreover, may cause an attested copy (a) of any document, other than a testamentary document admitted to probate, which creates a liability for payment of any succession duty, to be deposited with the Commissioners at their principal office in London, Edinburgh, or Dublin, as the case may require (b), and thereafter no person is liable for payment of any succession duty under the document after the expiration of six years from the date of notice (c), in writing, to the Commissioners, in such form as they prescribe, of the fact which gives rise to an immediate claim to such duty (d).

Certificate of
discharge
prior to
distribution
of fund.

A trustee etc. (e) before distribution of a fund can, in certain circumstances, as already stated in the case of legacy duty (e), obtain a certificate discharging him from his liability to any duty in respect of the fund (f).

SUB-SECT. 4.—Out of what Property the Duty is payable.

(1) *The Property.*

Personal
property.

413. The duty is a first charge on the interest of the successor in the personal property in respect of which the duty is assessed while the same remains in his ownership or control, or in that of any trustee for him, or of his guardian or committee or tutor or curator, or of the husband of any wife who is the successor (g).

Real property.

Where a succession to real property arises on the death of a person dying after the 1st August, 1894, and the successor is competent to dispose of it, the succession duty payable in respect of his succession is a charge on the property itself (h).

If the successor, however, is not competent to dispose of the property, the duty is a first charge on his interest, and on the

(a) The copy is exempt from stamp duty (Customs and Inland Revenue Act, 1889 (52 & 53 Vict. c. 7), s. 13 (1)).

(b) The copy is to be received at that office, and the officer of the Commissioners receiving it is, on request of the person making the deposit, and either by indorsement on the original document or otherwise, to give a receipt in writing under his hand for the copy (*ibid.*, s. 13 (2)). The costs of depositing the copy and of obtaining the receipt are costs duly incurred by any person in the execution of his duties under the document (*ibid.*, s. 13 (4)).

(c) *Ibid.*, s. 15. It is to be delivered or sent in duplicate, and an acknowledgment of its receipt by or on behalf of the Commissioners, upon the duplicate, is to be forthwith returned to the person by whom it was delivered or sent (*ibid.*).

(d) *Ibid.*, s. 13 (3).

(e) See p. 256, *ante*.

(f) Customs and Inland Revenue Act, 1880 (43 Vict. c. 14), s. 12.

(g) Succession Duty Act, 1853 (16 & 17 Vict. c. 51), s. 42. In the case of a legacy charged upon real estate and given free of duty, the duty is to be paid out of the real estate, and not out of the testator's personal estate (*Noel v. Henley* (Lord) (1819), 7 Price, 241). And in the case of a jointure given free of duty, the succession duty is likewise payable out of the real estate upon which the jointure is charged (*Floyer v. Bankes* (1863), 3 De G. J. & Sm. 306, 316).

(h) Finance Act, 1894 (57 & 58 Vict. c. 30), s. 18 (1); see also *Re Hole, Davies v. Davies* (1905), 119 L. T. Jo. 222.

interest of all persons (*i*) claiming in his right, in all the real property in respect of which the duty is assessed (*k*).

The duty, in the case of real property comprised in any succession, has priority over all charges and interests created by the successor, but does not charge or affect any other of his real property (*l*).

If the successor has availed himself of the option of paying the duty in moieties, and has died before all the duty, with the interest (if any), has been fully paid, the unpaid part of the duty, with the interest (if any), is a debt due to the Sovereign, and is payable out of the successor's estate, either in advance, or at the same time or times, and in the same manner, as the amount unpaid would have been payable by him if he had not died (*m*).

414. The succession duty in respect of any legacy charged upon or made payable out of any real estate, or out of any moneys to arise from the sale of any real estate, is to be retained by the person paying or satisfying the legacy as if it were a legacy out of personal estate (*n*).

The provisions limiting the liability for duty, in certain circumstances (*o*), of real property, or of any estate or interest therein, as against a purchaser for valuable consideration or a mortgagee, do not lessen or affect any liability of any successor or accountable person, other than the purchaser or mortgagee, to payment of duty,

SECT. 6.
Collection
of the Duty.

Where
successor dies
before all
duty paid.

Legacies
out of real
estate.

Liability of
accountable
person other
than a pur-
chaser or
mortgagee.

(*i*) See *A.-G. v. Mauder* (1896), 44 W. R. 413 (the purchaser of real estate subject to a lease is not a successor, but is liable for what the vendor would have been liable for, and the duty must accordingly be calculated on the basis of the vendor's life). As between vendor and purchaser, and apart from express stipulation, the purchaser of a reversion must pay the succession duty on the death of the life tenant (*Cooper v. Trevelly* (1860), 28 Ben. 191), and so must the purchaser of a *micro spes successionis*, if and when it ripens into an interest in possession (*Re Langham's Contract* (1890), 39 W. R. 156, C. A.). Where a purchaser buys an estate in possession, even from tenant for life and remainderman, he is entitled to have it cleared from succession duty (*Re Kidd and Gibbon's Contract*, [1893] 1 Ch. 695, per KEKEWICH, J., at p. 698), and if the duty is not commuted, and the purchaser pays at the life tenant's death, *semble*, he has a remedy against the vendor (*Re Cooper and Allen's Contract for Sale to Harlech* (1876), 4 Ch. D. 802, per JESSEL, M.R., at p. 827). If the estate in possession is subject to a lease, on the termination of which further duty is payable, the purchaser is equally entitled to have the estate cleared from the duty (*Re Kidd and Gibbon's Contract*, *supra*), and he is not bound to accept an indemnity instead of the duty being commuted (*Re Weston and Thomas's Contract*, [1907] 1 Ch. 244; see also *Re Roche's Estate* (1889), 23 L. R. Ir. 230 (unpaid duty cannot be claimed out of a fund representing a middle incumbrance, where the property has been sold, the first and last incumbrances paid off, and the balance of the proceeds paid to the owner, who has since died insolvent).

(*k*) Succession Duty Act, 1853 (16 & 17 Vict. c. 51), s. 42. And this rule obtains also where the successor is competent to dispose of the property, if the succession arose upon a death before the 2nd August, 1891.

(*l*) *Ibid.* The Land Transfer Act, 1897 (60 & 61 Vict. c. 65), does not affect any duty payable in respect of real estate (*ibid.*, s. 5).

(*m*) Customs and Inland Revenue Act, 1888 (51 & 52 Vict. c. 8), s. 22 (3) (b).

(*n*) Legacy Duty Act, 1805 (45 Geo. 3, c. 28), ss. 5, 7; see p. 256, *ante*.

(*o*) See p. 301, *post*.

SECT. 6. whether out of money received on any sale or mortgage or otherwise (*p*).
Collection of the Duty. The duty (if any) unpaid at the expiration of the period of six years, or of twelve years, as the case may be, referred to in such provisions, becomes charged substitutively upon any other estate or interest comprised in the succession of the successor remaining vested in him, or in any person in his right or on his behalf, other than the purchaser or mortgagee, and in case of a mortgage, upon the equity of redemption (*q*).

Shifting of charge, where (1) settled real property, subject to power of sale etc. ;

415. Where any settled real property comprised in a succession is subject to any power of sale, exchange, or partition, exercisable with the consent of the successor, or by the successor with the consent of another person, he is not to be disqualified by the charge of duty on his succession from effectually authorising by his consent the exercise of the power, or exercising any power with proper consent, as the case may be, and in such case the duty is to be charged substitutively upon the successor's interest in all real property acquired in substitution for the real property before comprised in the succession, and in the meantime upon his interest also in all moneys (*r*) arising from the exercise of any such power, and in all investments of those moneys (*s*).

(2) separate assessments made for separate properties ;

416. Where the Commissioners, at the request of any successor, or of any person claiming in his right, accept or cause to be made separate assessments of the duty payable in respect of the successor's interest in any separate properties, or in defined portions of the same property, the respective properties are chargeable only with the amount of duty separately assessed in respect of them (*t*).

(3) Commissioners certify that unpaid instalments are charged upon separate parts of the property.

The Commissioners are empowered, by their certificates, to be issued in such form as they think fit, from time to time to declare that any duties already assessed, whether collectively or distributively, in respect of any succession, shall thenceforth be charged, as to any unpaid instalments, according to any further distribution thereof, upon separate parts only of the property in respect of which such assessment has been made, in which case the charge of such duties shall be thenceforth limited according to such further distribution (*a*).

(2) *Powers to raise the Duty.*

Trusts for charitable or public purposes.

417. Where property is chargeable with duty on becoming subject to a trust for any charitable or public purposes, the trustee of any such property may raise the amount of any duty due in respect of it, with all reasonable expenses, upon the security of the

(*p*) Customs and Inland Revenue Act, 1889 (52 & 53 Vict. c. 7), s. 12 (3).

(*q*) *Ibid.*, s. 12 (2).

(*r*) *Dugdale v. Meadows* (1870), 6 Ch. App. 501 ; see also *Re Warner's Settled Estates, Warner to Steel* (1881), 17 Ch. D. 711 (a sale under the Settled Estates Act, 1877 (40 & 41 Vict. c. 18), s. 22), *per JESSEL, M.R.*, at p. 713.

(*s*) Succession Duty Act, 1853 (16 & 17 Vict. c. 51), s. 42.

(*t*) *Ibid.*, s. 43.

(*a*) *Ibid.*

property, at interest, with power for him to give effectual discharges for the money so raised (b).

Any body corporate, company, or society which becomes entitled as successors to any real property, or any trustee of it, may raise the amount of any duty due in respect of their succession upon the security thereof, at interest, with power for them to give the like effectual discharges (c).

All persons, beside the successor, made accountable for the duty payable in respect of any succession, are authorised to retain out of the property subject to such duty the amount of it, or to raise the amount, and the expenses incident thereto, at interest, on the security of the property, with power to give effectual discharges for the same, and the security is to have priority over any charge or incumbrance created by the successor (d).

Whenever a suit is pending in any court for the administration of any property chargeable with succession duty, the court is to provide, out of any property which may be in its possession and control, for the payment of duty to the Commissioners (e).

SECT. 6.
Collection
of the Duty.

Real property taken by a corporation etc.

Power to accountable persons to raise the duty.

Court to provide for duty.

(3) Limitation of the Charge of Duty.

418. Notwithstanding any provisions contained in the Succession Duty Act, 1853 (f), real property, or any estate or interest in real property, does not, as against a purchaser for valuable consideration, including the consideration of marriage (g), or a mortgagee, remain charged with or liable to payment of any sum for succession duty after the expiration of (1) six years from the date of notice (h) to the Commissioners of the fact that the successor, or any person in his right or on his behalf, has become entitled in possession to his succession or to the receipt of the income and profits of it, or from the date of the first payment by the successor or person of any instalment or part of the duty in case the successor has not availed himself of the option of paying the duty in moieties, or after two years from the time for payment by the successor of the last instalment or part of the duty, if the successor has availed himself of the option, or, in the absence of any such notice or payment, after (2) twelve years from the happening of the event giving rise to an immediate claim to the duty (i).

A purchaser or mortgagee is not, for the purpose of obtaining the exemption conferred by the above provisions, bound to see that

Purchasers for valuable consideration and mortgagees of real property.

(b) Succession Duty Act, 1853 (16 & 17 Vict. c. 51), s. 16.

(c) *Ibid.*, s. 27.

(d) *Ibid.*, s. 44.

(e) *Ibid.*, s. 53; Supreme Court Fund Rules, 1905, rr. 20, 52 (b), 66 (duties generally); County Court Rules, 1903, Ord. 2, r. 14 (legacy duty, succession duty, and estate duty). As to the desirability of commuting duty instead of leaving a fund in court to await the claim, see *Bayley v. Tindal* (1853), 2 W. R. 129. As to the extent of the court's function, see *Ewing's Trustees v. Mathieson* (1906), 44 Sc. L. R. 12, cited, p. 254, *ante*.

(f) 16 & 17 Vict. c. 51, *e.g.*, s. 42.

(g) *Re Donelan's Estate*, [1902] 1 I. R. 109, C. A.; see also note (n), p. 220, *ante*.

(h) See p. 298, *ante*.

(i) Customs and Inland Revenue Act, 1889 (52 & 53 Vict. c. 7), s. 12 (1).

SECT. 6.
Collection
of the Duty.

Certificate of
payment of
duty to
exonerate a
purchaser.

the duty is discharged out of the money or other consideration paid or given as the consideration for the sale or mortgage (*k*).

419. Every receipt and certificate purporting to be in discharge of the whole duty payable for the time being in respect of any succession, or any part of it, exonerates a *bond fide* purchaser for valuable consideration and without notice from the duty, notwithstanding any suppression or misstatement in the account upon the footing of which the duty may have been assessed, or any insufficiency of the assessment (*l*).

SUB-SECT. 5.—Remission of Duty and Interest.

Power to
remit.

420. The Commissioners and the Treasury respectively have, as already stated (*m*), certain powers to remit succession duty and interest thereon.

SUB-SECT. 6.—Commutation of Duty and Composition of Claims.

Commuta-
tions of
future claims
upon applica-
tion of
(1) the
expectant
successor ;

421. Upon application made by any person entitled to a succession in expectancy, the Commissioners may commute the duty presumptively payable in respect of the succession for a certain sum to be presently paid, and for assessing the amount so payable they are to cause a present value to be set upon the presumptive duty, regard being had to the contingencies affecting the liability to the duty, and the interest of money involved in the calculation being reckoned at the rate of 3 per cent. (*n*), and upon receipt of the certain sum they are to give discharges to the successor accordingly (*o*).

(2) a trustee
(or other
accountable
person) of
personal
property.

The Commissioners have a power in certain circumstances, as already stated in the case of legacy duty (*p*), to commute the duty presumptively payable in respect of personal property comprised in a succession, upon the application of the trustee or other person who would be accountable for the duty in respect of the interest in expectancy if it were in possession at the time of the application, and they are to give discharges for the duty upon receipt of the certain sum to be presently paid (*q*).

Commuta-
tion of the
duty payable
on a
successor's
interest in
the proceeds
of the sale
of timber.

Where timber, trees, or wood, not being coppice of under-wood, are comprised in a succession (whereon the duty is not payable upon principal value (*r*)), and the successor is desirous of commuting the duty payable upon his interest in the net moneys to be from time to time received from any sales, and delivers to the Commissioners an estimate of the net moneys obtainable by him from the sale of the timber etc. as may, in a prudent course of the management of the property, be felled by him during his life,

(*k*) Customs and Inland Revenue Act, 1889 (52 & 53 Vict. c. 7), s. 12 (3).

(*l*) Succession Duty Act, 1853 (16 & 17 Vict. c. 51), s. 52.

(*m*) See p. 182, *ante*.

(*n*) *I.e.*, the rate of discount for the time being allowed by the Commissioners for duties paid in advance (Succession Duty Act, 1853 (16 & 17 Vict. c. 51), s. 41).

(*o*) *Ibid*.

(*p*) See p. 258, *ante*.

(*q*) Customs and Inland Revenue Act, 1880 (43 Vict. c. 14), s. 11.

(*r*) See p. 298, *ante*.

the Commissioners, if satisfied with the estimate, are to accept it and assess the duty accordingly (s).

Where, in the opinion of the Commissioners, any succession is of such a nature, or so disposed or circumstanced, that its value is not fairly ascertainable under any of the directions in the Succession Duty Act, 1853 (t), or where, from the complication of circumstances affecting the value of a succession, or affecting the assessment or recovery of the duty upon it, the Commissioners think it expedient, they may compound the duty payable on the succession upon such terms as they think fit, and give discharges to the successor upon payment of duty according to such composition (u). This power is distinct from the Commissioners' power, already referred to (a), to compound for death duties generally.

SECT. 6.
Collection of the Duty.

Duty may be compounded where value is not easily ascertainable.

SECT. 7.—Interest, Penalties, and Proceedings.

SUB-SECT. 1.—Interest.

422. The provision with regard to the payment of interest on estate duty, already stated (b), applies also to succession duty (c). Rate of interest.

SUB-SECT. 2.—Penalties.

423. If any person required, as before stated (d), to give notice of a succession or to deliver an account, wilfully neglects to do so at the prescribed period, he is liable to pay to the Sovereign a sum equal to 10 per cent. upon the amount of duty payable by him, or in the case of a succession chargeable with a higher rate of duty than 1 per cent., upon such less sum as the duty, if assessable at the rate of 1 per cent. upon the value of the succession, would amount to, and a like penalty for every month after the first month during which the neglect continues (e). And if any person liable to pay any duty, after the duty has been finally ascertained, wilfully neglects to do so within twenty-one days, he is liable to pay etc. a sum equal to 10 per cent. upon the amount of duty so unpaid, or upon such less sum etc. as above (e). Penalty for not giving notice of succession.

Acceptance or recovery by the Commissioners of arrears of duty, with interest, is an absolute waiver of any penalties which may have been incurred (f). Waiver of penalties.

SUB-SECT. 3.—Proceedings.

424. Any accountable party resident in England (g) dissatisfied with the assessment of the Commissioners may appeal against it Power to appeal.

(a) Succession Duty Act, 1853 (16 & 17 Vict. c. 51), s. 23.

(t) 16 & 17 Vict. c. 51.

(u) *Ibid.*, s. 33.

(a) See p. 181, *ante*.

(b) See p. 225, *ante*.

(c) Finance Act, 1896 (59 & 60 Vict. c. 28), s. 18 (2). If a trustee mispays moneys comprised in a succession through mistake, and omits to pay the duty thereon, his estate is not liable to the successor, who pays the duty, for interest on the duty, although it might be to the Crown (*Brown v. Smith* (1875), 46 L. J. (OH.) 866).

(d) See p. 296, *ante*.

(e) Succession Duty Act, 1853 (16 & 17 Vict. c. 51), s. 46.

(f) Inland Revenue Act, 1868 (31 & 32 Vict. c. 124), s. 9.

(g) If the appellant is resident in Scotland or Ireland, the petition is to the

SECT. 7.
Interest,
Penalties,
and Pro-
ceedings.

by petition to the King's Bench Division, provided that he gives notice in writing to the Commissioners, within twenty-one days after the date of the assessment, of his intention to appeal, and furnishes a statement of the grounds of appeal within the further period of thirty days. The court, or any judge thereof sitting in chambers, has jurisdiction to hear and determine the matter of the appeal, and the costs, with power to direct, for the purposes of the appeal, any inquiry, valuation, or report, to be made by any officer of the court or other person, as the court or judge may think fit (*h*). If the Commissioners have caused an account and estimate to be taken by any person or persons appointed by them for that purpose, and have assessed the duty on the footing of it, the payment of the expenses is to be in the discretion of the court (*i*).

Appeal may
be made to
county court
if the sum
in dispute
does not
exceed £50.

If the sum in dispute in respect of duty on the assessment does not exceed £50, the accountable party may, upon due notice and delivery of a statement of the grounds on which he proceeds, appeal to the judge of a county court (*j*) for the district, county, or division in which the appellant resides or the property is situate, and every such judge has jurisdiction to hear and determine the matter of the appeal with the like power and authority as are given to a judge of the King's Bench Division (*k*).

Commis-
sioners may
sue out a
writ of
summons.

If any person accountable for or chargeable with succession duty, and required by the Commissioners to deliver an account, makes default in doing so, or if the Commissioners make an assessment of duty, and the duty is not paid, and there is no notice of appeal against the assessment, or of disputing the liability to assessment, the Commissioners may, as in the case of legacy duty (*l*), sue out of the King's Bench Division a writ of summons for an account or payment (*m*).

SECT. 8.—Repayment of Overpaid Duty.

Duty paid
by mistake
or not
properly
chargeable.

425. Where it is proved to the satisfaction of the Commissioners that any duty paid on account of any succession, not being due from the person paying it, was paid by mistake, or in respect of property which the successor has been unable to recover, or from or of which he has been evicted or deprived by any superior title, or that, for any other reason, the duty ought to be refunded, the Commissioners are thereupon to refund it to the person entitled to it (*n*).

Scottish or Irish court, as the case may be (Succession Duty Act, 1853 (16 & 17 Vict. c. 51), s. 50).

(*h*) Succession Duty Act, 1853 (16 & 17 Vict. c. 51), s. 50. The petitioner has the right to begin (*Re De Lancry's Succession* (1869), L. R. 4 Exch. 327, n.).

(*i*) *Ibid.*, s. 45.

(*j*) See title COUNTY COURTS, Vol. VIII., p. 687.

(*k*) Succession Duty Act, 1853 (16 & 17 Vict. c. 51), s. 50.

(*l*) See p. 261, *ante*.

(*m*) Crown Suits etc. Act, 1865 (28 & 29 Vict. c. 104), ss. 55, 56, 58, 63, 64. See title CROWN PRACTICE, Vol. X., p. 19. The Crown has the right to begin (*Re Greenwood* (1869), L. R. 4 Exch. 327).

(*n*) Succession Duty Act, 1853 (16 & 17 Vict. c. 51), s. 37. As to proceedings by petition of right under the Petitions of Right Act, 1860 (23 & 24 Vict. c. 34), if the Commissioners decline to repay, see title CROWN PRACTICE, Vol. X., p. 26.

A person who has paid duty in advance to the Commissioners is not, by reason of the payment, to be prejudiced in his right to be repaid any duty to which he may become entitled (o).

SECT. 8.
Repayment
of Overpaid
Duty.

Part VI.—Probate Duty.

SECT. 1.—*The Imposition of the Duty.*

426. Probate duty (*p*) is chargeable, save as expressly provided (*q*), in respect of the estate and effects of any deceased person for or in respect of which probate or letters of administration in this country (*r*) is or are, or ought (*s*) to be, granted (*t*). The extent
of the charge.

(o) Succession Duty Act, 1853 (16 & 17 Vict. c. 51), s. 40.

(p) Probate Duty Act, 1801 (41 Geo. 3, c. 86), s. 3; Probate and Legacy Duties Act, 1808 (48 Geo. 3, c. 149), ss. 35–37; Stamp Act, 1815 (55 Geo. 3, c. 184), ss. 2, 37, 38, 40–43, 45–51, Sched., Part III.; Railway Passenger Duty Act, 1812 (5 & 6 Vict. c. 79), s. 23; Court of Probate Act, 1857 (20 & 21 Vict. c. 77), s. 92; Probate Duty Act, 1859 (22 & 23 Vict. c. 36), s. 1; Indian Securities Act, 1860 (23 & 24 Vict. c. 5), s. 1; Probate Duty Act, 1860 (23 & 24 Vict. c. 15), ss. 4, 5; Probate Duty Act, 1861 (24 & 25 Vict. c. 92), s. 3; Revenue Act, 1862 (25 & 26 Vict. c. 22), s. 39; Revenue (No. 2) Act, 1864 (27 & 28 Vict. c. 50), ss. 4, 5; Crown Suits etc. Act, 1865 (28 & 29 Vict. c. 104), Part V.; Inland Revenue Act, 1868 (31 & 32 Vict. c. 124), s. 7; Customs and Inland Revenue Act, 1880 (43 Vict. c. 14), ss. 9, 10, Sched.; Customs and Inland Revenue Act, 1881 (44 & 45 Vict. c. 12), ss. 26–33, 35, 37, 40; Revenue Act, 1884 (47 & 48 Vict. c. 62), s. 11; Revenue Act, 1889 (52 & 53 Vict. c. 42), s. 19; Finance Act, 1894 (57 & 58 Vict. c. 30), ss. 1, 21 (2), 24, Sched. I. (1); Finance Act, 1896 (59 & 60 Vict. c. 28), s. 18 (1), (2).

The following further statutes deal with probate duty in Ireland:—Probate Duty (Ireland) Act, 1816 (56 Geo. 3, c. 56), ss. 115–117, 119–131; Stamp Duties (Ireland) Act, 1842 (5 & 6 Vict. c. 82), ss. 35, 36.

The following further statutes deal with inventory duty (which corresponds to probate duty) in Scotland:—Probate and Legacy Duties Act, 1808 (48 Geo. 3, c. 149), ss. 38–42; Stamp Act, 1853 (16 & 17 Vict. c. 59), s. 8; Probate Duty Act, 1860 (23 & 24 Vict. c. 15), s. 6; Heritable Securities (Scotland) Act, 1860 (23 & 24 Vict. c. 80), ss. 1–8.

(q) See p. 311, *post*.

(r) The production of a British grant of representation is necessary (except as stated at pp. 306, 311, *post*), to establish the right to recover or receive any part of the personal estate and effects of any deceased person situated in the United Kingdom (Revenue Act, 1884 (47 & 48 Vict. c. 62), s. 11). Probate duty must be paid to cover the sum to be recovered, where the title of the personal representative is put in issue (*A.-G. v. Brunning* (1860), 8 H. L. Cas. 243, *per* Lord WENSLEYDALE, at p. 262; following *Hunt v. Stevens* (1810), 3 Taunt. 113). See also *Thynne v. Protheroe* (1814), 2 M. & S. 553; *Rogers v. James* (1816), 2 Marsh. 425; *Harper v. Ravenhill* (1829), Taml. 144, 145; *Carr v. Roberts* (1831), 2 B. & Ad. 905; *Christian v. Devereux* (1841), 12 Sim. 264; *Jones v. Howells*, *Jones v. Goddall* (1843), 2 Hare, 342; *Howard v. Prince* (1847), 10 Beav. 312; *In the goods of Bell* (1871), 25 L. T. 163; *Cormack v. Barragry* (1876), 10 L. R. C. L. 147. The validity of a probate is, however, not affected by the insufficiency of the duty (*A.-G. v. Smith and Cocks*, [1892] 2 Q. B. 289, *per* HAWKINS, J., at p. 296).

(s) *New York Breweries Co. v. A.-G.*, [1899] A. C. 62; compare, also, *In the Goods of Gunn* (1884), 9 P. D. 242, *per* HANNEN, P., at p. 244 (where probate duty is payable, it follows that probate must be granted).

(t) Customs and Inland Revenue Act, 1881 (44 & 45 Vict. c. 12), s. 27.

SECT. 1.
The
Imposition
of the Duty.

The death of the testator or intestate must, however, be before the 2nd August, 1894 (*u*), although the property may accrue to his estate on a death on or after that date.

SECT. 2.—The Subject-matter of the Charge.

SUB-SECT. 1.—“Estate and Effects.”

What is chargeable with probate duty.

427. All personal estate (*a*) which the personal representative recovers by virtue of the grant, whether legal or equitable assets, must be considered part of the deceased's estate and effects, and subject to probate duty accordingly (*b*); provided that the representative's office is prescribed, and the distribution of the estate regulated, by the general law for the administration of assets (*c*), and that the estate was at the time of the death within the jurisdiction of the court by which the grant was made (*d*).

Mortgage debts.

428. Mortgage debts are chargeable with the duty, even if received by the personal representative by the aid of a court of equity (*e*), or where secured on the deceased's own real estate (*f*).

Leaseholds for years.

Leasehold estates for years, whether absolute or determinable on lives, are also chargeable with the duty (*g*).

Personal property appointed by will under a general power.

The duty is payable in respect of all the personal estate which the deceased disposes of by will, under any authority enabling him to dispose of it as he thinks fit (*h*).

(*u*) Finance Act, 1894 (57 & 58 Vict. c. 30), ss. 1, 21 (2), 24, Sched. I. (1); compare *Winans v. A.-G.*, [1910] A. C. 27, 30, 37, 43, 47.

(*a*) *I.e.*, which is of that nature at the time of the death, or which by subsequent events becomes so (*Lord v. Colvin* (1867), L. R. 3 Eq. 737, *per* MALINS, V.-C., at p. 741).

(*b*) *A.-G. v. Brunning* (1860), 8 II. L. Cas. 243, *per* LORD CAMPBELL, L.C., at p. 256. Every item of property, however, which the executor has a right to recover *virtute officii* is legal assets (*ibid.*, *per* LORD CHILMSFORD, at p. 265; adopting *Cook v. Gregson* (1856), 3 Drew. 547, *per* KINDERSLEY, V.-C., at p. 550). In considering, for this purpose, whether assets are legal or equitable, the question is not whether the money is receivable through the agency of a court of equity or a court of law, but whether it is money which the personal representative is entitled to recover independently of any direction of the testator (*A.-G. v. Brunning*, *supra*, *per* LORD CRANWORTH, at p. 258).

(*c*) Compare *Herbert v. Hungerford* (1886), 20 L. R. Ir. 100, C. A., *per* FITZGIBBON, L.J., at p. 109. The duty, therefore, does not attach in respect of compensation moneys under the Prevention of Crime (Ireland) Act, 1882 (45 & 46 Vict. c. 25), s. 19 (*Herbert v. Hungerford*, *supra*); under the Grand Jury (Ireland) Act, 1836 (6 & 7 Will. 4, c. 116), s. 106 (*Re Martin* (1889), 23 L. R. Ir. 413); under the Fatal Accidents Act, 1846 (9 & 10 Vict. c. 93), s. 2 (*Lord Campbell's Act*) (*Bulmer v. Bulmer* (1883), 25 Ch. D. 409; *A.-G. v. Brunning*, *supra*, *per* LORD CAMPBELL, L.C., at p. 256); see also p. 311, *post*.

(*d*) *A.-G. v. Bouwens* (1838), 4 M. & W. 171, *per* LORD ABINGER, C.B., at p. 191, on the authority of *A.-G. v. Dimond* (1831), 1 Cr. & J. 356, and *A.-G. v. Hope* (1834), 1 Cr. M. & R. 530, H. L.; see also *Winans v. A.-G.*, *supra*, at p. 40.

(*e*) *A.-G. v. Brunning*, *supra*, *per* LORD CAMPBELL, L.C., at p. 257; see also *per* LORD CRANWORTH, at p. 260.

(*f*) *Swabey v. Swabey* (1848), 15 Sim. 502; *Re Nunn's Estate*, [1894] 1 I. R. 252, 259; see also *A.-G. v. Darell* (1871), 6 I. R. C. L. 491.

(*g*) Compare Stamp Act, 1815 (55 Geo. 3, c. 184), s. 38.

(*h*) Probate Duty Act, 1860 (23 & 24 Vict. c. 16), s. 4, which relates to deaths on or after the 3rd April, 1860. Prior to that date, probate duty was not payable

Real estate, as such, is not chargeable with probate duty (*i*), but where, by reason of the doctrine of equitable conversion, it is impressed with the character of personal estate in the lifetime of the deceased, the duty is payable (*k*).

The duty is payable, in connection with the owner's death, in respect of real estate which has been purchased by trustees, out of personal estate, without authority (*l*); or which has been purchased by order of the court sitting in lunacy (*m*), or in Chancery (*n*), subject to a direction, in either case, that the purchased real estate is to be treated as personal estate.

The duty is also payable in respect of the deceased's interest in moneys to arise from the sale of real estate under a trust for that purpose in a deed, or in the will of another person, notwithstanding that the real estate remains unsold (*o*).

Where real estate is contracted in the lifetime of the deceased to be sold, and there is a valid and binding agreement enforceable by the executor against the purchaser, the duty is payable (*p*), and whether the agreement is to be specifically performed in its original form, or with additional terms and conditions, is wholly immaterial (*q*). The fact of the contract being contingent does not

SECT. 2.
The
Subject-
matter of
the Charge.

In what
circumstances
real estate
is to be
regarded as
personal
estate for
the purpose
of probate
duty.

in respect of personal estate appointed by will under a general power (*Phatt v. Routh* (1841), 3 Nev. 257, affirmed, *sub nom. Drake v. A.-G.* (1843), 10 Cl. & Fin. 257, 281, II. 1., upholding *Vandiest v. Eynmore* (1834), 6 Sim. 570, but on other grounds, and overruling *Palmer v. Whitmore* (1832), 5 Sim. 178; *Nail v. Punter* (1832), 5 Sim. 555, 563; *A.-G. v. Staff* (1833), 2 Cr. & M. 121).

(*i*) Compare Customs and Inland Revenue Act, 1880 (43 Vict. c. 14), s. 10; *A.-G. v. Jones* (1849), 1 Mac. & G. 374. The profits of a lighthouse levied under a private Act of Parliament have been held to be real estate (*A.-G. v. Jones, supra*). Land tax redeemed or purchased under the Land Tax Perpetuation Act, 1798 (38 Geo. 3, c. 60), but not discharged by the Act, is personal estate (*ibid.*, s. 99; *Pigott v. Pigott* (1867), 37 L. J. (CH.) 116); *secus* under the Land Tax Redemption Act, 1802 (42 Geo. 3, c. 116).

(*k*) *A.-G. v. Hubbuck* (1881), 13 Q. B. D. 275, C. A., per Lord COLERIDGE, C.J., at p. 280, on the authority of Lord CRANWORTH in *A.-G. v. Brunning* (1860), 8 II. L. Cas. 243, at p. 260. The rights of the Crown must depend upon what was the condition of the property, not by way of estoppel, but by way of equitable principles (*A.-G. v. Hubbuck, supra*, per BRETT, M.R., at p. 288); see also *A.-G. v. Dodd*, [1891] 2 Q. B. 150.

(*l*) *Advocate-General v. Anstruther* (1850), 13 Dunl. (Ct. of Sess.) 450 (savings from the real estate of an infant invested in real estate); *A.-G. v. Ailesbury (Marquis)* (1887), 12 App. Cas. 672, per Lord SELBORNE, at p. 681.

(*m*) *A.-G. v. Ailesbury (Marquis)*, *supra*.

(*n*) *Ibid.*, per Lord MACNAGHTEN, at p. 692.

(*o*) *A.-G. v. Lomas* (1873), L. R. 9 Exch. 29; *In the Goods of Gunn* (1884), 9 P. D. 242; *Re Richerson, Scales v. Heyhoe*, [1892] 1 Ch. 379, 384. If real estate remains unconverted at the time when the heir who takes an undisposed-of interest in it dies, and if there is nothing in the will making it necessary to convert it, it is taken as real estate, and devolves according to the rules governing the descent of real estate; but where there is a legal obligation to sell, and the proceeds are to form a portion of a joint and single fund for the purposes of the will, then, whatever may be the condition of the property at the time of the death of the heir taking the undisposed-of interest, it is, both for the purpose of distribution, and for the purpose of probate duty, to be considered as money (*A.-G. v. Lomas, supra*, per KELLY, C.B., at p. 34, on the authority of *A.-G. v. Brunning, supra*; see also *Re Richerson, Scales v. Heyhoe, supra*).

(*p*) *A.-G. v. Brunning, supra*.

(*q*) *Ibid.*, per Lord CHELMSFORD, at p. 265.

SECT. 2.

The
Subject-
matter of
the Charge.Lease of
real estate
with option
to purchase.Partnership
real estate.

deprive the purchase-money of the character of personal estate when it is completed (r).

Where a lease of real estate contains an option to purchase, which is exercised by the lessee after the lessor's death, the real estate is regarded as converted from the date of the lease, and the purchase-money forms part of the personal estate of the lessor (s), and is chargeable with probate duty (t); but it is otherwise where the period for the exercise of the option is extended by the lessor's will, and the option is exercised during the extended period (a).

As real estate belonging to a partnership is impressed in equity with the character of personal estate, the share of a deceased partner therein is chargeable with probate duty (b), unless by a binding agreement, the performance of which would affect the property during the lifetime, the rule of law is superseded by the real estate being taken out of the partnership property (c). If the real estate was substantially involved in the business, it is immaterial how it was acquired by the partners, whether, *e.g.*, by descent or devise (d). The interest of a deceased person in a joint adventure in land is governed by similar considerations (e).

SUB-SECT. 2.—Cumulative Duties.

The duty is
payable
upon every
grant in the
chain of title.

429. Probate duty, subject to the exceptions stated later (f), is payable in connection with every grant which is necessary to establish the devolution of property (g), and it is immaterial that a person entitled to an expectant interest dies before the reversion falls into possession (h).

Where a bequest of personal estate takes effect, notwithstanding the death of the legatee in the testator's lifetime (i), the subject-

(r) *A.-G. v. Brunning* (1860), 8 II. L. Cas. 243, *per* Lord CHELMSFORD, at p. 266. If the duty is paid, and the contract goes off, there should be a return of duty (*ibid.*). If the purchaser dies before performance of the agreement, probate duty is payable on his personal estate, but on the contract being performed, a return of duty should be made under the Railway Passenger Duty Act, 1842 (5 & 6 Vict. c. 79), s. 23 (*ibid.*, at p. 267).

(s) *Collingwood v. Row* (1857), 3 Jur. (N. S.) 785.

(t) *Lord v. Colvin* (1867), L. R. 3 Eq. 737, *per* MALINS, V.-C., at p. 742.

(a) *Re Goodall, Goodall v. Goodall*, [1895] W. N. 136.

(b) *A.-G. v. Hubbuck* (1854), 13 Q. B. D. 275, 278, 289, C. A.; *Forbes v. Steven, Mackenzie v. Forbes* (1870), L. R. 10 Eq. 178; Partnership Act, 1890 (53 & 54 Vict. c. 39), s. 22.

(c) *A.-G. v. Hubbuck, supra*, at pp. 278, 286. As to what will remit land to its original character, see *per* BOWEN, L.J., at p. 290. See also *Matson v. Swift* (1845), 8 Beav. 368, explained in *A.-G. v. Brunning, supra*, *per* Lord CRANWORTH, at p. 260; *Custance v. Bradshaw* (1845), 4 Hare, 315, explained in *A.-G. v. Brunning, supra*, *per* Lord CRANWORTH, at p. 259, in *Forbes v. Steven, Mackenzie v. Forbes, supra*, *per* JAMES, V.-C., at p. 191, and in *A.-G. v. Hubbuck, supra*, *per* Lord COLERIDGE, C.J., at p. 280.

(d) *Waterer v. Waterer* (1873), L. R. 15 Eq. 402, 406; *Re Cooper, Cooper v. Cooper* (1878), 26 W. R. 785.

(e) *Lord Advocate v. Macfarlane's Trustees* (1893), 31 Sc. L. R. 357; see also Partnership Act, 1890 (53 & 54 Vict. c. 39), s. 20 (3).

(f) See p. 311, *post*.

(g) *Partington v. A.-G.* (1869), L. R. 4 H. L. 100.

(h) Compare *A.-G. v. Malkin* (1846), 2 Ph. 64; *A.-G. v. Maxwell* (1860), 10 I. C. L. R. 262.

(i) *Wills Act*, 1837 (7 Will. 4 & 1 Vict. c. 26); see p. 186, *ante*.

matter of the bequest forms part of the personal estate of the dead legatee, and is chargeable with probate duty (*k*). But it is otherwise where the bequest is to the pre-deceasing legatee's representatives to be applied as part of his estate (*l*).

SECT. 2.
The
Subject-matter of
the Charge.

SUB-SECT. 3.—*Domicil and Situs.*

430. The personal estate and effects belonging to the deceased, in order to be liable to probate duty, must be locally situate within the jurisdiction of the British court at the time of the death, when the right to duty attaches (*m*), and it is immaterial that the grant has been eventually *de facto* made available to collect foreign funds (*n*).

The property must be situate within the jurisdiction of the British court.

431. The domicil of the deceased does not affect the liability to the duty (*o*).

The domicil of the owner is immaterial.

432. Furniture and such like things are assets for the purposes of jurisdiction where they are actually situate at the time of the death; leases are assets where the land lies (*p*); specialty debts owing from persons out of the United Kingdom (*q*) are assets where the instrument happens to be (*r*); simple contract debts, whether the title is evidenced or not by bills of exchange or promissory notes (*s*), and specialty debts owing from persons in the United Kingdom (*q*), are assets where the debtor resides at the time of the death (*a*). Foreign bonds or other securities situate in the United Kingdom, and transferable here by delivery, whether the dividends are payable here or abroad, are assets in this country (*b*), and it is

Situation of various descriptions of property.

(*k*) *Perry's Executors v. R.* (1868), L. R. 4 Exch. 27.

(*l*) *Lord Advocate v. Bogie*, [1894] A. C. 83; *A.-G. v. Lloyd*, [1895] 1 Q. B. 496. *Quere* whether the duty would not be payable if the testator indicated that the bequest was to be in the same position under the statute as if it had in fact belonged to the legatee (*Lord Advocate v. Bogie, supra, per Lord Watson*, at p. 95).

(*m*) *A.-G. v. Dimond* (1831), 1 Cr. & J. 356; *A.-G. v. Hope* (1834), 1 Cr. M. & R. 530, H. L.; *A.-G. v. Partington* (1862), 1 H. & C. 457, 474; *A.-G. v. Pratt* (1874), L. R. 9 Exch. 140, 143. In cases, however, where the fixed duty of 30s. is to be paid under the Customs and Inland Revenue Act, 1881 (41 & 45 Vict. c. 12), s. 33, see p. 312, *post*. Compare *In the Goods of Henley* (1886), 11 P. D. 126.

(*n*) *A.-G. v. Dimond, supra*, at p. 371; *A.-G. v. Hope, supra*, at p. 560; *A.-G. v. Bouwens* (1838), 4 M. & W. 171, 190; *Pearse v. Pearse* (1838), 9 Sim. 430.

(*o*) *Partington v. A.-G.* (1869), L. R. 4 H. L. 100; see also *Winans v. A.-G.*, [1910] A. C. 27, 30, 33, 35.

(*p*) Compare *Gurney v. Rawlins* (1836), 2 M. & W. 87, *per PARKE, B.*, at p. 91.

(*q*) Revenue Act, 1862 (25 & 26 Vict. c. 22), s. 39. A policy under seal is a specialty (*Gurney v. Rawlins, supra*).

(*r*) Compare *Stamps Commissioner v. Hope*, [1891] A. C. 476, P. O.

(*s*) It is immaterial that the bills of exchange have not reached maturity, been accepted, or even presented, or are on the high seas, if the person who becomes debtor was in the United Kingdom (*A.-G. v. Pratt* (1874), L. R. 9 Exch. 140). If the drawee refuses to accept, or does not pay at maturity, *quere (ibid., per KELLY, C.B., at p. 144)*. See also *In the Goods of Wyckoff* (1802), 3 Sw. & Tr. 20.

(*a*) *A.-G. v. Bouwens, supra, per Lord ABINGER, C.B., at p. 191*; see also *Winans v. A.-G., supra*.

(*b*) *A.-G. v. Bouwens, supra*.

SECT. 4.
Rates of
Duty.

Rates of
duty.

SECT. 4.—Rates of Duty.

434. The rate of probate duty depends upon the value of the estate and effects, and the scale of rates is as follows (*b*):—Where the value of the estate and effects is above £100 and not above £500, the rate is £1 for every full sum of £50, and for any fractional part of £50 over any multiple of £50. Where the value is above £500 and not above £1,000, the rate is £1 5s. for every full sum of £50, and for any fractional part of £50 over any multiple of £50. Where the value is above £1,000, the rate is £3 for every full sum of £100, and for any fractional part of £100 over any multiple of £100.

Fixed duty
of 30s.

Where the value of the whole personal estate in or out of the United Kingdom of any person dying after the 31st May, 1881, without any deduction for debts and funeral expenses, exceeds £100 but does not exceed £300, a fixed duty of 30s. may be paid (*c*).

SECT. 5.—Value Chargeable.

SUB-SECT. 1.—Gross Value.

The general
rule.

435. The duty is payable upon the principal value of the property chargeable therewith in respect of which the grant is obtained (*d*), and the affidavit (*e*) must accordingly include the property at its then value (*f*), with all accretions of interest since the death (*g*).

(*b*) Customs and Inland Revenue Act, 1881 (41 & 45 Vict. c. 12), s. 27. The rate of duty depends upon the law in force at the date of the grant (*Re Joy, Inlor v. Jones* (1880), 5 L. R. Ir. 282). For the duties on grants of representation prior to the 1st June, 1881, see stat. (1694) 5 & 6 Will. & Mar. c. 21; stat. (1698) 9 Will. 3, c. 25; stat. (1779) 19 Geo. 3, c. 66; stat. (1783) 23 Geo. 3, c. 58; stat. (1789) 29 Geo. 3, c. 51; stat. (1795) 35 Geo. 3, c. 30; stat. (1797) 37 Geo. 3, c. 90; Administration of Estates Act, 1798 (38 Geo. 3, c. 87); Probate Duty Act, 1801 (41 Geo. 3, c. 86); Stamp Act, 1804 (44 Geo. 3, c. 98); Stamp Act, 1815 (55 Geo. 3, c. 184), s. 2, Sched., Part III.; Probate Duty Act, 1859 (22 & 23 Vict. c. 36), s. 1; Revenue (No. 2) Act, 1864 (27 & 28 Vict. c. 56), s. 5; Customs and Inland Revenue Act, 1880 (43 Vict. c. 14), s. 9, Sched. Where, in the case of an application for an original grant on or after the 1st June, 1889, in the case of a person dying before the 2nd August, 1894, the value of the estate and effects exceeds £10,000, temporary estate duty is also payable. Where a further affidavit is to be delivered in respect of additional value, then if the original value exceeded £10,000, additional duty is payable in respect of the additional value, but if the original value did not exceed £10,000, although the whole value does, duty is payable in respect of the whole value. The rate of the duty is £1 for every full sum of £100, and for any fraction of £100 over any multiple of £100. As to the subject generally, see Customs and Inland Revenue Act, 1889 (52 & 53 Vict. c. 7), ss. 5 (1), (3—7), 7—9.

(*c*) Customs and Inland Revenue Act, 1881 (44 & 45 Vict. c. 12), s. 33 (1), (5). The grant must be obtained under the provisions of the section. If it is afterwards discovered that the value exceeds £300, probate duty is payable in respect of the true value, and no allowance is made for the fixed duty paid (*ibid.*, s. 35).

(*d*) *Doe d. Richards v. Evans* (1847), 10 Q. B. 476 (leasehold property improved by building between the death and the grant). Scottish and Irish assets may be included for duty in the affidavit when the English grant is to be resealed in Scotland under the Confirmation of Executors (Scotland) Act, 1858 (21 & 22 Vict. c. 56), ss. 14, 15, and in Ireland under the Probates and Letters of Administration Act (Ireland), 1857 (20 & 21 Vict. c. 79), ss. 94, 95.

(*e*) See p. 314, *post*.

(*f*) *A.-G. v. Partington* (1862), 1 H. & C. 457, *per* BRAMWELL, B., at p. 474.

(*g*) *Partington v. A.-G.* (1869), L. R. 4 H. L. 100.

Stocks and shares are to be valued at their then market price (*h*).

If the duty in respect of a contingent reversionary interest is not paid when the grant is obtained, the duty when the interest falls into possession is to be paid upon the value actually realised (*i*). It is not sufficient to include such an interest at a nominal sum in the original affidavit, the Crown being entitled to duty upon the fair value of the expectancy (*k*).

Conjectural estimates are to be set right when the facts are ascertained (*l*).

Desperate and doubtful debts owing to the deceased may, in the judgment of the executor fairly and *bonâ fide* exercised, be omitted in the first instance (*m*), but if afterwards paid they become part of the estate (*n*).

SUB-SECT. 2.—Deductions.

436. Where the deceased died domiciled in the United Kingdom, the person applying for the grant may state in his affidavit the fact of such domicile, and deliver a schedule of the debts due from the deceased to persons resident in the United Kingdom, and an account of the funeral expenses, and, for the purpose of the charge of duty, the aggregate amount of the debts and funeral expenses may be deducted from the value of the estate and effects specified in the account delivered with the affidavit (*o*).

SECT. 5.
Value Chargeable.
Special cases.

Power to deduct debts and funeral expenses where the deceased died domiciled in the United Kingdom.

437. Debts which may be so deducted are debts due and owing from the deceased which, in their own nature and character, apart from any direction in the deceased's will (*p*), are payable by law out of any part of the estate and effects comprised in the affidavit (*q*). They do not include voluntary debts expressed to be payable on the death of the deceased, or payable under any instrument which has not been *bonâ fide* delivered to the donee three months before the death (*r*), or debts in respect of which any real estate may be primarily liable (*s*), or in respect of which a

What debts may be deducted.

(*h*) *Wishart v. Lord Advocate* (1880), 18 Sc. L. R. 62.

(*i*) *Lord v. Colvin* (1867), L. R. 3 Eq. 737; *H. M. Advocate v. Findlay (Kennedy's Factor)* (1890), 28 Sc. L. R. 596. These cases are upon the Stamp Act, 1815 (55 Geo. 3, c. 184), s. 41. *Quare*, whether the position is the same under the Customs and Inland Revenue Act, 1881 (44 & 45 Vict. c. 12), s. 32.

(*k*) *Lord Advocate v. Pringle* (1878), 15 Sc. L. R. 624.

(*l*) *Wishart v. Lord Advocate*, *supra*, per the Lord President (INGLIS), at p. 64.

(*m*) *Moses v. Crafier* (1831), 4 C. & P. 524, per Lord TENTERDEN, C.J., at p. 525; approved, *A.-G. v. Brunning* (1860), 8 H. L. Cas. 243, per Lord WENSLEYDALE, at p. 282; and *Perry's Executors v. R.* (1868), L. R. 4 Exch. 27, per BRAMWELL, B., at p. 31.

(*n*) *Perry's Executors v. R.*, *supra*, per BRAMWELL, B., at p. 31.

(*o*) Customs and Inland Revenue Act, 1881 (44 & 45 Vict. c. 12), s. 28.

(*p*) *Percival v. R.* (1864), 3 H. & C. 217, per MARTIN, B., at p. 230 (direction to pay out of mixed fund).

(*q*) Calls on shares paid by executors may be deducted, even where the shares have been transferred into their names, provided the calls are paid in the ordinary course of administration (*Wishart v. Lord Advocate*, *supra*).

(*r*) See also Probate Duty Act, 1861 (24 & 25 Vict. c. 92), s. 3.

(*s*) *Re Taylor's Estate* (1853), 8 Exch. 384; see also *Barham v. Thanet (Earl)* (1834), 3 My. & K. 607, per LEACH, M.R., at p. 624.

SECT. 5.

Value Chargeable.

Mortgage debts on leaseholds.

Covenant debts in consideration of marriage.

Debts where deceased owned foreign personal estate.

reimbursement may be capable of being claimed from any real estate of the deceased (*t*), or from any other estate or person (*a*).

In any case where leasehold estates are the sole security by way of mortgage for any debts due and owing from the deceased, the amount of the mortgage debts may be deducted from the value of the leasehold estates (*b*).

Deduction may be made in respect of a specified sum of money covenanted by the deceased, in consideration of marriage, to be paid after his death (*c*), but not where the covenant was to bequeath a share (*d*), or the entirety (*e*), of his residuary estate.

Where the deceased owned property both in this country and abroad, and owed debts to persons resident in this country, the foreign property is not to be taken into consideration in estimating the deduction to be allowed in respect of such debts (*f*).

Funeral expenses.

438. Funeral expenses which may be deducted must be reasonable according to law (*g*).

SECT. 6.—*Collection of the Duty.*SUB-SECT. 1.—*The Duty.*

Nature of the duty.

439. Probate duty is a stamp duty, and may be denoted by impressed or adhesive stamps, or partly by one and partly by the other, as the Commissioners (*h*) think proper (*i*).

How payable.

The duty is chargeable on the affidavit (*k*) to be required and received from the person applying for the grant (*l*), and the several provisions in force on the 1st June, 1881 (*m*), in relation to

(*t*) *E.g.*, a mortgage debt which is payable by the heir or devisee under the Real Estate Charges Acts, 1854, 1867, and 1877 (17 & 18 Vict. c. 113; 30 & 31 Vict. c. 69; 40 & 41 Vict. c. 34).

(*a*) Customs and Inland Revenue Act, 1881 (44 & 45 Vict. c. 12), s. 28.

(*b*) Inland Revenue Act, 1868 (31 & 32 Vict. c. 124), s. 7.

(*c*) *Lord Advocate of Scotland v. Hugar* (1872), L. R. 2 Sc. & Div. 217; see also *A.-G. v. Murray* (1887), 20 L. R. Ir. 124, 127, C. A.

(*d*) *Marshall v. Lord Advocate* (1874), 11 Sc. L. R. 392.

(*e*) *Moir's Trustees v. Lord Advocate* (1874), 11 Sc. L. R. 157; *A.-G. v. Murray* (1887), 20 L. R. Ir. 124, C. A.

(*f*) *R. v. Stamps and Taxes Commissioners* (1849), 18 L. J. (Q. B.) 201.

(*g*) Customs and Inland Revenue Act, 1881 (44 & 45 Vict. c. 12), s. 28. See note (*b*), p. 210, *ante*.

(*h*). See note (*h*), p. 249, *ante*.

(*i*) Customs and Inland Revenue Act, 1881 (44 & 45 Vict. c. 12), s. 26. An adhesive stamp is used for the fixed duty of 30s. under *ibid.*, s. 33, and impressed stamps for the other duties.

(*k*) The affidavit is to be in such form as may be prescribed (Customs and Inland Revenue Act, 1880 (43 Vict. c. 14), s. 10 (4); Customs and Inland Revenue Act, 1881 (44 & 45 Vict. c. 12), s. 29; and the Commissioners are to provide forms of affidavit stamped to denote the duties payable (Customs and Inland Revenue Act, 1881 (44 & 45 Vict. c. 12), s. 29).

(*l*) Customs and Inland Revenue Act, 1881 (44 & 45 Vict. c. 12), s. 27. Prior to the 1st June, 1881, the duty was chargeable upon the grant itself (Stamp Act, 1815 (55 Geo. 3, c. 184), s. 2, Sched., Part III.).

(*m*) *I.e.*, the date of the commencement of the Customs and Inland Revenue Act, 1881 (44 & 45 Vict. c. 12).

the earlier probate duties are, so far as they are consistent, deemed to be applicable to the duty so chargeable (*n*).

SECT. 6.
Collection
of the
Duty.

SUB-SECT. 2.—*When the Duty is payable.*

440. If any part of the estate is taken possession of, or in any manner administered, a grant must be obtained, and the probate duty paid, within six calendar months after the death of the deceased, or within two calendar months after the termination of any action or dispute respecting the will, or the right to letters of administration, if there is any such, that is not ended within four calendar months after the death (*o*).

When
the duty
is payable.

If at any time it is discovered that the estate was, at the time of the grant, of greater value than that mentioned in the certificate on the grant of the officer of the court (*p*), or that any deduction for debts or funeral expenses was made erroneously, a further affidavit, with an account, is, within six months after the discovery, to be delivered to the Commissioners, duly stamped for the additional duty payable, with interest from the date of the grant, or from such subsequent date as the Commissioners may, in the circumstances, think proper (*q*).

When
additional
duty is
payable.

SUB-SECT. 3.—*By whom the Duty is payable.*

441. The duty is payable by the person applying for the grant (*r*), or by any person who takes possession of, or in any manner administers (*s*), any part of the personal estate (*t*).

By whom
the duty
is payable.

Together with the affidavit (*a*) to be required and received from the applicant for the grant, an account (*b*) is to be delivered of the particulars of the personal estate for or in respect of which the grant is to be made, and of the estimated value of the

Account to
accompany
affidavit on
application
for grant.

(*n*) Customs and Inland Revenue Act, 1881 (44 & 45 Vict. c. 12), s. 26 (3); see also Court of Probate Act, 1857 (20 & 21 Vict. c. 77), s. 92.

(*o*) Stamp Act, 1815 (55 Geo. 3, c. 184), s. 37; Crown Suits etc. Act, 1865 (28 & 29 Vict. c. 104), s. 57; Customs and Inland Revenue Act, 1881 (44 & 45 Vict. c. 12), s. 40. The Commissioners have power, in certain circumstances, and on certain conditions, to allow a grant to issue on credit (Stamp Act, 1815 (55 Geo. 3, c. 184), ss. 45—49; see *Doe d. Hanley v. Wood* (1819), 2 B. & Ald. 724, 733; *Howard v. Prince* (1847), 10 Beav. 312).

(*p*) See p. 316, *post*.

(*q*) Customs and Inland Revenue Act, 1881 (44 & 45 Vict. c. 12), s. 32. In the case of grants obtained before the 1st June, 1881, see Stamp Act, 1815 (55 Geo. 3, c. 184), ss. 41, 43.

(*r*) Customs and Inland Revenue Act, 1881 (44 & 45 Vict. c. 12), s. 27.

(*s*) Including a British company which transfers shares without production of a British grant (*New York Breweries Co. v. A.-G.*, [1899] A. C. 62).

(*t*) Stamp Act, 1815 (55 Geo. 3, c. 184), s. 37; Crown Suits etc. Act, 1865 (28 & 29 Vict. c. 104), s. 57; Customs and Inland Revenue Act, 1881 (44 & 45 Vict. c. 12), s. 40.

(*a*) Stamp Act, 1815 (55 Geo. 3, c. 184), s. 38. The affidavit may be made by some other competent person, and not necessarily by the executor (*In the Goods of Urruela* (1869), L. R. 1 P. & D. 598).

(*b*) As to the transmission of the account and other documents and particulars to the Commissioners by the Probate Registry, see Court of Probate Act, 1857 (20 & 21 Vict. c. 77), s. 93; Customs and Inland Revenue Act, 1880 (43 Vict. c. 14), s. 10 (2).

SECT. 6.
Collection
of the
Duty.

Grant to
bear a
certificate
in lieu of
a stamp.
Power to
require
explanations
and proof in
support of
affidavit.

Where
insufficient
duty paid
at first.

particulars (c). The affidavit is to extend to the verification of the account, or to the verification of such account and the schedule of debts and funeral expenses, as the case may be (d).

Every grant is to bear a certificate in writing under the hand of the proper officer of the court, showing that the affidavit for the Commissioners has been delivered, and, if liable to duty, has been duly stamped, and stating the amount of the gross value of the estate and effects as shown by the account (e).

The Commissioners may at any time, and from time to time, within three years after the grant, as they may think necessary, require the person acting in the administration (f) of the estate and effects to furnish such explanations, and to produce such documentary or other evidence respecting the contents of, or particulars verified by, the affidavit as the case may seem to them to require (g).

442. If a correction of the original estimate of value becomes necessary, it is to be made by the person acting in the administration of the estate (h), when the mistake is discovered (i), and if there is no such person, the estate having been fully administered, the Crown is without remedy (k).

The Commissioners upon receipt of a stamped further affidavit are to cause a certificate (l) to be written on the grant, by an authorised officer, setting forth the true value of the estate and effects as then ascertained, or, as the case may be, the corrected amount of the deductions, and such certificate is substituted for, and has the same force and effect as, the certificate of the officer of the court (h).

SUB-SECT. 4.—Out of what Property the Duty is payable.

443. Probate duty is, in general, payable out of the residuary personal estate (m).

In the case, however, of estate and effects which the deceased has disposed of by will under any authority enabling him to dispose of

(c) Customs and Inland Revenue Act, 1880 (43 Vict. c. 14), s. 10 (1).

(d) Customs and Inland Revenue Act, 1881 (44 & 45 Vict. c. 12), s. 29.

(e) *Ibid.*, s. 30.

(f) See note (h), *infra*.

(g) Customs and Inland Revenue Act, 1881 (44 & 45 Vict. c. 12), s. 37.

(h) *Ibid.*, s. 32. In the case of grants obtained before the 1st June, 1881, see Stamp Act, 1815 (55 Geo. 3, c. 184), ss. 41, 43.

(i) *A.-G. v. Smith*, [1893] 1 Q. B. 239, C. A.; *Re Nunn's Estate*, [1894] 1 I. R. 252, 257.

(k) *A.-G. v. Smith*, *supra*, per A. L. SMITH, I.J., at p. 244.

(l) In an administration case, the administrator must first give security to the court to cover the corrected gross assets. Periodical notifications of rectifications are to be given by the Commissioners to the court (Stamp Act, 1815 (55 Geo. 3, c. 184), s. 42).

(m) *Re Bourne, Martin v. Martin*, [1893] 1 Ch. 188. Where the residuary personal estate is insufficient, a specific bequest must exonerate real estate taken by the heir (*Shepherd v. Beetham* (1877), 6 Ch. D. 597; *secus* for estate duty (*Re Pullen, Parker v. Pullen*, [1910] 1 Ch. 564)). Probate duty is a testamentary expense (*Davies v. Fowler* (1873), L. R. 16 Eq. 308); but is not a disbursement within the Solicitors Act, 1843 (6 & 7 Vict. c. 73), s. 37 (*Re Kingdon and Wilson*, [1902] 2 Ch. 242, C. A., overruling *Re Lamb* (1889), 23 Q. B. D. 5).

The general
rule.

Personal
property
appointed

it as he thinks fit, the probate duty payable in respect thereof (*n*) is a charge or burden upon the property so disposed of, and is to be paid out of it, by the trustees or owners, to the person for the time being lawfully having or taking the burden of the execution of the will or testamentary instrument, or of the administration or management of the personal estate of the deceased, for the benefit of the persons entitled thereto (*o*).

SECT. 6.
Collection
of the
Duty.

by will
under a
general
power.

SECT. 7.—Interest, Penalties, and Proceedings.

SUB-SECT. 1.—Interest.

444. Simple interest at the rate of 3 per cent. per annum, without deduction for income tax, is payable upon duty in arrear, and is recoverable in the same manner as if it were part of the duty (*p*). Rate of interest.

SUB-SECT. 2.—Penalties.

445. If any person who ought to obtain probate or letters of administration (*q*), or to deliver a further affidavit (*r*), neglects to do so within the proscribed period, he is liable to pay double the amount of duty chargeable, and the same is a debt due from him to the Sovereign, and is recoverable by any of the ways or means in force (*s*) for the recovery of probate, legacy, or succession duties (*t*). Double duty in case of default.

SUB-SECT. 3.—Proceedings.

446. If any person takes possession of, or in any manner administers, any part of the personal estate of any person deceased, without obtaining a grant within the prescribed period, the Commissioners may sue out of the King's Bench Division a writ of Summary proceedings for recovery of duty.

(*n*) *I.e.*, where the deceased died after the 3rd April, 1860 (Probate Duty Act, 1860 (23 & 24 Vict. c. 15), s. 5).

(*o*) *Ibid.*; *Re Lambert's Estate, Stanton v. Lambert* (1888), 39 Ch. D. 626, 635. Where a general power of appointment over a fund is exercised by will by way of appointing "the clear value" of specified sums of money, and "all the residue," the probate duty, apart from express direction (*Davies v. Fowler* (1873), L. R. 16 Eq. 308), is payable out of the part appointed as residue (*Re Currie, Bjorkman v. Kimberley (Lord)* (1888), 57 L. J. (CH.) 743).

(*p*) Finance Act, 1896 (59 & 60 Vict. c. 28), s. 18 (1), (2).

(*q*) Compare *New York Breweries Co. v. A.-G.*, [1899] A. C. 62, *per* Lord DAVEY, at p. 77. In *Re Ranking's Settlement Trusts* (1868), L. R. 6 Eq. 601, 605, the court, the Commissioners accepting the probate duty, dispensed with a grant where insistence on it would have involved such expense and delay as to render the order of the court practically useless.

(*r*) If the further affidavit is in a case where the fixed duty of 30s. under the Customs and Inland Revenue Act, 1881 (44 & 45 Vict. c. 12), s. 33, has been paid, a sum equal to the probate duty in respect of the true value of the estate, without allowance for the 30s., is a debt due to the Sovereign from the person acting in the administration of the estate (*ibid.*, s. 35).

(*s*) *I.e.*, in 1881.

(*t*) Customs and Inland Revenue Act, 1881 (44 & 45 Vict. c. 12), s. 40. Prior to the 1st June, 1881, see Stamp Act, 1815 (55 Geo. 3, c. 184), s. 37, for the penalty for not obtaining a grant within a given time, and *ibid.*, s. 43, for the penalty for not paying further duty in a given time after the discovery that insufficient duty has been paid. The penalty under s. 37 does not prevent the representatives from subsequently taking out a grant (*Bodger v. Arch* (1854), 10 Exch. 333, *per* PARKE, B., at p. 337). See also Stamp Act, 1891 (54 & 55 Vict. c. 39), s. 15, as to the penalty on stamping probates more than six months after the true value of the estate has been discovered.

SECT. 7.
Interest,
Penalties,
and Pro-
ceedings.

summons commanding him to deliver an account of the estate of the deceased, and of its value, and to pay the duty properly chargeable, and costs of the proceedings, or to show cause to the contrary, and on cause being shown, such order is to be made as seems just; and any such proceedings are to be a waiver of all relative penalties incurred by such person (a).

SECT. 8.—Repayment of Overpaid Duty.

Return of
 overpaid
 duty—
 (1) Where
 original
 estimate of
 value
 excessive;
 (2) where
 insufficient
 deduction in
 respect of
 debts and
 funeral
 expenses,

447. If at any time after the grant, and during the administration of the estate, the value mentioned in the certificate of the officer of the court is found to exceed the true value, or if at any time within three years after the grant, or within such further period as the Commissioners may allow, it appears that no amount, or an insufficient amount, was deducted on account of debts and funeral expenses, the Commissioners, upon proof of the facts to their satisfaction, may return the amount of duty overpaid, and cause a certificate by an authorised officer to be written on the grant stating the true value, or, as the case may be, the amount, or corrected amount, of the deductions, and this certificate is to be substituted for, and have the same force and effect as, the original certificate (b).

(a) Crown Suits etc. Act, 1865 (28 & 29 Vict. c. 104), s. 57; see title CROWN PRACTICE, Vol. X., p. 19.

(b) Customs and Inland Revenue Act, 1881 (44 & 45 Vict. c. 12), s. 31. As to grants on or after the 1st June, 1881, the alteration in the mode of dealing with debts effected by this Act is a mere change in the mode of collection, and does not in any way alter the imposition of the tax (*A.-G. v. Murray* (1887), 20 L. R. Ir. 121, C. A., per FRYGIBSON, L.J., at p. 147). In prior cases, see Stamp Act, 1815 (55 Geo. 3, c. 184), ss. 40, 51, and Railway Passenger Duty Act, 1842 (5 & 6 Vict. c. 79), s. 23, in which cases a return of duty can only be made where it is proved to the satisfaction of the Commissioners, by oath and proper vouchers, that the executor has paid the debts (Stamp Act, 1815 (55 Geo. 3, c. 184), s. 51; Railway Passenger Duty Act, 1842 (5 & 6 Vict. c. 79), s. 23). The power of the Commissioners to allow time beyond three years is where by reason of any proceeding at law or in equity the debts have not been ascertained and paid, or the effects of the deceased recovered and made available, and in consequence the executor has been prevented from claiming the return within three years (Railway Passenger Duty Act, 1842 (5 & 6 Vict. c. 79), s. 23). Where the duty has been repaid on a fraudulent application, *quare*, whether it can be again demanded (*Hicks v. Keat* (1840), 3 Beav. 141). As to petitions under the Petitions of Right Act, 1860 (23 & 24 Vict. c. 34), where the Commissioners decline to repay, see title CROWN PRACTICE, Vol. X., p. 27; *Percival v. R.* (1864), 3 H. & C. 217; *Perry's Executors v. R.* (1868), L. R. 4 Exch. 27; *Re Nathan* (1884), 12 Q. B. D. 461.

Semble, the Scots common law principle of *condictio indebiti* has no application to money paid as probate duty (*Alston's Trustees v. Lord Advocate* (1895), 33 Sc. L. R. 278, *per* the Lord Ordinary (MONCRIEFF), at p. 281).

ESTATE BY THE CURTESY.

See COPYHOLDS; HUSBAND AND WIFE; REAL PROPERTY AND
CHATELS REAL.

ESTATE FOR LIFE.

See REAL PROPERTY AND CHATELS REAL; SETTLEMENTS.

ESTATE PUR AUTRE VIE.

See DESCENT AND DISTRIBUTION; REAL PROPERTY AND CHATTELS
REAL.

ESTATE TAIL.

See DESCENT AND DISTRIBUTION; REAL PROPERTY AND CHATTELS
REAL; SETTLEMENTS.

ESTATES OF THE REALM.

See CONSTITUTIONAL LAW; PARLIAMENT.

ESTOPPEL.

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<i>For Conclusiveness of Foreign Judgment</i>	-	<i>See title</i>	CONFLICT OF LAWS.
<i>Conclusiveness of Judgment</i>	-	„	JUDGMENTS AND ORDERS.
<i>Documentary Evidence</i>	-	„	EVIDENCE.
<i>Estoppel on Bailee</i>	-	„	BAILEMENT.
<i>Estoppel on Principal or Agent</i>	-	„	AGENCY.
<i>Negotiable Instruments</i>	-	„	BILLS OF EXCHANGE ETC.

Part I.—Definition, Nature, and Classification.

SECT. 1.—*Definition.*

Definition.

448. There is said to be an estoppel where a party is not allowed to say that a certain statement of fact is untrue, whether in reality it be true or not (*a*). Estoppel, or “conclusion” as it is frequently called by the older authorities, may therefore be defined as a disability whereby a party is precluded (*b*) from alleging or proving in legal proceedings that a fact is otherwise than it has been made to appear by the matter giving rise to that disability. The law of estoppel is a branch of the law of evidence (*c*).

SECT. 2.—*Kinds of Estoppel.*

Classification.

449. Estoppel is of three kinds—estoppel by matter of record or *quasi* of record, estoppel by deed, and estoppel *in pais*.

(*a*) See Co. Litt. 352 a; “Estoppel is when one is concluded and forbidden in law to speak against his own act or deed, yea, though it be to say the truth” (*Termes de la Ley*, tit. Estoppel, cited in *Ashpiter v. Bryan* (1863), 3 B. & S. 474, 489); *Simm v. Anglo-American Telegraph Co.* (1879), 5 Q. B. D. 188, C. A., per BRAMWELL, J., at p. 202.

(*b*) In the older phraseology, “concluded.”

(*c*) “Estoppel is only a rule of evidence: you cannot found an action upon estoppel” (*Low v. Bouverie*, [1891] 3 Ch. 82, C. A. per BOWEN, L.J., at p. 105; and see per LINDLEY, L.J., at p. 101, to same effect); *Re Ottos Kopje Diamond Mines, Ltd.*, [1893] 1 Ch. 618, C. A. per BOWEN, L.J., at p. 628; and see *Dickson v. Reuter's Telegram Co.* (1877), 3 C. P. D. 1; *Harriman v. Harriman*, [1909] P. 123, C. A., per FARWELL, L.J., at p. 144.

SECT. 2.
Kinds of
Estoppel.

Of record or
quasi of
record.

450. Estoppel of record or *quasi* of record arises (1) where an issue of fact has been judicially determined in a final manner between the parties by a tribunal having jurisdiction (*d*), concurrent or exclusive, in the matter, and the same issue comes directly in question in subsequent proceedings between the same parties; (2) where the first determination was by a court having exclusive jurisdiction, and the same issue comes incidentally in question in subsequent proceedings between the same parties (*e*); (3) in some cases (*f*) where an issue of fact affecting the status of a person or thing has been necessarily (*g*) determined in a final manner as a substantive part (*h*) of a judgment *in rem* (*i*) of a tribunal of competent jurisdiction to determine that status, and the same issue comes directly in question in subsequent civil proceedings between any parties whatever.

Where the earlier decision is that of a court of record the resulting estoppel is said to be "of record"; where it is that of any other tribunal, whether erected by agreement of the parties or otherwise, the estoppel is said to be "*quasi* of record."

451. Where, in a deed made between parties and verified by their seals, there is a statement of fact an estoppel results, and is called "estoppel by deed" (*j*). If upon the true construction of the deed the statement is that of both or all the parties, the estoppel is binding on each party; if otherwise, it is only binding on the party making it (*k*). It seems that an estoppel also arises upon a deed poll, the mode of its execution being equally solemn with that of an indenture (*l*). By deed.

452. Where one has either by words or conduct made to another a representation of fact, either with knowledge of its falsehood or with the intention that it should be acted upon (*m*), or has so conducted himself that another would, as a reasonable man, understand that a certain representation of fact was intended to be acted on, and that other has acted on such representation and thereby By matter
in pais.

(*d*) Jurisdiction is essential; see p. 353, *post*.

(*e*) *Kingston's (Duchess) Case* (1776), 2 Smith, L. C., 11th ed., 731, *per* DE GREY, C.J., at p. 732; *Mackintosh v. Smith and Lewe* (1865), 4 Macq. 913, *per* LORD CHELMSFORD, at p. 924.

(*f*) See *Hill v. Clifford*, [1907] 2 Ch. 236, C. A., *per* GORELL BARNES, P., at p. 250.

(*g*) *R. v. Hartington Middle Quarter (Inhabitants)* (1855), 4 E. & B. 780; *Concha v. Concha* (1886), 11 App. Cas. 541, affirming *De Mora v. Concha* (1885), 29 Ch. D. 268, C. A. *R. v. Hartington Middle Quarter (Inhabitants)* *supra*, was doubted by LORD SELBORNE, L.C., in *R. v. Hutchings* (1881), 6 Q. B. D. 300, 303, but it appears to be well established; see *Wakefield Corporation v. Cooke*, [1903] 1 K. B. 417, 424, C. A.; affirmed [1904] A. C. 31.

(*h*) *R. v. Hartington Middle Quarter (Inhabitants)*, *supra*; *Hobbs v. Henning* (1864), 17 O. B. (N. S.) 791 (foreign judgment *in rem*).

(*i*) For definition of judgment *in rem*, see p. 327, *post*.

(*j*) Co. Litt. 352 a; explained, 2 Smith, L. C., 11th ed., p. 746.

(*k*) *Stroughill v. Buck* (1850), 14 Q. B. 781; see p. 368, *post*.

(*l*) *Bac. Abr. tit. Leases and Terms for Years*, O. (ed. 1832), p. 852.

(*m*) *Freeman v. Cooke* (1848), 2 Exch. 654, *per* PARKE, B., at p. 663, explaining the word "wilfully" in the rule in *Pickard v. Sears* (1837), 6 Ad. & El. 469, 474; approved, *Citizens' Bank of Louisiana v. First National Bank of New Orleans* (1873), L. R. 6 H. L. 352, 360.

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Kinds of
Estoppel.

altered his position to his prejudice, an estoppel arises against the party who made the representation, and he is not allowed to aver that the fact is otherwise than he represented it to be (n).

The conduct relied upon as amounting to a representation may be negligence, but this can only give rise to an estoppel where there is a duty to the person complaining to use due care; and it is also necessary that the neglect should be in the transaction itself which is in dispute, calculated to lead, and in fact leading, as its real (o) cause to the belief created (p).

The estoppel arising from conduct of the kinds here briefly referred to is one of the forms of estoppel by matter *in pais*, and is probably in modern times what is most usually meant by that expression. It is, however, properly, and was in old times more commonly, used to describe an estoppel arising from acts establishing certain relations of parties. Thus, the acceptance of rent on the one hand, and of an estate on the other, raise an estoppel between landlord and tenant (q), the former being precluded from denying the tenancy, the latter from denying his landlord's title. A similar estoppel ordinarily arises from the acceptance of a bailment (r). And the signatory of a bill of exchange or promissory note is precluded as against subsequent holders from denying the truth and genuineness of various matters appearing, expressly or by implication, upon the bill at the time of his signature (s).

Difference
 between
 "estoppel"
 and "con-
 clusive
 evidence."

453. In some cases the courts have called attention to a distinction between an estoppel, which was pleadable as such, and prevented the issue sought to be raised from going to the jury, and conclusive evidence, which obliged them to find the issue in accordance with it (t). Estoppel *in pais* always belonged to the

(n) *Carr v. London and North Western Rail. Co.* (1875), L. R. 10 C. P. 307, *per* BRETT, J., at pp. 316, 317. The three propositions on these two pages, which it is here attempted to summarise, appear to be collected from *Pickard v. Sears* (1837), 6 Ad. & El. 469; *Freeman v. Cooke* (1818), 2 Exch. 654; *Swan v. North British Australasian Co.* (1862), 7 H. & N. 603 (first part of the rule laid down by WILDE, B., at p. 633); and *Cornish v. Abington* (1859), 4 H. & N. 519, 556. See also *Cuirncross v. Lorimer* (1860), 3 Macq. 827, *per* Lord CAMPBELL, L.C., at p. 829.

(o) *Seton v. Lafone* (1887), 19 Q. B. D. 68, C. A., *per* Lord ESHER, M.R., at p. 71, reaffirming with the substitution of "real" for "proximate" the fourth proposition in *Carr v. London and North Western Rail. Co.*, *supra*.

(p) *Carr v. London and North Western Rail. Co.*, *supra*, at p. 318, founded on the second part of WILDE, B.'s, rule in *Swan v. North British Australasian Co.*, *supra*, with BLACKBURN, J.'s, correction ((1863), 2 H. & C. 175, Ex. Ch., at p. 182); and approved in *Coventry v. Great Eastern Rail. Co.* (1883), 11 Q. B. D. 776, C. A.

(q) Co. Litt. 352 a. In like manner a "surrender by operation of law" takes place by estoppel (*Lyon v. Reed* (1844), 13 M. & W. 285); see p. 375, *post*, and title LANDLORD AND TENANT.

(r) *Stonard v. Dunkin* (1810), 2 Camp. 344; *Gosling v. Birnie* (1831), 7 Bing. 339; *Biddle v. Bond* (1865), 6 B. & S. 225; *Henderson & Co. v. Williams*, [1895] 1 Q. B. 521, C. A.; see p. 406, *post*; and title BAILMENT, Vol. I., p. 562.

(s) Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), ss. 54 (2), 55 (1) (b), (2) (b), (c), 88 (2); and see *Nash v. De Fréville*, [1900] 2 Q. B. 72, 89, C. A., and p. 394, *post*; and title BILLS OF EXCHANGE, Vol. II., pp. 495, 517 *et seq.*

(t) *Conradi v. Conradi* (1868), L. R. 1 P. & D. 514, *per* Lord PENZANCE, at

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latter category (*u*). The distinction, to which allusion will occasionally have to be made, is seldom referred to at the present time, and under the modern system of pleading seems to be of small importance.

454. A maxim which is stated by the old writers as applicable to estoppels generally is that they "ought to be mutual" or "reciprocal" (*a*), which means that they must bind both parties, and that a stranger can neither take advantage of nor be bound by them. This maxim, as will be seen later, has an important bearing on the law of estoppel by record (*b*). Its application to estoppel by deed depends, in the case of an indenture, on the construction of the deed (*c*); and it is to some extent true of estoppel between landlord and tenant (*d*). As to estoppel by representation, arising as it does out of a unilateral act, while it is true that a stranger to the representation cannot take advantage of it (*e*), the maxim has no further application, until, at least, the party relying on the representation has elected to treat it as true, after which it would seem, upon the principle expressed by it, that he would be conclusively bound by his election (*f*). The case of estoppel by representation seems to present the same sort of exception as the estoppel which has been said to arise from a deed poll (*g*).

"Estoppels ought to be mutual."

Part II.—Estoppel by Matter of Record.

SECT. 1.—What will create Estoppel by Record.

SUB-SECT. 1.—In General.

455. A number of matters are enumerated by Lord Coke as matters of record giving rise to an estoppel, including, among others which are obsolete, letters patent, pleadings, and warrants of attorney (*h*); but for present purposes that which appears on the records of courts of law (*i*) need alone be considered.

Matters
of record :

Records of
courts of law

p. 518; *Howard v. Hudson* (1853), 2 E. & B. 1, 10, 11; *Hobbs v. Henning* (1861), 17 C. B. (N. S.) 791, 824; *Flitters v. Alfrey* (1874), L. R. 10 C. P. 29, 41.

(*a*) *Freeman v. Cooke* (1848), 2 Exch. 654, 662; and see p. 350, *post*.

(*a*) Co. Litt. 352 a; Bac. Abr. tit. Leases and Terms for Years, O. (ed. 1832), p. 852, citing *James v. Landen* (1585) Cro. Eliz. 36.

(*b*) See p. 349, *post*.

(*c*) See p. 368, *post*.

(*d*) *Cadle v. Moody* (1861), 30 L. J. (EX.) 385, *per* BRAMWELL, B., at p. 387; see also *Hartcup & Co. v. Bell* (1883), Cab. & El. 19.

(*e*) *R. v. Ambergate etc. Rail. Co.* (1853), 1 E. & B. 372.

(*f*) *Scarf v. Jardine* (1882) 7 App. Cas. 345.

(*g*) Bac. Abr. tit. Leases and Terms for Years, O. (ed. 1832), p. 852; see p. 365, note (*a*), *post*.

(*h*) Co. Litt. 352 a.

(*i*) As to records and courts of record, see title COURTS, Vol. IX., pp. 9—11, *et passim*. See also as to the conclusiveness of such records, Co. Litt. 260 a, quoted by Lord TENTERDEN, C.J., in *R. v. Carlile* (1831), 2 B. & Ad. 362, at pp. 367, 368; 3 Bl. Com. (ed. 1770), p. 24; and as to courts of record and courts not of record, 3 Bl. Com. cc. 3 (p. 24), 4, 5; 4 Bl. Com. c. 19 (pp. 255 *et seq.*) (Criminal Courts).

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The doctrine of estoppel by record thus limited finds expression in two legal maxims—*Interest reipublicæ ut sit finis litium*, and *Nemo debet bis vexari pro eadem causâ*. It accords with the first of these maxims that a party relying on estoppel by record should be able to show that the matter has been determined by a judgment in its nature final (*k*). The word "final" is here used as opposed to "interlocutory" (*l*). A judgment which purports finally to determine rights is none the less effective for the purposes of creating an estoppel because it is liable to be reversed on appeal (*m*), or because an appeal is pending (*n*), or because for the purpose of working it out inquiries or accounts have to be taken (*a*).

Judgment
essential.

456. But the proceedings must have resulted in a judgment or decree. A verdict, not followed by judgment, will not create an estoppel, the reason being that there is nothing to show that such verdict may not have been set aside, or that the court has not declined to act upon it (*b*). A verdict in divorce proceedings, followed by decree *nisi*, is, however, conclusive evidence in a subsequent suit between the same parties, although the decree has been set aside on the intervention of the King's Proctor, if this has been done on grounds *dehors* the verdict, and not affecting its correctness (*c*).

(*k*) *Lungmead v. Maple* (1865), 18 C. B. (N. S.) 255; *Massim v. Thorley's Cattle Food Co.* (1880), 14 Ch. D. 748, 751, C. A.; *Badar Bee v. Habib Merican Noordin*, [1909] A. C. 615; and see *Pitt v. Hill and Broadway* (1674), Cas. temp. Finch, 70; *Temple v. Baltinglass (Viscountess)* (1677), Cas. temp. Finch, 275. It is on this principle that no action can be brought to recover money paid under a judgment which has not been set aside, or for maliciously and without probable cause setting the law in motion while a judgment against the party complaining stands unreversed; see *Huffer v. Allen* (1866), L. R. 2 Exch. 15; compare *Wildes v. Russell* (1866), L. R. 1 C. P. 722; *Bynne v. Bank of England*, [1902] 1 K. B. 467, C. A., following *Basébé v. Matthews* (1867), L. R. 2 C. P. 684; *Vanderbergh v. Blake* (1661), Har. 194; and *Castrique v. Behrens* (1861), 3 E. & E. 709, 721; applied in *Turley v. Daw* (1906), 94 L. T. 216; compare *Huddleston v. Ashby* (1675), Cas. temp. Finch, 204. So a decree for foreclosure is a bar to an action for redemption (*Mallock v. Galton* (1735), 1 Dick. 65; compare *Forde v. Tynte* (1864), 10 L. T. 93). For cases in which an interlocutory judgment intended finally to determine rights has been allowed to have the effect of a *res judicata*, see p. 334, *post*.

(*l*) *Huntly (Marchioness) v. Gaskell*, [1905] 2 Ch. 656, C. A., *per* COZENS-HARDY, L.J., at p. 667; and p. 334, *post*.

(*m*) *Doe v. Wright* (1839), 10 Ad. & El. 763; *Overton v. Harvey* (1850), 9 C. B. 324; *Huntly (Marchioness) v. Gaskell*, *supra*; compare *Horrocks v. Stubbs* (1896), 74 L. T. 58; *Oxbridge Union v. Winchester Union* (1904), 91 L. T. 533 (appeal failed, but not on merits); *Clanmorris (Lady) v. Clanmorris (Lord)* (1862), 14 L. Ch. R. 420; and, as to foreign judgments, *Scott v. Pilkington* (1862), 2 B. & S. 11; *Nouvion v. Freeman* (1859), 15 App. Cas. 1, 10, 11; see also title JUDGMENTS AND ORDERS.

(*n*) *Harris v. Willis* (1855), 15 C. B. 710.

(*a*) *Poulton v. Adjustable Cover and Boiler Block Co.*, [1908] 2 Ch. 430, C. A.

(*b*) *O'Connor v. Malone* (1839), 6 Cl. & Fin. 572, *per* Lord COTTENHAM, L.C., at p. 596 (verdict on an issue directed in a Chancery suit); *Buncroft v. Bancroft* (1864), 3 Sw. & Tr. 597, *per* Sir J. WILDE, at p. 599; compare *Robinson v. Dulcep Singh* (1879), 11 Ch. D. 798, C. A. See also *Kinsey v. Kinsey* (1754), 2 Ves. Sen. 577; *Joly v. Swift* (1847), 11 L. Eq. R. 410 (necessity for enrolment of decree), which, however, appear now to be obsolete, see *Pearse v. Dobinson* (1865), 35 L. J. (OH.) 110, 112.

(*c*) *Butler v. Butler*, [1894] P. 25, C. A., applying *Conradi v. Conradi* (1868),

457. A judgment which would be final if it resulted from judicial decision after a contest is not prevented from being so by the fact that it was obtained by consent (*d*) or default (*e*), or as the result of admissions (*f*), provided the party against whom it is set up was under no disability (*g*). But the efficacy of a judgment so obtained is somewhat strictly limited (*h*).

SECT. 1.
What will
create
Estoppel
by Record.

SUB-SECT. 2.—Judgments in rem.

458. Final judgments which will give rise to an estoppel are divided into two classes, namely, judgments *in rem* and judgments *in personam*. But, as many judgments which fall into the former class deal with the status of persons, and not of things, the term "judgments *inter partes*" seems a preferable description of the latter class (*i*).

Judgments
classified.

459. A judgment *in rem* may be defined as the judgment of a court of competent jurisdiction determining the status of a person or thing, or the disposition of a thing (as distinct from the particular interest in it of a party to the litigation) (*k*). Apart from the application of the term to persons, it must affect the *res* in the way of condemnation, forfeiture, declaration of status or title, or order for sale or transfer (*l*).

Definition of
judgment
in rem.

L. R. 1 P. & D. 514; compare *Waters v. Waters* (1848), 2 De G. & Sm. 591, 615.

(*d*) *Re South American and Mexican Co., Ex parte Bank of England*, [1895] 1 Ch. 37, C. A.; *Allason v. Stark* (1838), 9 Ad. & El. 255; see also *Bowden v. Beauchamp* (1740), 2 Atk. 82; *Hurke v. Crosbie* (1811), 1 Ball & B. 489, 503.

(*e*) *Huffer v. Allen* (1866), L. R. 2 Exch. 15; *Re South Essex Estuary Co., Re parte Chorley* (1870), L. R. 11 Eq. 157, 162; *Williams v. St. George's Harbour Co.* (1858), 2 L. G. & J. 547. But dismissal for want of prosecution is no bar to a fresh action, in the absence of any agreement to compromise (*Byrne v. Frece* (1828), 2 Mol. 157, 180); see *Magnus v. National Bank of Scotland* (1888), 57 L. J. (CH.) 902.

(*f*) See *Boileau v. Rutlin* (1848), 2 Exch. 665, 681; and p. 357, *post*.

(*g*) As to the power of a corporation to escape the necessity of a seal by an act of record, see *Thetford (Mayor) Case* (1703), 1 Salk. 192; but judgment by consent cannot give validity to the contract of a corporation which is *ultra vires*, where its legality has not been in dispute and its infirmity depends on facts which have not been disclosed (*Great North West Central Railway v. Charlebois*, [1899] A. C. 114, P. C.; *A.-G. v. Dublin Corporation* (1841), 1 Dr. & War. 545); compare *Canterbury Corporation v. Cooper* (1909), 100 L. T. 597, C. A. (deed). Nor can a married woman by consent or admission get rid of a restraint on anticipation; see *Bateman (Lady) v. Faber*, [1898] 1 Ch. 144, 149, 151, C. A. But even before the Married Women's Property Act, 1882 (45 & 46 Vict. c. 75), a married heiress-at-law, party to proceedings for probate, and not asking for an issue, was bound by the decree (*Turner v. Turner* (1852), 2 De G. M. & G. 28, C. A., *per* Lord ORANWORTH, L.J.).

(*h*) See pp. 342, 357, 358, *post*.

(*i*) This term is adopted by the author of the notes to Smith's Leading Cases, and is borrowed from that work.

(*k*) *Castrique v. Imrie* (1870), L. R. 4 H. L. 414, 428; compare *Warren v. Baring Bros. & Co., Ltd.* (1910), 54 Sol. Jo. 720.

(*l*) *Francis Times & Co. v. Carr* (1900), 82 L. T. 698, 702, C. A. The decision was reversed on grounds not affecting the passage cited; see *Carr v. Francis Times & Co.*, [1902] A. C. 176. As to declaration of the status of immovables (highway), see *Wakefield Corporation v. Cooke*, [1904] A. C. 31; *R. v. St. Pancras (Inhabitants)* (1794), Peake, 286 [219]; and see *The City of Mecca* (1881), 6 P. D. 106, C. A.

SECT. 1.

**What will
create
Estoppel
by Record.****Examples of
judgments
in rem.**

460. The following are examples of judgments *in rem* :—
 Condemnations in the old Court of Exchequer for breach of revenue laws (*m*), the judgments of a prize court condemning a vessel as prize (*n*), of an admiralty court establishing a lien (*o*), or condemning a vessel in an action (*e.g.*, for necessities) where there was no lien before the commencement of proceedings (*p*), or disposing of the proceeds of a sale in enforcement of a lien (*q*), the judgment of a court of probate establishing a will, or creating the status of administrator (*r*), of a divorce court dissolving or establishing a marriage (*s*), or declaring the nullity of a marriage or affirming its existence (*t*); the judgment on a parliamentary election petition (*u*); the order of justices for removal of a pauper, establishing both the status of the pauper and the place of his settlement (*a*); a conviction for non-repair of a highway (*b*), and a determination of justices under the Private Street Works Act, 1892 (*c*), that a street is a highway repairable by the inhabitants at large, establishing in each case the status of a highway and the liability to repair; an order for revocation of a patent (*d*); a sentence or order of expulsion or rustication from a college (*e*), or deprivation of a living (*f*).

(*m*) *Scott v. Shearman* (1775), 2 Wm. Bl. 977; *R. v. Matthews* (1797), 5 Price, 202, n.; *Geyer v. Aguilar* (1798), 7 Term Rep. 681, 696; *Hurt v. M'Namara* (1817), 4 Price, 154, n. As to acquittals, see *Cooke v. Sholl* (1793), 5 Term Rep. 255, 256; Buller's *Nisi Prius*, 241.

(*n*) *Hughes v. Cornelius* (1682), 2 Show. 232; 2 Smith, L. C., 11th ed., 741; *Custique v. Imrie* (1870), L. R. 4 H. L. 414, 434.

(*o*) *Castrique v. Imrie*, *supra*, at p. 429; *Simpson v. Foyo* (1863), 1 Hem. & M. 195, 243; *Ballantyne v. Mackinnon*, [1896] 2 Q. B. 454, 462, C. A.; *aliter* of a judgment *in personam* enforceable against the ship (*The City of Mecca* (1881), 6 P. D. 106, C. A.).

(*p*) *The Cella* (1888), 13 P. D. 82, C. A.

(*q*) *Minna Craig Steamship Co. v. Chartered Mercantile Bank of India, London, and China*, [1897] 1 Q. B. 460, C. A.

(*r*) *Noel v. Wells* (1668), 1 Lev. 235; *Douglas v. Cooper* (1834), 3 My. & K. 378; *Beardsley v. Beardsley*, [1899] 1 Q. B. 746, approving the *dictum* of Sir C. GRESSWELL in *Emberley v. Trevanion* (1860), 4 Sw. & Tr. 197; *Concha v. Concha* (1886), 11 App. Cas. 541.

(*s*) *Bater v. Bater*, [1906] P. 209 C. A.; *Harvey v. Farnie* (1882), 8 App. Cas. 43.

(*t*) *Bunting v. Lepingwell* (1585), 4 Co. Rep. 29 a; *Kingston's (Duchess) Case* (1776), 2 Smith, L. C., 11th ed., 731, 734; see *Ogden v. Ogden*, [1908] P. 46, C. A.

(*u*) *Waygood v. James* (1869), L. R. 4 C. P. 361, at p. 372.

(*a*) *Uxbridge Union v. Winchester Union* (1904), 91 L. T. 533, following *R. v. Corsham (Inhabitants)* (1809), 11 East, 388, and *R. v. Catterall (Township)* (1817), 6 M. & S. 83; *R. v. Hartington Middle Quarter (Inhabitants)* (1855), 4 E. & B. 780. An order of sessions quashing an order of removal is conclusive only *inter partes* as to what it decides (*R. v. Wick St. Lawrence (Inhabitants)* (1833), 5 B. & Ad. 526, *per PARKER, J.*, at p. 535).

(*b*) *R. v. St. Pancras (Inhabitants)* (1794), Peake, 286 [219]; *R. v. Haughton (Inhabitants)* (1853), 1 E. & B. 501.

(*c*) 55 & 56 Vict. c. 57, ss. 7, 8; *Wakefield Corporation v. Cooke*, [1904] A. C. 31, distinguishing *R. v. Hutchings* (1881), 6 Q. B. D. 300, C. A.

(*d*) *Poulton v. Adjustable Cover and Boiler Block Co.*, [1908] 2 Ch. 430, C. A., *per MOULTON, L.J.*, at p. 439.

(*e*) *R. v. Graddon* (1775), 1 Cowp. 315.

(*f*) *Phillips v. Bury* (1694), 1 Ld. Raym. 4; compare *Hill v. Clifford*, [1907] 2 Ch. 236, C. A., as to the effect of an order of the General Medical Council removing the name of a practitioner from the register.

Upon the same principles it would seem that an adjudication or an order of discharge in bankruptcy (*g*), an order for the dissolution of a company, or declaring such a dissolution void (*h*), the finding upon an inquisition of lunacy until superseded (*i*), the certificate determining a building line of the superintending architect under the London Building Act, 1894 (*k*), are in the nature of judgments *in rem*.

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461. But a judgment is not a judgment *in rem* because it has, in a suit *inter partes*, determined an issue concerning the status of a particular person or family (*l*); nor, it seems, is a judgment determining that a sale of personal property was valid according to the law of the country where it was made and that the property had passed to the purchaser (*m*).

Judgments
which re-
semble, but
are not judg-
ments *in rem*

The following have also been held not to be judgments *in rem* :— A conviction in the Exchequer for penalties (not being a condemnation of the goods) for adulteration (*n*); a judgment in a jactitation suit, where marriage is not pleaded, or where the defendant fails to prove a marriage (*o*); a verdict in the divorce court, followed by the dismissal of the suit, effecting no change of status (*p*); a conviction on an indictment for obstructing a highway (*q*); a finding of magistrates, on a summons for payment of expenses under s. 150 of the Public Health Act, 1875 (*r*), that the street in question was a highway repairable by the inhabitants at large (*s*); a winding-up order under the Companies Act, 1862 (*t*). A decree under the Legitimacy Declaration Act, 1858 (*u*), though it satisfies the conditions of a judgment *in rem*, is expressly deprived of its effect inasmuch as by s. 8 it is not to prejudice any person unless he, or the person under whom he claims, has been cited or made party to the proceedings.

(*g*) Bankruptcy Acts, 1883 (46 & 47 Vict. c. 52), s. 20; 1890 (53 & 54 Vict. c. 71), s. 8; compare *Re Bremner, Ex parte Harper* (1875), 10 Ch. App. 379.

(*h*) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), ss. 172, 223.

(*i*) See *Hill v. Clifford*, [1907] 2 Ch. 236, 244, C. A.; and p. 342, *post*.

(*k*) 57 & 58 Vict. c. cxxiii., s. 22; *Lilley v. London County Council*, [1910] A. C. 1, affirming *Re Lilley, Lilley v. Skinner* (1907), 97 L. T. 306; 98 L. T. 110, C. A.

(*l*) *Katama Natchiar v. Shivagunga (Rajah)* (1863), 9 Moo. Ind. App. 539, 601.

(*m*) *Cannell v. Sewell* (1860), 5 H. & N. 728, Ex. Ch. The Court of Exchequer had held (S. C. (1858) 3 H. & N. 617) that the judgment of the Norwegian court was "in the nature of" a judgment *in rem*; but the Exchequer Chamber declined to concur in this view, while affirming the judgment on the ground that the sale was governed by Norwegian law and therefore valid.

(*n*) *Hart v. M'Namara* (1817), 4 Price, 154, n.

(*o*) *Kingston's (Duchess) Case* (1776), 2 Smith, L. C., 11th ed., 731, 738.

(*p*) *Needham v. Bremner* (1866), L. R. 1 C. P. 583; compare *R. v. Wick St. Lawrence (Inhabitants)* (1833), 5 B. & Ad. 526, 535 (quashing of order for removal of pauper).

(*q*) *Petrie v. Nuttall* (1856), 11 Exch. 569.

(*r*) 38 & 39 Vict. c. 55.

(*s*) *R. v. Hutchings* (1881), 6 Q. B. D. 300, C. A.; followed, *Scott v. Lowe* (1902), 86 L. T. 421; compare *A.-G. for Trinidad and Tobago v. Eriché*, [1893] A. C. 518, P. C.

(*t*) 25 & 26 Vict. c. 89 (replaced by Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69)); *Re Bowling and Welby's Contract*, [1895] 1 Ch. 663, C. A.

(*u*) 21 & 22 Vict. c. 93, s. 1.

SECT. 1.

SUB-SECT. 3.—*Judgments in personam or inter partes.*

**What will
create
Estoppel
by Record.**

All judgments
which are
not *in rem*.

462. Judgments *in personam* or *inter partes* are those which determine the rights of parties *inter se* to or in the subject-matter in dispute, whether it be corporeal property of any kind whatever or a liquidated or unliquidated demand, but do not affect the status of either persons or things, or make any disposition of property or declare or determine any interest in it except as between the parties litigant (*v*). They include all judgments which are not judgments *in rem*. Some examples have been given (*a*) of judgments which, though having some resemblance to judgments *in rem*, were only judgments *inter partes*. Judgments in actions for detention of chattels (*b*) and recovery of land may also be mentioned, which determine rights of possession, and may (as does also the judgment on an interpleader issue) decide questions of title as between the parties; but none of them at all affect any interests which third parties may have in the subject-matter. It may be added that as a judgment *inter partes*, though binding between them, does not affect the rights of third parties, so neither does a sale by way of execution for giving effect to that judgment: it is only a disposition of the particular interest (*c*).

Estoppel and
res judicata.

463. The most usual manner in which questions of estoppel have arisen on judgments *inter partes* has been where the defendant in an action raised a defence of *res judicata*, which he could do where former proceedings for the same cause of action by the same plaintiff had resulted in the defendant's favour, by pleading the former judgment by way of estoppel (*d*). In order to support that defence it was necessary to show that the subject-matter in dispute was the same (that is to say, that everything that was in controversy in the second suit as the foundation of the claim for relief was also in controversy in the first suit) (*e*), that it came in question before a court of competent jurisdiction (*f*), and that the result was conclusive so as to bind every other court (*g*).

But, provided a matter in issue is determined with certainty by the judgment (*h*), an estoppel may arise where a plea of *res judicata*

(*v*) *Castrique v. Imrie* (1870), L. R. 4 II. L. 414, 427, 441; *Simpson v. Fogg* (1863), 1 Hem. & M. 195, 244.

(*a*) See p. 329, *ante*.

(*b*) See *Brinsmead v. Harrison* (1871), L. R. 6 C. P. 581, *per* WILLES, J., at p. 588; affirmed, 7 C. P. 547, Ex. Ch.

(*c*) See *Castrique v. Imrie* (1870), L. R. 4 II. L. 414, *per* BLACKBURN, J., at pp. 427, 428.

(*d*) Bullen and Leake, *Precedents of Pleadings*, 3rd ed., p. 575.

(*e*) *Moss v. Anglo-Egyptian Navigation Co.* (1865), 1 Ch. App. 108, explaining (p. 115) *Brandlyn v. Ord* (1738), 1 Atk. 571; *Behrens v. Sieveking* (1837), 2 My. & Cr. 602; perhaps it would be more correct to say "open to controversy" (see *Re Hilton, Ex parte March* (1892), 67 L. T. 594; *Worman v. Worman* (1869), 43 Ch. D. 296, 306, following *Henderson v. Henderson* (1843), 3 Hare, 100, 115; *Humphries v. Humphries*, [1910] 1 K. B. 796; affirmed [1910] 2 K. B. 531, C. A.).

(*f*) A judgment of a court which has no jurisdiction to pronounce it is void and cannot give rise to estoppel (*Dublin (Archbishop) v. Trimleston (Lord)* (1849), 12 I. Eq. R. 251).

(*g*) *Behrens v. Sieveking*, *supra*, at p. 603.

(*h*) An estoppel must be "certain to every intent" (Co. Litt. 352 b).

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could never be established; as where the same cause of action has never been put in suit. A party is precluded from contending the contrary of any precise point which, having been once distinctly put in issue, has been solemnly found against him (*i*). Though the objects of the first and second actions are different, the finding on a matter which came directly (not collaterally or incidentally) in issue in the first action is conclusive in a second action between the same parties (*k*). And this principle has been applied when the point involved in the earlier decision, and as to which the parties were estopped, was one rather of law than of fact (*l*).

SUB-SECT. 4.—*Res Judicata*.

464. Where *res judicata* is pleaded by way of estoppel to an entire cause of action it amounts to an allegation that the whole legal rights and obligations of the parties are concluded by the earlier judgment, which may have involved the determination of questions of law as well as findings of fact (*m*). But although the judgment was pleadable by way of estoppel, it is perhaps not strictly correct to regard its determination of legal rights as a question of estoppel. The parties are estopped by the findings of fact involved in the judgment; as to the determination of questions

Meaning of
res judicata.

(*i*) *Outram v. Moewood* (1803), 3 East, 346 (successive actions for different trespasses to the same close; defendant estopped from alleging the same title as was found against his wife, in whose right he claimed, in the first action); *Strutt v. Boringdon* (1803), 5 Esp. 56, 58; *Hancock v. Welsh* (1816), 1 Stark. 347 (finding of tenancy in action of replevin conclusive in action for rent); *Flitters v. Alfrey* (1874), L. R. 10 C. P. 29, following *Routledge v. Hislop* (1860), 2 E. & E. 549 (defendant in first action plaintiff in second action); *Re Bank of Hindustan, China, and Japan, Alison's Case* (1873), 9 Ch. App. 1, 25 (liquidator barred by finding in action for calls that respondent was not a shareholder).

(*k*) *Priestman v. Thomas* (1884), 9 P. D. 210, C. A. (first action to set aside compromise, second action to revoke probate founded on the same compromise); *Barrs v. Jackson* (1845), 1 Ph. 582 (first suit for grant of letters administration; second suit for distribution of assets); *Jewsbury v. Mummery* (1872), L. R. 8 C. P. 56, Ex. Ch. (verdict against executor on a plea of *plene administravit* estopped him from any defence open to him under that plea), citing *Ramsden v. Jackson* (1737), 1 Atk. 292; compare *Dawson v. Gregory* (1845), 7 Q. B. 756; *Ennis v. Rochford* (1884), 14 L. R. Ir. 285; *Erving v. Peters* (1790), 3 Term Rep. 685; *Thompson & Sons v. Clarke* (1901), 17 T. L. R. 455; and other cases in the Yearly Practice of the Supreme Court, 1910, p. 152, notes to r. 8; and see *Re South American and Mexican Co., Ex parte Bank of England*, [1895] 1 Ch. 37, C. A.; *Doe v. Wright* (1839), 10 Ad. & El. 763 (judgment in ejectment before the Common Law Procedure Act, 1852 (15 & 16 Vict. c. 76), conclusive in action for mesne profits); distinguish *Harris v. Mulhern* (1875), 1 Ex. D. 31, after that Act; for the modern practice, see R. S. C., Ord. 13, r. 9; Ord. 18, r. 2, and title PRACTICE AND PROCEDURE. For recent applications of the same principle to criminal proceedings, see *R. v. Brakenridge* (1884), 48 J. P. 293; *Riley v. Brown* (1890), 62 L. T. 458; *Welton v. Taneborne* (1908), 99 L. T. 668. See title CRIMINAL LAW AND PROCEDURE, Vol. IX., p. 356, note (a). For its application in divorce proceedings, see *Sopwith v. Sopwith* (1861), 2 Sw. & Tr. 160; *Finney v. Finney* (1868), L. R. 1 P. & D. 483; approved, *Harriman v. Harriman*, [1909] P. 123, per FARWELL, I.J., at p. 144; *Butler v. Butler*, [1894] P. 25, C. A.

(*l*) *Re Graydon, Ex parte Official Receiver*, [1896] 1 Q. B. 417.

(*m*) *Collier v. Walters* (1873), L. R. 17 Eq. 252; *Badur Bee v. Habib Merican Noordin*, [1909] A. C. 615, P. C. In *Marriot v. Hampton* (1797), 7 Term Rep. 269, which rested on the same principle, the plaintiff, on its appearing in an action for money had and received that the money had been paid under a judgment which had not been set aside, was nonsuited.

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of law, the true view seems to be that the legal rights of the parties are such as they have been determined to be by the judgment of a competent court. But the conclusiveness of the determination rests upon the same principles in each case. The doctrine of *res judicata* is not a technical doctrine applicable only to records: it is a fundamental doctrine of all courts that there must be an end of litigation (*n*). It will therefore be convenient to follow the ordinary classification and treat it as a branch of the law of estoppel.

Essentials of
***res judicata*.**

465. In order that a defence of *res judicata* may succeed it is necessary to show not only that the cause of action was the same, but also that the plaintiff has had an opportunity of recovering (*o*), and but for his own fault might have recovered in the first action that which he seeks to recover in the second. A plea of *res judicata* must show either an actual merger, or that the same point has been actually decided between the same parties (*p*). Where the former judgment has been for the defendant, the conditions necessary to conclude the plaintiff are not less stringent. It is not enough that the matter alleged to be concluded might have been put in issue, or that the relief sought might have been claimed. It is necessary to show that it actually was so put in issue or claimed (*q*).

(*n*) *Re May* (1885), 28 Ch. D. 516, C. A. *per* BRETT, M.R., at p. 518; compare *Re Graydon, Ex parte Official Receiver*, [1896] 1 Q. B. 417; *Phillips v. Bury* (1794), 1 Ld. Raym. 5, *per* Lord HOLT, C.J., at p. 14; *Badar Bee v. Habib Merican Noordin*, [1909] A. C. 615, P. C.; see also title JUDGMENTS AND ORDERS. A verdict for the plaintiff on a plea of set-off (being a matter distinctly put in issue) was pleadable by way of estoppel in an action subsequently brought against him by the defendant for the debt which he had sought to set off (*Eastmure v. Lawes* (1839), 5 Bing. (N. C.) 444; followed, *Danks v. Harley* (1853), 1 W. R. 291; compare *Webster v. Armstrong* (1885), 54 L. J. (Q. B.) 236). A verdict for defendant in an action for libel in respect of certain parts of a publication constituted a defence of *res judicata* to a second action in respect of other parts of the same publication, the subject-matter of both actions being the same (*Mardougall v. Knight* (1890), 25 Q. B. D. 1, C. A.).

(*o*) *Sc.*, by its being open to him on the pleadings (see *Re Hilton, Ex parte March* (1892), 67 L. T. 594). A plaintiff is not bound to join two separate causes of action in one proceeding (see *Seddon v. Tutop* (1790), 6 Term Rep. 607; *Hudley v. Green* (1832), 2 Cr. & J. 374; *Florence v. Jennings* (1857), 2 C. B. (N. S.) 454; *Brunsdon v. Humphrey* (1884), 14 Q. B. D. 141, 146; *Balby-with-Hextonpe v. Mullan* (1903), 2 L. G. R. 330; compare *Overton v. Harvey* (1850), 9 C. B. 324; *Russell v. Waterford and Limerick Rail. Co.* (1885), 16 L. R. Ir. 314).

(*p*) *Nelson v. Couch* (1863), 15 C. B. (N. S.) 99, 108, 109 (plea of judgment recovered by the plaintiff).

(*q*) *Collins v. Gough* (1785), 7 Bro. Parl. Cas. 94, 99; *Hunter v. Stewart* (1861), 4 De G. F. & J. 168, 177—179; compare *Davis v. Hedges* (1871), L. R. 6 Q. B. 687; *Moore v. Battie* (1759), Amb. 371; *Hindley v. Haslam* (1878), 27 W. R. 61; and see also *Brunsdon v. Humphrey*, *supra*, *per* BOWEN, L.J., at p. 147; *Bake v. French*, [1907] 1 Ch. 428 (and see p. 355, *post*). *Humphries v. Humphries*, [1910] 1 K. B. 796; affirmed [1910] 2 K. B. 531, C. A. (*res judicata* as to the Statute of Frauds, which might have been, but was not, pleaded in a former action for rent of the same premises, in which the existence of the agreement was in issue), appears at first sight to conflict with this proposition. But in such a case the issue is contract or no contract. The statute only prescribes the evidence by which the contract must be proved. The fact that it was founded on defective or incomplete evidence is no answer to a judgment which has not been

466. But in all cases where the cause of action is really the same, and has been determined on the merits (*r*), and not on some ground (as the non-expiration of the term of credit) which has ceased to operate when the second action is brought, the plea of *res judicata* would succeed. The doctrine applies to all matters which existed at the time of the giving of the judgment, and which the party had an opportunity of bringing before the court. But if there be matter subsequent which could not be brought before the court at the time, the party is not estopped from raising it (*s*).

467. A party cannot in a subsequent proceeding raise a ground of claim or defence which upon the pleadings or the form of the issue was open to him in the former one (*t*). The mere discovery of fresh evidence (as distinguished from the development of fresh circumstances (*u*)) on matters which have been open for controversy in the earlier proceeding is no answer to a defence of *res judicata*. Where this is applicable, the original cause of action is gone, and can only be restored by getting rid of the *res iudicata* (*a*); and this must be done by an action or application, which can only succeed on the same grounds as the former "bill of review" in the Court of Chancery, namely, the discovery of fresh evidence which entirely changes the aspect of the case, and was not and could not by reasonable diligence have been obtained before (*b*). The effect of

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Applicable
wherever
same cause
of action has
been deter-
mined on
the merits.

Party cannot
raise issue
available in
former action.

set aside (see notes (*u*), (*a*), *infra*); and this proposition is not affected by a rule of court which prevents the evidence being objected to without notice by pleading or otherwise. The question could not have arisen under the old system of pleading, under which a mere denial of the contract throw upon the plaintiff the burden of proving it by proper evidence (*Buttemere v. Hayes* (1839), 5 M. & W. 456, 461; Bullen and Leake, *Precedents of Pleadings*, 3rd ed., p. 467).

(*r*) *Badar Bee v. Habib Merican Noordin*, [1909] A. C. 615; *Livesey v. Harding* (1855), 21 Beav. 227; *A.-G. v. Rochester Corporation* (1833), 6 Sim 273. A prohibition is not a decision on the merits, and raises no estoppel as regards the cause of action in the prohibited proceeding (*Grundy v. Townsend* (1888), 36 W. R. 531, C. A.). As to the effect of want of finality, see p. 359, *post*.

(*s*) *Newington v. Levy* (1870), L. R. 6 C. P. 180, Ex. Ch., per BLACKBURN, J., at p. 193; see also the sequel in *Hall v. Levy* (1875), L. R. 10 C. P. 154; *Peterborough (Earl) v. Germaine* (1709), 6 Bro. Parl. Cas. 1; and see pp. 349, 354, *post*.

(*t*) *Re Hilton, Ex parte March* (1892), 67 L. T. 594.

(*u*) *Heming v. Wilton* (1832), 5 C. & P. 54; *Liverpool Corporation v. Chorley Waterworks Co.* (1852), 2 Do G. M. & G. 852, C. A.; *Cotter v. Barrymore* (1733), 4 Bro. Parl. Cas. 203; *Hall v. Levy*, *supra*; compare *R. v. Evenwood and Barony (Inhabitants)* (1843), 3 Q. B. 370, 377, and distinguish *R. v. Wick St. Lawrence (Inhabitants)* (1833), 5 B. & Ad. 526, 533; *Peters v. Tilly* (1886), 11 P. D. 145; see p. 354, *post*. On application to review an order for weekly payments under the Workmen's Compensation Act, 1906 (6 Edw. 7, c. 58), Sched. L., very slight evidence of change of circumstances will exclude the doctrine of *res judicata* (*Radcliffe v. Pacific Steam Navigation Co.*, [1910] 1 K. B. 685, C. A.).

(*a*) *Lockyer v. Ferryman* (1877), 2 App. Cas. 519; compare *Dundas v. Waddell* (1880), 5 App. Cas. 249. The same principle applies to defences, and the failure to plead the Statute of Frauds falls within it (*Humphries v. Humphries*, [1910] 1 K. B. 796; affirmed [1910] 2 K. B. 531, C. A.); see note (*q*) on p. 332, *ante*. But an order of a bankruptcy court as to amendment of proof made under mistake does not amount to *res judicata* (*Re Greaves, Ex parte Whitton* (1880), 43 L. T. 480).

(*b*) *Phosphate Sewage Co. v. Molleson* (1879), 4 App. Cas. 801, 814, per Lord CAIRNS, L.C.; *Re May* (1885), 28 Ch. D. 516, C. A., per COTTON, L.J., at n. 521:

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Res judicata
 not limited
 to formal
 records.

fraud and collusion in preventing an estoppel by record from arising will be considered later (c).

468. *Res judicata* is no technical doctrine. It has been applied to the dismissal of a petition on the ground of insufficient evidence although there was, strictly speaking, no record (d), and to an order, interlocutory in form, which was meant to be a declaration of the rights of the parties (e). On the same principle an action was stayed as frivolous and vexatious, when the point had been determined by a county court in a manner intended to be final, but not amounting to *res judicata*, because on an interlocutory application (f). The doctrine applies equally in all courts, and it is immaterial in what court the former proceeding was taken, provided only that it was a court of competent jurisdiction, or what form the proceeding took, provided it was really for the same cause (g).

SUB-SECT. 5.—Judgment Recovered.

Cause of
 action merged
 in the
 judgment.

469. The defence of "judgment recovered," arising as it does out of *res judicata*, has much in common with estoppel by record, though it is not founded upon it. A plaintiff, who has once sued a defendant to judgment, cannot, while the judgment stands, although unsatisfied, sue him again for the same cause, not because he is estopped from doing so (though he, as well as the defendant, is estopped from averring anything contrary to the record (h)), but

Falcke v. Scottish Imperial Insurance Co. (1887) 57 L. T. 39; *Re Scott and Alvarez's Contract*, *Scott v. Alvarez*, [1895] 1 Ch. 596, C. A. There seems to be no instance of such an action succeeding on this ground since the Judicature Acts. As to an action in the nature of a bill of review for fraud, see *Cole v. Langford*, [1898] 2 Q. B. 36; *Boswell v. Coaks* (No. 2) (1894), 86 L. T. 365, n., H. L.; and see p. 352, *post*.

(c) See p. 351, *post*.

(d) *Re May* (1885), 28 Ch. D. 516, 518, C. A.; compare *Jones v. Nixon* (1831), You. 359; *Symons v. Lees* (1876) 1 Ex. D. 416.

(e) *Pearth v. Marriott* (1882), 22 Ch. D. 182, 191, C. A.; compare *Livesey v. Harding* (1855), 21 Beav. 227; *Re Larrard* (1896), 3 Mans. 317, C. A.; *Bader Bee v. Habib Merican Noordin*, [1909] A. C. 615, P. C.

(f) *Stephenson v. Garnett*, [1898] 1 Q. B. 677, C. A.

(g) The finding of a county court judge in an action for wrongful dismissal that the dismissal was justified was conclusive on a summons for wages before justices founded on the same dismissal (*Routledge v. Hislop* (1860), 2 E. & E. 549; compare *Plitters v. Alfrey* (1874), L. R. 10 C. P. 29; *Eastmure v. Laws* (1839), 5 Bing. (N. C.) 444; *Furness, Withy & Co. v. Hall (J. & E.)* (1909), 25 T. L. R. 233 (plaintiff, who has recovered in one action for breach of contract the damages which he has had to pay to a third party, cannot bring second action for the costs incurred in defending the third party's action, because they are in fact damages for the cause of action already sued upon; and the fact that they are claimed on a contract of indemnity arising upon an implied request to defend the third party's action makes no difference). So a dismissal by justices of a summons for bringing forward a house beyond the building line was a bar to a summons for subsequently continuing the same house beyond the same line (*Kinnis v. Graves* (1898), 78 L. T. 502). But a decision of justices which amounts merely to an exercise of discretion does not estop them from giving a contrary decision on the same facts on a subsequent occasion (*Smith v. Shann*, [1898] 2 Q. B. 347); see also p. 354, *post*.

(h) *Webster v. Armstrong* (1885), 54 L. J. (Q. B.) 236; *Todd v. Stewart* (1845), 9 Q. B. 759; reversed, *Stewart v. Todd* (1846), 9 Q. B. 767, Ex. Ch.

because the cause of action is merged in the judgment, which creates an obligation of a higher nature (*i*). It is also probably true to say that a person who has once recovered judgment for a sum of money is estopped from averring that he ought to recover any further sum for the same cause of action (*k*). Thus, the recovery of £50 in a county court for fraudulent misrepresentation is a bar to an action for damages subsequently accruing from the same misrepresentation (*l*). So a consent order in the Chancery Division restraining the defendant from parting with shares is a bar to an action in the King's Bench Division for damages for detention of the same shares, as the plaintiff might have obtained the relief in the first action. The principle is that where there is but one cause of action, the damages must be assessed once for all (*m*).

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470. On this principle, a judgment recovered (though unsatisfied) against some one of a number of persons who are jointly (not jointly and severally) liable on the same contract (*n*), or are liable for the same tort (*o*), with others is, until set aside (*p*), a bar to an action against the others (although the plaintiff may not have been

Judgment
against one of
two who are
jointly liable.

(*i*) See *King v. Hoare* (1841), 13 M. & W. 494, per PARKE, B., at p. 504; *Re Hodgson, Beckett v. Ramsdale* (1885), 31 Ch. D. 177, C. A. per BOWEN, L.J., at pp. 188, 189; *Florence v. Jennings* (1857), 2 C. B. (N. S.) 454; *Stewart v. Todd* (1846), 9 Q. B. 767, 777, 778, Ex. Ch.; compare *Savile v. Jackson* (1824), 13 Price, 715. See form of plea, Bullen and Leake, *Precedents of Pleadings*, 3rd ed., p. 624; see also title JUDGMENTS AND ORDERS.

(*k*) *Stewart v. Todd*, *supra*.

(*l*) *Clarke v. York* (1882), 52 L. J. (CH.) 32 (see County Courts Act, 1888 (51 & 52 Vict. c. 43), s. 81); compare *Wright v. London General Omnibus Co.* (1877), 2 Q. B. D. 271; *Sanders v. Hamilton* (1907), 96 L. T. 679.

(*m*) *Serrao v. Noel* (1885), 15 Q. B. D. 549, C. A., per BOWEN, L.J., at p. 559; distinguished, *Worman v. Worman* (1889), 43 Ch. D. 296, 308, 309 (relief claimed in second action entirely outside the former compromise); and compare *Bugot (Lord) v. Williams* (1824), 3 B. & C. 235.

(*n*) *King v. Hoare*, *supra*; *Kendall v. Hamilton* (1879), 4 App. Cas. 504; *Re Tyler, Ex parte Higgins*, (1858), 3 Do G. & J. 33, C. A. The rule applies to a husband and wife contracting jointly, though the latter only contracts with respect to her separate estate (*Hoare v. Niblett*, [1891] 1 Q. B. 781); but judgment against a married woman for an ante-nuptial debt is no defence to a subsequent action for the same debt against her husband, because the liability is not joint (*Beck v. Pierce* (1889), 23 Q. B. D. 316, C. A.; see title HUSBAND AND WIFE). As to the peculiar several liability of the estate of a deceased partner, see Partnership Act, 1890 (53 & 54 Vict. c. 39), s. 9; and title PARTNERSHIP.

(*o*) *Brinsmead v. Harrison* (1871), L. R. 6 C. P. 584; affirmed (1872) L. R. 7 C. P. 547, Ex. Ch., following *Brown v. Wootton* (1605), Cro. Jac. 73; *Pease v. Chaytor* (1861), 1 B. & S. 658; (1863) 3 B. & S. 620, 647. The result is the same where the plaintiff having the right to sue either in tort or contract upon the same facts, having sued one joint tortfeasor to judgment in tort, endeavours to proceed against the other in contract (*Buckland v. Johnson* (1854), 15 C. B. 145; compare *Smith v. Baker* (1873), L. R. 8 C. P. 350). But an unsatisfied judgment for the plaintiff in an action of conversion does not change the property in the goods (*Manton v. Phillips* (1863), 9 L. T. 289); and one who was a joint tortfeasor with the defendant may thereafter be sued by the plaintiff for a fresh tort to the same goods (*Brinsmead v. Harrison*, *supra*).

(*p*) *Partington v. Hawthorne* (1888), 52 J. P. 807; but a consent judgment regularly obtained, and not objectionable on the merits, cannot be set aside by consent of parties, so as to prejudice a third person in whose favour it is a bar (*Hammond v. Schofield*, [1891] 1 Q. B. 453; *Cross & Co. v. Matthews and Wallace* (1904), 91 L. T. 500).

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aware of their liability (*g*)), not on any ground of estoppel, but because there was but one cause of action, and that has merged in the judgment—*transit in rem judicatam* (*r*); and because in the case of contract the others are deprived by the act of the plaintiff of the right to have their liability determined in the same judgment with their co-contractors (*s*). For the last-mentioned reason it seems that a judgment in favour of one of several joint contractors is a bar to an action against the others, if it proceeds upon a ground (*e.g.*, payment or release) which would have been a defence to them. It is clearly not so if it is founded on a defence which is personal to the defendant, *e.g.*, infancy or bankruptcy (*t*).

Subject to exceptions provided by the rules of court (*a*), a separate judgment against one joint contractor is equally efficacious as a defence to the others though obtained in a proceeding to which they were parties (*b*).

Judgment
against one
of two
alternative
defendants.

The above principles apply where a plaintiff having a right to elect which of two parties to sue (*e.g.*, principal or agent) sues one of them to judgment (*c*). But to bar the second action it is essential (as in the case of a former judgment against the same defendant (*d*)) that the earlier judgment should be for the same cause of action as it is sought to enforce in the later proceedings. Thus, an unsatisfied judgment on a bill or cheque, given by one joint contractor only, in conditional payment of a joint debt, is no answer to an action on the original consideration against the others (*e*).

No merger
unless full
opportunity
of recovering

471. But there will be no merger, unless the cause of action is the same (*f*) and the plaintiff had an opportunity of recovering in the first action what he seeks to recover in the second; otherwise

(*g*) *Kendall v. Hamilton* (1879), 4 App. Cas. 504 (contract); *Munster v. Coz* (1885), 10 App. Cas. 680, see *per* Lord BLACKBURN, at p. 688 (tort); distinguish *Badely v. Consolidated Bank* (1886), 34 Ch. D. 536, 555 (surety's right of indemnity against partner preserved); see titles GUARANTEE; PARTNERSHIP.

(*r*) *King v. Hoare* (1844), 13 M. & W. 494, 501; *Re Hodgson, Beckett v. Ramsdale* (1885), 31 Ch. D. 177, C. A., *per* BOWEN, L.J., at pp. 188, 189; compare *Bermundsey Vestry v. Ramsey* (1871), 11 R. 6 C. P. 247, 251.

(*s*) *Kendall v. Hamilton*, *supra*, *per* Lord CAIRNS, L.C., at pp. 515, 516.

(*t*) *Phillips v. Ward* (1863), 2 H. & C. 717, *per* BRAMWELL, B., at p. 721.

(*a*) See L. S. C., Ord. 13, r. 4; Ord. 14, r. 5; Ord. 27, r. 3. In an action against two joint debtors, on summons for judgment under Ord. 14 one consented to judgment against him and paid half the debt, the other obtained leave to defend. It was held that plaintiff could proceed with the action against that defendant (*Weall v. James* (1893), 68 L. T. 515, C. A.; and see title PRACTICE AND PROCEDURE).

(*b*) *McLeod v. Pover*, [1898] 2 Ch. 295; compare *Cross & Co. v. Matthews and Wallace* (1904), 91 L. T. 500.

(*c*) *Priestly v. Fennie* (1865), 3 H. & C. 977; *Cross & Co. v. Matthews and Wallace*, *supra*; *Scarf v. Jardine* (1882), 7 App. Cas. 345; see title AGENCY, Vol. I., p. 209; *French v. Howie*, [1906] 2 K. B. 674, C. A.

(*d*) See next paragraph.

(*e*) *Drake v. Mitchell* (1803), 3 East, 251; followed, *Wegg-Prosser v. Evans*, [1895] 1 Q. B. 108, C. A., overruling *Cumbeftort v. Chapman* (1887), 19 Q. B. D. 229.

(*f*) *Leggott v. Great Northern Rail. Co.* (1876), 1 Q. B. D. 599 (recovery by personal representatives of damages sustained by relatives of deceased from his death by accident is no bar to action for damage to his estate); followed, *Daly v. Dublin, Wicklow and Wexford Rail. Co.* (1892), 30 L. R. Ir. 514, C. A.

the defendant is not twice vexed for the same cause (*g*). Accordingly a plaintiff in the High Court, who, in a county court action brought against him by the defendant, had obtained a verdict on a counterclaim for an amount exceeding the limit of county court jurisdiction whereby he defeated the then plaintiff's action, but recovered no judgment for the balance due to him, was allowed to proceed with his own action for that which he had had no opportunity of recovering; but the defendant in the second action was estopped by the county court judgment from again contesting the issues of fact, which it was within the jurisdiction of the county court to determine, the question of amount alone remaining open (*h*). So a plaintiff is not precluded by an order in an administration suit to which he was a party from afterwards commencing proceedings relating to the same subject-matter for relief which he was not in a position to ask in the earlier suit (*i*); and this principle applies even though the plaintiff might have set up in the first suit the case which he made in the second, and did not do so (*k*). *A fortiori*, where the matters in question in the second suit arose while the first was pending, and could only have been raised (if at all) in the first by amendment of the proceedings (*l*); or where, though the causes of action in the first and the second proceeding have a common origin, they are not the same, as in the case of a continuing trespass (*m*) or of successive breaches of the same contract (*n*). A plaintiff is allowed to bring successive actions in respect of the very same circumstances, provided those circumstances give rise to two different causes of action (*o*); so an action

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Nor where
causes of
action
different.

(*g*) See *Nelson v. Couch* (1863), 15 C. B. (N. S.) 99; *Few v. Backhouse* (1838), 8 Ad. & El. 789.

(*h*) *Webster v. Armstrong* (1885), 54 L. J. (Q. B.) 236; see now, on the question of jurisdiction, Judicature Act, 1881 (47 & 48 Vict. c. 61), s. 18; compare *Midland Rail. Co. v. Martin & Co.*, [1893] 2 Q. B. 172. But a party who selects a tribunal having jurisdiction in the premises cannot afterwards seek the same remedy before another tribunal on the ground that the first had not power to award him adequate damages (*Wright v. London Omnibus Co.* (1877), 2 Q. B. D. 271).

(*i*) *Guidici v. Kinton* (1843), 6 Beav. 517; compare *Whittaker v. Kershaw* (1890), 45 Ch. D. 320, 327, C. A.; *Re Hampshire Co-operative Milk Co., Purcell's Case* (1880), 29 W. R. 170.

(*k*) *Hunter v. Stewart* (1861), 4 De G. F. & J. 168.

(*l*) *National Bolivian Navigation Co. v. Wilson* (1880), 5 App. Cas. 176, 185, 198, 199.

(*m*) *Clarke v. Midland and Great Western Rail. Co.*, [1895] 2 I. R. 294, C. A., following *Thompson v. Gibson* (1841), 7 M. & W. 456.

(*n*) *Bristowe v. Fairclough* (1840), 1 Man. & G. 143; *Ebbetts v. Conquest* (1900), 82 L. T. 560 (breaches of covenant to keep, and to deliver up, in repair).

(*o*) *Brunsdon v. Humphrey* (1884), 14 Q. B. D. 141, C. A. (injury to a man's person and to his carriage). "The test is not whether the plaintiff had the opportunity of recovering in the first action what he claims to receive in the second" (*ibid.*, per BOWEN, L.J., at p. 146), but whether he in fact sought to do so; compare *Florence v. Jennings* (1857), 2 C. B. (N. S.) 454 (plaintiff recovered the principal due on a bill in one action, and in another interest due under a separate agreement, but only down to the date of the first judgment, for thereupon the bill passed *in rem judicatam*); *Whittaker v. Kershaw*, *supra*; *Gibbs v. Cruikshank* (1873), L. R. 8 C. P. 454 (recovery in replevin of the value of the goods barred an action for damage by the same trespass to the same goods, for such damage might have been recovered in the former action; *aliter* of damages for trespass to the land, which were not recoverable in that action).

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for false imprisonment is no bar to a subsequent action for a malicious prosecution following on the same arrest, even though the jury improperly gave damages in the first action for imprisonment consequential on the prosecution (*p*).

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SUB-SECT. 1.—Parties estopped by Judgment in rem.

Distinction
 between
 judgments
in rem and
in personam

472. The most important distinction between judgments *in rem* and judgments *in personam* is that whereas the latter are only binding as between the parties thereto and those who are privy to them (*a*), the judgment *in rem* of a court of competent jurisdiction is, as regards persons domiciled (*b*) and property situated (*c*) within the jurisdiction of the court pronouncing the judgment, conclusive against all the world in whatever it settles as to the status of the persons or property (*d*), or as to the right or title to the latter, and as to whatever disposition it makes of the property itself, or of the proceeds of its sale (*e*). In other words, all persons, whether party to the proceedings or not, are estopped from averring that the status of persons or things, or the right or title to property, is other than the court has by such a judgment declared or made it to be. But a judgment *in rem* can have no effect beyond the limits of the State within which the court delivering the judgment exercises jurisdiction, unless the thing affected is situate (*f*), or the person is domiciled (*g*), within those limits.

(*p*) *Guest v. Warren* (1854), 9 Exch. 379.

(*a*) See p. 343, *post*.

(*b*) *Bater v. Bater*, [1906] P. 209, C. A.; *Harvey v. Farnie* (1882), 8 App. Cas. 43; *Pemberton v. Hughes*, [1899] 1 Ch. 781, C. A.; see title CONFLICT OF LAWS, Vol. VI., pp. 268, 269, 297. An exception must be made in regard to the establishment of a penal status by a foreign court; see *ibid.*, p. 284; *Re Selol's Trust*, [1902] 1 Ch. 488, 492.

(*c*) *Castrique v. Imrie* (1870), L. R. 4 H. L. 414, *per* BLACKBURN, J., at p. 428, quoting Story, Conflict of Laws, s. 592; and *per* Lord CHIELMSFORD, at p. 448; see also *Wakefield Corporation v. Cooke*, [1904] A. C. 31; *R. v. St. Pancras (Inhabitants)* (1794), Peake, 286 [219] (highway cases), as to immovables. The finding of a jury on an inquisition in lunacy presents an exception; see p. 329, *ante*, and p. 341, *post*.

(*d*) *R. v. Wick St. Lawrence (Inhabitants)* (1833), 5 B. & Ad. 526, 535, 536 (settlement of pauper); *Noel v. Wells* (1668), 1 Lev. 235; *Poulton v. Adjustable Cover and Boiler Block Co.*, [1908] 2 Ch. 430, C. A., *per* MOUNTON, L.J., at p. 439. It may be noted that the decree of a court of probate, establishing a will, or the status of administrator, though conclusive against all parties and in all courts until set aside, is not, as against persons who had no opportunity of intervening or upon whom a fraud has been practised in obtaining the decree, so far conclusive as to prevent their taking proceedings in the same court for revocation of the probate or the grant; see *Young v. Holloway*, [1895] P. 87; *Priestman v. Thomas* (1884), 9 P. D. 70, 210; compare *Ritchie v. Malcolm*, [1902] 2 L. R. 403; and title EXECUTORS AND ADMINISTRATORS.

(*e*) *Minna Craig Steamship Co. v. Chartered Mercantile Bank of India, London and China*, [1897] 1 Q. B. 460, C. A.

(*f*) *Castrique v. Imrie*, *supra*, *per* BLACKBURN, J., at p. 435, citing *Novelli v. Rossi* (1831), 2 B. & Ad. 757. As to the conclusiveness of a foreign judgment as to title to personal estate of a person domiciled in the foreign country at his death, see *Dogliotti v. Crispin* (1866), L. R. 1 H. L. 301, 306, 314; *Re Trufort, Trafford v. Blanc* (1887), 36 Ch. D. 600. See title CONFLICT OF LAWS, Vol. VI., pp. 222, 296.

(*g*) *Shaw v. Gould* (1868), L. R. 3 H. L. 55; *Bonaparte v. Bonaparte*, [1892]

473. The question whether and in what cases the findings of the court upon which its determination of a question of status or title, or the disposition of property, have been founded are binding on strangers does not admit of a categorical answer. It is a fundamental rule that a judgment is not conclusive as to anything but the point decided (*h*), nor of any matter which came collaterally in question, or of any matter incidentally cognisable, or of any matter to be inferred by argument from the judgment (*i*), and this applies as well to judgments *in rem* as to judgments *inter partes*. Accordingly, a judgment of the Admiralty Court in a salvage action, where salvage services are admitted and money paid into court, concludes nothing more (at least against strangers) than the amount of the award, and the existence of a lien for it, and is not conclusive in an action by the owners of the salvaged vessel against underwriters that the loss was due to sea perils (*k*). The difficulty arises in the application of the rule, in determining in each case what was the point decided and what was matter incidentally cognisable, and the opinion of judges seems to have undergone some fluctuations (*l*). But in order that a judgment

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P. 402. And even as regards such persons it cannot, where they have concluded in a foreign country a contract affecting their status with due regard to the ceremonies prescribed by the *lex loci contractus*, affect in that country the validity of the ceremony, so that it is possible for a marriage to be invalid in the country of domicile and valid in the country of its celebration; see *Simonin* (falsely called *Mallac*) v. *Mallac* (1860), 2 Sw. & Tr. 67; *Hay v. Northcote*, [1900] 2 Ch. 262; *Ogden v. Ogden*, [1908] P. 46, C. A. As to how far the capacity of parties to enter into a contract is to be determined by the law of their domicile, see *Sottomayor v. De Barros* (1877), 3 P. D. 1, C. A.; *Sottomayor v. De Barros* (1879) 5 P. D. 91; *Ogden v. Ogden*, *supra*, at p. 74; *Chetti v. Chetti*, [1909] P. 67; *Cass v. Cass* (otherwise *Pfaff*) (1910), 102 L. T. 397; and see title CONFLICT OF LAWS, Vol. VI., p. 254.

(*h*) *Castrique v. Imrie* (1870), L. R. 4 H. L., 414, 431.

(*i*) *Kingston's (Duchess) Case* (1776), 2 Smith, L. C., 11th ed., 731, 732.

(*k*) *Ballantyne v. Muckinnon*, [1896] 2 Q. B. 455, O. A.; and see *Hill v. Rufford*, [1907] 2 Ch. 236, C. A., *per* GORELL BARNES, P., at p. 251.

(*l*) In *Hood-Barrs v. Jackson* (1842), 1 Y. & C. Ch. Cas. 585, KNIGHT BRUCE, V.-C., after quoting the well-known passage from *Kingston's (Duchess) Case*, goes on at pp. 597, 598 to say that "however essential the establishment of particular facts may be to the soundness of a judicial decision, however it may proceed on them as established, and however binding and conclusive the decision may, as to its immediate and direct object, be, those facts are not all necessarily established conclusively between the parties, and that either may again litigate them for any other purpose as to which they may come in question"; and he held that a finding of fact in a suit in the ecclesiastical court for a grant of letters of administration, necessary to the decision, and appearing on the face of the order (a judgment *in rem*), was not conclusive in proceedings between the same parties in a court of equity for distribution. This decision was reversed by Lord LYNCHURST, L.C., on the authority of *Bouchier v. Taylor* (1776), 4 Bro. Parl. Cas. 708, which proceeded partly at least on the ground (see *Barrs v. Jackson* (1845), 1 Ph. 582, 583) that the ecclesiastical court was (what the Probate Division is not) a court of distribution, and of the inconvenience attending the existence of two different findings by two courts of co-ordinate jurisdiction; and though, having regard to Lord LYNCHURST's remarks on *Kingston's (Duchess) Case*, it is difficult to resist the conclusion that there was a difference of opinion between him and the vice-chancellor as to what matters were to be regarded as "incidentally cognisable," and what as "the point decided," it is said on high authority that the principles laid down by the vice-chancellor are "untouched by the reversal" (see 2 Smith, L. C., 11th ed., p. 779; *R. v. Hutchings* (1881), 6 Q. B. D. 301, C. A., *per* Lord

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in rem may conclude strangers as to any finding of fact besides the status or title which it establishes, it is necessary that the finding should be essential to the judgment (*m*), and ascertainable without ambiguity from the judgment itself (*n*). It is not sufficient to create an estoppel, even *inter partes*, if the finding relied on is only discoverable from a perusal of the judge's reasons (*o*).

Prize cases.

474. Prize cases have been regarded as to a certain extent exceptional (*p*), and the rule applied in actions against underwriters

SELBORNE, L.C., at p. 304), and his judgment is regarded as a *locus classicus* on the subject of estoppel by record. On the other hand, a grant of probate is conclusive as to the validity of the testamentary document, and concludes any question as to the regularity of its execution; therefore, so long as the probate remains unrecalled, no relief can be obtained in equity against a fraud in obtaining the execution of the document (*Allen v. M'Pherson* (1847), 1 H. L. Cas. 191; followed in *Meluish v. Milton* (1876), 3 Ch. D. 27, C. A.). In the former case the codicil in question had been contested by the plaintiff in the Chancery suit; but in the latter the will appears from the dates (see p. 28) to have been proved in common form. Moreover, the record of a condemnation in the Exchequer was conclusive on all parties as to the title of the Crown to the goods and their liability to be seized; and also, in civil proceedings and in proceedings for penalties under the statute creating the forfeiture (but not under a different statute), as to the grounds of condemnation appearing on the record (*Scott v. Shearman* (1775), 2 Wm. Bl. 977; *A.-G. v. King* (1817), 5 Price, 195). Again, in *R. v. Hartington Middle Quarter (Inhabitants)* (1855), 4 E. & B. 780, an order for removal of unemancipated pauper children, based (as might be gathered from the order itself) upon a finding (erroneous in fact) as to the settlement, was held to be conclusive (at least between the same parties) on the question of the father's settlement; and the judgment (p. 794) went further, treating the finding as a judgment *in rem*. "Orders of removal," said COLERIDGE, J. (p. 797). "unappealed against, or confirmed on appeal, are conclusive evidence, not merely of the fact directly decided, but of those facts also which are mentioned in them and necessary steps to the decision. Unless they are necessary steps the rule fails, and they are collateral facts only." Some doubt was thrown upon this case by Lord SELBORNE, L.C., in *R. v. Hutchings* (1881), 6 Q. B. D. 301, C. A., at p. 303. But the rule had been laid down in the same words in *R. v. Wye (Inhabitants)* (1838), 7 Ad. & El. 761, 769, 770, adopting the law as laid down in *R. v. Catterall (Township)* (1817), 6 M. & S. 83, but distinguishing the facts; see also *Nympsfield (Parish) v. Woodchester (Parish)* (1742), 2 Stra. 1172; *R. v. St. Mary, Lambeth (Inhabitants)* (1796), 6 Term Rep. 615; and *R. v. Hartington Middle Quarter (Inhabitants)* (1855), *supra*, was cited, apparently with approval, in *Wakefield Corporation v. Cooke*, [1903] 1 K. B. 417, C. A., by VAUGHAN WILLIAMS, L.J., at p. 424; affirmed [1904] A. C. 31. It may be doubted whether these cases are within the limits laid down by Lord BLACKBURN and DE GREY, C.J., quoted in the text. They appear to place pauper cases almost on the same footing as prize cases, which are admittedly anomalous; see *supra*. The question whether in a pauper case a separation order made by justices under the Summary Jurisdiction (Married Women) Act, 1895 (58 & 59 Vict. c. 39), was admissible or conclusive evidence of the desertion on which it was founded was left open in *Eastbourne Guardians v. Croydon Guardians*, [1910] 2 K. B. 16.

(*m*) *Concha v. Concha* (1886), 11 App. Cas. 541 (it seems that such a finding after the matter had been litigated, appearing on the face of a judgment *in rem*, would be binding *inter partes*, though not essential to the judgment (*ibid.*)); *R. v. Hartington Middle Quarter (Inhabitants)*, *supra*.

(*n*) *Hobbs v. Henning* (1864), 17 C. B. (N. S.) 791, 824; *Dalglish v. Hodgson* (1831), 7 Bing. 495, 504; *R. v. Hartington Middle Quarter (Inhabitants)*, *supra*.

(*o*) *Re Bank of Hindustan, China, and Japan, Alison's Case* (1873), 9 Ch. App. 1, 26, C. A.; *Re Allison and Joy's Contract* (1889), 61 L. T. 213, 215. As to the conclusiveness of decisions of courts for hearing election petitions, see title ELECTIONS, Vol. XII, pp. 410, 411, 460.

(*p*) *Hobbs v. Henning*, *supra*, at p. 823; *Ballantyne v. Mackinnon*, [1896] 2 Q. B. 455, 463, C. A.

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by owners of vessels condemned as prize has been that the judgment of a foreign prize court condemning a vessel or cargo as enemy's property is conclusive evidence not only that the property was condemned, but also that it was not neutral (*q*); but it is otherwise if it can be shown (*z.e.*, it seems from an examination of the sentence) (*r*) that the judgment did not proceed on that ground (*s*). And it has been laid down further that, in the absence of any other cause appearing on the sentence, it must be presumed from the condemnation that it proceeded on the ground that the property was that of the enemy (*t*). But where the circumstances are not such as to give rise to this presumption, as, for example, where the sentence itself suggests some other ground of condemnation, it is not conclusive if there be any ambiguity as to what the ground is. It must not be left in uncertainty whether the ship was condemned on a ground which would be just by the law of nations, or on another ground which would amount only to a breach of the municipal regulations of the condemning country. In such case the sentence must be carefully examined to see whether the fact in proof of which it is adduced is clearly and certainly found by the judge whose sentence is relied on (*u*). Such a finding of fact in the course of adjudication by a prize court, though receivable as conclusive evidence of the fact, is not regarded as raising an estoppel strictly so called, and is therefore not pleadable as such (*b*). Further, the ground of condemnation, to be conclusive, must be found in the operative part of the sentence (*c*). The recitals may, however, be looked at, if incorporated in the operative part by reference (*d*).

475. There are some cases in which judgments *in rem*, though not conclusive in proceedings to which strangers are party, so far differ from judgments *in personam* that they are not deemed to be *res inter alios actæ*, and are admissible in evidence. Of this nature is the verdict of a jury on an inquisition in lunacy, which, though

Certain judgments *in rem* admissible in evidence.

(*q*) *Kindersley v. Chase* (1801), 2 Park, Marine Insurance, 8th ed., 743, 747, 791; *Baring v. Royal Exchange Assurance Co.* (1804), 5 East, 99; and see **TITLES INSURANCE; PRIZE LAW AND JURISDICTION.**

(*r*) See *Dalgleish v. Hodgson* (1831), 7 Bing. 495, *per* TINDAL, C.J., at p. 501; *Culvert v. Bovill* (1798), 7 Term Rep. 523.

(*s*) *Castrique v. Imrie* (1870), L. R. 4 II. L. 414, *per* BLACKBURN, J., at p. 434; *Geyer v. Aguilar* (1798), 7 Term Rep. 681; *Pollard v. Bell* (1800), 8 Term Rep. 434, 437; *Baring v. Clagett* (1802), 3 Bos. & P. 215; *Bolton v. Gladstone* (1801), 5 East, 155; affirmed (1809) 2 Taunt. 85, Ex. Ch. As to how the rule came into existence, see *Lothian v. Henderson* (1803), 3 Bos. & P. 499, H. L., *per* Lord ELDON, L.C., at p. 545.

(*t*) *Salucci v. Woodmass* (1784), 2 Park, Marine Insurance, 8th ed., 727; *Baring v. Clagett*, *supra*; *Lothian v. Henderson*, *supra*. But see *Dalgleish v. Hodgson*, *supra*, and cases cited in following note. This is an exception to the rule "that estoppels must be certain to every intent"; "if a thing be not directly and precisely alleged, it shall be no estoppel" (Co. Litt. 352 a).

(*u*) *Hobbs v. Henning* (1864), 17 C. B. (N. S.) 791, 824, citing *Dalgleish v. Hodgson*, *supra*; *Bernardi v. Motteux* (1781), 2 Doug. (K. B.) 575; *Culvert v. Bovill*, *supra*; *Fisher v. Ogle* (1808), 1 Camp. 418.

(*b*) *Hobbs v. Henning*, *supra*.

(*c*) *Christie v. Secretan* (1799), 8 Term Rep. 192.

(*d*) *Dalgleish v. Hodgson*, *supra*; *Bernardi v. Motteux*, *supra*.

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it declares the status of the party at the time of taking the inquisition, is not conclusive otherwise than *inter partes* even as to that point of time (e), but is admissible as to his mental state at a later period, though liable to be contradicted (f). And on the same principle an order of the General Medical Council under the Dentists Act, 1878 (g), erasing the name of a dentist from the register on the ground that he had been guilty of conduct infamous or disgraceful in a professional respect, which is apparently conclusive on all parties as to the professional status of the dentist (h), may be admitted in proceedings between the dentist and third parties as evidence, though not conclusive, not only as to what the grounds of erasure were, but as to the truth of those grounds (i).

Consent
 judgment
in rem.

476. Although a judgment by consent may well create an estoppel between the parties (k), it is at least doubtful whether a judgment *in rem* obtained by consent of parties can ever be conclusive against persons who were not and do not claim through the parties to it, except so far as may be necessary to protect the title of a person who purchases the *res* on the faith of the judgment. It has been laid down that a judgment by consent cannot effect a *res judicata* so as to bind the public or absent parties (l), and that a judgment by consent establishing a will in solemn form does not bind a party who, though served with a citation to see proceedings, has not appeared or been represented at the hearing, so as to prevent him from taking proceedings to revoke probate (m).

Judgment
in rem, how
 far conclusive
 in criminal
 cases.

477. It seems clear that in criminal cases, at all events, a judgment *in rem* is conclusive, as between strangers or between a party to it and a stranger, only as to the status or title which it declares or creates (n), or the disposition which it actually makes, and not as to any matter of fact upon which it may be founded (o). So a decree absolute in a divorce case concludes the fact of dissolution of the marriage, but nothing further; and it is apprehended that

(e) *Sergeson v. Sealey* (1742), 2 Atk. 412, 414.

(f) *Sergeson v. Sealey*, *supra*; *Faulier v. Sulk* (1811), 3 Camp. 125; *Hill v. Clifford*, [1907] 2 Ch. 236, C. A., *per* COZENS-HARDY, M.R., at p. 244, citing *Van Grutten v. Foxwell*, [1897] A. C. 658, not reported on this point. See title LUNATICS, ETC.

(g) 41 & 42 Vict. c. 33, ss. 13, 14, 15.

(h) See *Hill v. Clifford*, *supra*, *per* GORELL BARNES, P., at p. 252; Dentists Act, 1878 (41 & 42 Vict. c. 33), s. 3; and see title MEDICINE AND PHARMACY.

(i) *Hill v. Clifford*, *supra*, *dubitante* GORELL BARNES, P., on this point; affirmed *sub nom. Clifford v. Timms*, [1908] A. C. 12, without reference to the points dealt with in the Court of Appeal.

(k) *Bowden v. Beauchamp* (1740), 2 Atk. 82, and cases cited p. 327, *ante*.

(l) *Jenkins v. Robertson* (1867), L. R. 1 Sc. & Div. 117 (a Scotch case; had the judgment been the result of a contest it would have determined the question of highway as against the public and been in the nature of a judgment *in rem*); compare *Bullintyne v. Mackinnon*, [1896] 2 Q. B. 455, C. A.; *The Bellicairn* (1885), 11 P. D. 1, C. A.; see also note (g), p. 327, *ante*.

(m) *Ritchie v. Malcolm*, [1902] 2 I. R. 403; and see note (d), p. 338, *ante*.

(n) Compare *R. v. Grundon* (1775), 1 Cowp. 315.

(o) *Kingston's (Duchess) Case* (1776), 2 Smith, L. C., 11th ed., 731, 735—738; *R. v. Buttery* (1818), Russ. & Ry. 342 (grant of probate not conclusive in favour of prisoner on indictment for forging a will), not following *R. v. Vincent* (1721), 1 Stra. 481.

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a decree of nullity pronounced by the English court on a marriage celebrated here or of a foreign court on a marriage celebrated in the country of its jurisdiction, and under the law of that country (*p*), between persons domiciled there, is equally conclusive as to the question of existence of the marriage (*q*). A mere dismissal of a suit would not have a similar effect (*r*). The old cases referred to above (*s*), upon the conclusiveness of a record of condemnation in the Exchequer in subsequent proceedings for penalties under the statute creating the forfeiture as to the grounds of condemnation appearing on the record, form an apparent exception to the above propositions. Apart from the fact that an information for penalties for breach of the revenue laws is not, strictly speaking, a criminal proceeding (*t*), they may perhaps be explained by the fact that the parties were in substance the same—the defendant on the one hand, and on the other the King, prosecuting in his own name or in that of his Attorney-General.

SUB-SECT. 2.—Parties estopped by Judgment *inter partes*.

478. A judgment *inter partes* raises an estoppel only against the parties (*a*) to the proceeding in which it is given, and their privies, *i.e.*, those claiming or deriving title under them (*b*). As against all other persons it is *res inter alios acta* (*c*), and with certain exceptions (*d*), though conclusive of the fact that the judgment was

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privies.

(*p*) As to marriages celebrated in a British consulate, see *Hay v. Northcote*, [1900] 2 Ch. 262.

(*q*) This seems to follow from the reasoning of the notes to *Kingston's (Duchess) Case* (1776), 2 Smith, L. C., 11th ed., 731, at p. 755, and of BLACKBURN, J., in *Casrique v. Imrie* (1870), L. R. 4 H. L. 414, at p. 428. De GREY, C.J. (see 2 Smith, L. C., 11th ed., at pp. 734, 737), did not concede so much to the sentences of ecclesiastical courts. But those courts had not the power to effect a dissolution of marriage; and he apparently did not regard the sentence of an ecclesiastical court, pronouncing against the fact of marriage, as final (see *ibid.*, p. 737). See the point discussed, 2 Smith, L. C., 11th ed., at p. 777. For the modern doctrine as to decrees of nullity, as distinguished from decrees of divorce, see *Ogden v. Ogden*, [1908] P. 46, 78 *et seq.*, C. A.

(*r*) *Needham v. Bremner* (1866), L. R. 1 C. P. 583. In this case the petition was for dissolution, but the same principle would seem to apply to nullity proceedings.

(*s*) *R. v. Matthews* (1797), *A.-G. v. Wakefield* (1757), *A.-G. v. Reynolds* (1804), in the notes to *A.-G. v. King* (1817), 5 Price, 195, at p. 202; see also the note to *Scott v. Shearman* (1775), 2 Wm. Bl. 977, at p. 982; and note (*t*), p. 339, *ante*.

(*t*) *R. v. Hausmann* (1909), 73 J. P. 516, C. C. A.

(*α*) 1 Eq. Cas. Abr. 163; Co. Litt. 352.

(*b*) *Borough v. Whichcote* (1732), 3 Bro. Parl. Cas. 595 (privy to a decree which was a hundred years old); *Gray v. Lewis, Parker v. Lewis* (1873), 8 Ch. App. 1035, 1060; *Outram v. Morewood* (1803), 3 East, 346, 355; *Strutt v. Bovingdon* (1803), 5 Esp. 56; *Richards v. Johnson* (1859), 4 H. & N. 660; citing Com. Dig. tit. Estoppel (C).

(*c*) *Christy v. Tuncred* (1842), 9 M. & W. 438; *Spencer v. Williams* (1871), L. R. 2 P. & D. 230; *Jenkyn v. Jenkyn* (1856), 5 W. R. 43; *Muskerry (Lord) v. Skeiffington* (1868), L. R. 3 H. L. 144.

(*d*) *E.g.*, where the judgment determines a question of public right and is admissible as evidence of reputation (*Reed v. Jackson* (1801), 1 East, 355; *Pim v. Curell* (1840), 6 M. & W. 234; *Petrie v. Nuttall* (1856), 11 Exch. 569; *Berry v. Banner* (1792), Peake, 212 [156]), or where the amount of damages recovered in a former action is in question (*Green v. New River Co.* (1792), 4 Term Rep. 589, 590. See title EVIDENCE, *post*).

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by Record.Classes of
privies.

obtained and of its terms (e), is not even admissible evidence of the facts established by it (f). Privies are of three classes:—(1) Privies in blood, as ancestor and heir (g). (2) Privies in law, as tenant by the courtesy, tenant in dower; and others that come in by act in law (h), as testator and executor, intestate and administrator (i); bankrupt and trustee in bankruptcy (k). (3) Privies in estate, as testator and devisee (l); vendor and purchaser (m); lessor and lessee (n); a husband and his wife claiming under his title and *e converso* (o); successive incumbents of the same benefice (p);

(e) *Reed v. Jackson* (1801), 1 East, 355; see title JUDGMENTS AND ORDERS.

(f) *Castrique v. Inrie* (1870), L. R. 4 H. L. 414, 434; *Evans v. Evans* (1814), 1 Rob. Eccl. 165, 170; *Doe d. Bacon v. Brydges (Lady)* (1813), 6 Man. & G. 282; *Yates v. Kyffin-Taylor*, [1899] W. N. 141 (proof of conviction of defendant no evidence in civil proceedings of his guilt), following *Leyman v. Latimer* (1878), 3 Ex. D. 352, C. A., *per* BRAMWELL, L.J., at p. 354; see also *Anderson v. Collinson*, [1901] 2 K. B. 107; and title EVIDENCE, *post*. The question whether an acquittal on a charge of murder could be pleaded by way of estoppel in civil proceedings by the prisoner when the question "Murder or no" was in issue was raised, but not decided, the opinion of the court being apparently against the estoppel, in *Irisham v. Blackwood* (1851), 11 C. B. 111. Seamou convicted and imprisoned for refusing to go to sea brought an action for wages. It was held that the conviction did not operate as an estoppel between them and the owners so as to defeat their claim (*Caine v. Palace Steam Shipping Co.*, [1907] 1 K. B. 670, C. A.; affirmed, *Palace Shipping Co., Ltd. v. Caine*, [1907] A. C. 386, on another point; see also *Wilson v. Bennett* (1904), 6 F. (Ct. of Sess.) 269. Having regard to s. 31 of the Matrimonial Causes Act, 1857 (20 & 21 Vict. c. 85), the Divorce Court will treat as conclusive its own previous finding of the adultery of a party to an earlier suit who was also party to a later one, although the issue was raised in each suit by one who was not a party to the other (by a co-respondent in the first and by the King's Proctor in the second) (*Conradi v. Conradi* (1868), L. R. 1 P. & D. 514, 521).

(g) Co. Litt. 352 a; *Conner v. Browne* (1784), 1 Ridg. Parl. Rep. 139; *Dundas v. Waddell* (1880), 5 App. Cas. 249; *Weekes v. Birch* (1893), 69 L. T. 759. The Inheritance Act, 1833 (3 & 4 Will. 4, c. 106), s. 2, while it altered the mode of tracing the descent of particular property, did not affect the question of privity in blood (*ibid.*).

(h) Co. Litt. 352 a.

(i) *R. v. Milden* (1738), Andr. 388; *Ennis v. Rochford* (1884), 14 L. R. Ir. 285.

(k) *Jones v. Yates* (1829), 9 B. & C. 532; *Edmanvils v. Best* (1862), 7 L. T. 279; *Harris v. Truman* (1882), 9 Q. B. D. 264, C. A. For some limitations on the effect of the trustee's privity with the bankrupt, see p. 348, *post*.

(l) *Dalton v. Fitzgerald*, [1897] 2 Ch. 86, C. A. But the purchaser for value from a devisee with the legal estate is not affected by an equitable interest created by the deviser, of which the purchaser had no notice (*Clemow v. Geach* (1870), 40 L. J. (Ch.) 44).

(m) 1 Eq. Cas. Abr. 163; *Board v. Board* (1873), L. R. 9 Q. B. 48; *Sumner v. Schofield* (1880), 43 L. T. 763; *Doe d. Gaisford v. Stone* (1816), 3 C. B. 176 (mortgagor, and purchaser of equity of redemption).

(n) Co. Litt. 352 a.

(o) *Doe d. Leeming v. Skirrow* (1837), 7 Ad. & El. 157; *Whittaker v. Jackson* (1864), 2 H. & C. 926; *Outram v. Morewood* (1803), 3 East, 346.

(p) *Borough v. Whitchote* (1732), 3 Bro. Parl. Cas. 595; *Dunias v. Waddell* (1880), 5 App. Cas. 249 (ministers of Scotch Church). It was held by the Divisional Court that the incumbent was privy to the patron under whom he claimed (*Magrath v. Reichel* (1887), 57 L. T. 850), on the authority of Bro. Abr. tit. Quare Impedit, pl. 66 (*R. v. W. de L.* (1364), Y. B. 38 Edw. 3, fo. 31). The decision was affirmed by the Court of Appeal, who, however, apparently differed from the Divisional Court on this point (see 14 App. Cas. at p. 667), and in the House of Lords, but without discussing this question (*Reichel v. Magrath* (1889), 14 App. Cas. 665).

assignor and assignee of a bond (*q*); the servant of a corporation defending an action of trespass at the cost of his employers and justifying under their title, and the corporation itself (*r*). So a judgment of ouster against a corporator would be conclusive evidence against another deriving title under him—*i.e.*, by his vote (*s*).

SECT. 2.
Parties
estopped
by Record.

479. But it is necessary to the relation of party and privy, not only that the two persons should have a similar interest in the property to which the estoppel relates, but that the latter should derive title from the former (*t*). Thus a tenant admitted by the landlord upon a surrender by the former tenant is not estopped from denying the truth of a recital in the former tenant's deed to the effect that he was seised for life; for his estate comes not from the former tenant, but from the landlord (*u*).

Similar
interest not
privy.

So, if the heir of a deceased man do not claim as privy, but by his own purchase, or from another ancestor, he is not bound by an estoppel upon the deceased (*a*); and as neither a sheriff nor an execution creditor is privy to the debtor, neither of them is bound by an estoppel which prevents the latter from denying the title of a third person who has in fact no property in the goods (*b*). So strictly is this rule applied that the determination in a Chancery suit as to who are next of kin of the deceased is not binding on persons claiming to be entitled to a grant of letters of administration in respect of an independent right arising upon the renunciation of the next of kin, though they trace their kinship through one of the parties to the former suit (*c*). But the successive possession of a similar interest is evidence of privity of estate. Thus the fact that a sole plaintiff was in possession of an estate when the former cause of action accrued, and that he and his

(*q*) *Horton v. Westminster Improvement Commissioners* (1852), 7 Exch. 780.

(*r*) *Re Walton-cum-Trimley Manor, Ex parte Trimline* (1873), 28 L. T. 12; compare *Hancock v. Welsh and Cooper* (1816), 1 Stark. 317 (privity between bailiff and landlord under whom he justified).

(*s*) *R. v. York Corporation* (1792), 5 Term Rep. 66, 72, 76, differing from *R. v. Grimes* (1770), 5 Burr. 2598, 2601, as to the conclusiveness of the verdict.

(*t*) *Liverpool and North Wales Steamship Co., Ltd. v. Mersey Trading Co., Ltd.*, [1909] 1 Ch. 209, O. A., per FARWELL, L.J., at p. 217.

(*u*) *Doe d. Marchant v. Errington* (1839), 6 Bing. (N. C.) 79; compare *Lock v. Norborne* (1688), 3 Mod. Rep. 147 (verdict against one only of several defendants; no evidence against the others).

(*a*) *Goodtitle v. Morse* (1789), 3 Term Rep. 365, per Lord KENYON, C.J., at p. 371, citing *Edwards v. Rogers* (1640), W. Jo. 459; compare *Keate v. Phillips* (1881), 18 Ch. D. 456, 577 (*cestui que trust* not bound by estoppel on fraudulent trustee).

(*b*) *Richards v. Johnston* (1859), 4 H. & N. 660, citing *Heane v. Rogers* (1829), 9 B. & C. 577, 586; followed, *Richards v. Jenkins* (1886), 18 Q. B. D. 451, O. A.; and see *Heugh v. Chamberlain* (1877), 25 W. R. 742 (one who after assignment of a patent becomes partner of the assignor, not privy to the estoppel arising out of the assignment); *Tighe v. Tighe* (1877), 11 L. R. Eq. 203 (no privity between administrator appointed in colony and administrator appointed at home of deceased having assets in both places).

(*c*) *Spencer v. Williams* (1871), L. R. 2 P. & D. 230, more fully and more correctly reported *sub nom. Spencer v. Spencer*, 40 L. J. (P. & M.) 45; compare *Mercantile Investment and General Trust Co. v. River Plate Trust, Loan, and Agency Co.*, [1894] 1 Ch. 578.

SECT. 2.

Parties
estopped
by Record.

Privy's title
must be
derived
subsequent to
proceedings.

co-plaintiff were so at the time of the later cause of action, is *prima facie* evidence that the later plaintiffs are privy in estate to the former plaintiff (*d*), and privity has been assumed to exist between successive lords of the same manor (*e*).

480. In order that a judgment may be conclusive against a person as privy in estate to a party litigant it is necessary to show (apart from his taking with a notice of a *lis pendens*) (*f*) that he derives title under the latter by act or operation of law subsequent to the recovery of the judgment (*g*), or at least to the commencement of the proceedings, and that the judgment was one affecting the property to which title is derived. Purchasers of land are not estopped by proceedings commenced after the purchase (*h*); and a judgment obtained against the mortgagor of land after completion of the mortgage, setting aside his purchase of the land on the ground of fraud, is not even evidence against the mortgagee who was not a party to the action (*i*).

Party must
sue or defend
in same
right.

481. Again, it is necessary to an estoppel by record that the parties to the litigation (or their privies) should have claimed or defended in the same right in the former proceedings as they represent in the later ones (*k*). A patentee whose patent has in an action by himself for infringement been held invalid for want of novelty is not in subsequent proceedings by the defendant as

(*d*) *Blakemore v. Glamorganshire Canal Co.* (1835), 2 Cr. M. & R. 133; *R. v. Blakemore* (1852), 2 Den. 410 (conviction of former owner and occupier, liable *ratione tenuræ*, for non-repair of highway).

(*e*) *Re Walton-cum-Trimley Manor, Ex parte Tomline* (1873), 28 L. T. 12.

(*f*) See Judgments Act, 1839 (2 & 3 Vict. c. 11), s. 7; and title JUDGMENTS AND ORDERS.

(*g*) *Re De Burgho's Estate*, [1896] 1 I. R. 274, 280; and see *Doe d. Foster v. Derby (Earl)* (1834), 1 Ad. & El. 783, 790; cited, *Lodson v. Walker* (1872), 1 L. R. 7 Exch. 55, 61.

(*h*) *Mercantile Investment and General Trust Co. v. River Plate Trust, Loan, and Agency Co.*, [1894] 1 Ch. 578; compare *The Thyatira* (1883), 8 P. D. 154 (indorsee of bill of exchange not affected by proceedings commenced after indorsement); *Poore v. Clark* (1742), 2 Atk. 515 (lord of manor and copyholders); *Gaunt v. Wainman* (1836), 3 Bing. (N. C.) 69 (widow not estopped in action of dower by recital in her husband's deed); *Wenman (Lady) v. Mackenzie* (1855), 5 E. & B. 417, 458, following *Evans v. Rees* (1839), 10 Ad. & El. 151 (landlord and tenant); but it is otherwise where the tenant proceeds by direction and authority of his landlord (*Kinnersley v. Orpe* (1780), 2 Doug. (K. B.) 517); compare *Mowatt v. Castle Steel and Iron Works Co.* (1886), 34 Ch. D. 58, 63, O. A. (estoppel by representation).

(*i*) *Natal Land and Colonization Co. v. Good* (1868), L. R. 2 P. O. 121, 132; compare *Morret v. Westerne* (1710), 2 Vern. 663; *Simpson v. Pickering* (1834), 1 Cr. M. & R. 527; *Doe d. Downe (Lord) v. Thompson* (1847), 9 Q. B. 1037 (estoppel by lease on mortgagor did not bind mortgagee).

(*k*) *Robinson's Case* (1603), 5 Co. Rep. 32 b; *Huggins v. York-Buildings Co.* (1740), 2 Atk. 44; *Rattenbury v. Fenton* (1833), Coop. temp. Brough. 60; *Bainbrigg v. Baddeley* (1847), 2 Ph. 705; *Hacking v. Lee* (1860), 9 W. R. 70; *Bennett v. Gamgee* (1876), 2 Ex. D. 11 (trustee in bankruptcy, after electing not to continue debtor's action, not barred from bringing his own); *Mellers v. Brown* (1863), 1 H. & C. 687 (principle applied to estoppel by deed), citing Com. Dig. Estoppel, C. It does not matter in what character they are summoned (e.g., as heir-at-law or next of kin) provided they have been party in their own right (*Beardsley v. Beardsley*, [1899] 1 Q. B. 748, following *Emberley v. Trevanion* (1860), 4 Sw. & Tr. 197).

petitioner for the revocation of the same patent precluded from again alleging the novelty of the patent, because the petition is on behalf of the public, and the former defendant is therefore appearing in a different right (*l*). Again, the determination of the issues in an action by a personal representative for damage sustained by the relatives of the deceased from his death by accident raises no estoppel in a subsequent action by the same plaintiff for damage caused to the deceased's estate by the same accident, because the plaintiff sues in two different rights, and in effect the parties in the two actions are different (*m*).

SECT. 2.
Parties
estopped
by Record.

482. In certain cases, though there is in strictness no privity between a party to a judgment and the person against whom it is set up, the relations between them are such that the latter is not allowed to dispute it. There is no privity of estate between the parties to a contract of indemnity (*n*); but a person who has covenanted to indemnify another against liabilities and actions in respect thereof is, as between himself and the party indemnified, estopped from disputing the judgment in an action against the latter (*o*), not because he is a privy, but because that is the true meaning of the contract. On the other hand, where indemnity is claimed independently of contract against trustees who have committed a breach of trust, they are not estopped by a judgment obtained by third parties against the plaintiffs from saying that no damage has arisen from the breach (*p*).

Quasi-
privity:
contract of
indemnity.

Again, although a trustee and his *cestui que trust* are different parties, and neither derives his title from the other (*q*), equity will not allow the same question to be litigated between a person and the *cestui que trust* and afterwards between the same person and the trustee (*r*). There may perhaps be said to be a quasi-privity between them.

Trustee and
cestui que
trust.

(*l*) *Re Deely's Patent*, [1895] 1 Ch. 687, C. A.; reversed on other points, *sub nom. Deely v. Perkes*, [1896] A. C. 496; compare *Poulton v. Adjustable Cover and Boiler Block Co.*, [1908] 2 Ch. 430, C. A.

(*m*) *Leggott v. Great Northern Rail. Co.* (1876), 1 Q. B. D. 599; followed, *Daly v. Dublin, Wicklow, and Wexford Rail. Co.* (1892), 30 L. R. Ir. 514, C. A.

(*n*) *King v. Norman* (1847), 4 C. B. 884, 898; nor between a surety and the principal debtor or his trustee in bankruptcy (*Pritchard v. Hitchcock* (1843), 6 Man. & G. 151 (surety not concluded by judgment between the debtor's trustee and the creditor that the debtor's discharge of the debt was a fraudulent preference)).

(*o*) *Mercantile Investment and General Trust Co. v. River Plate Trust, Loan, and Agency Co.*, [1894] 1 Ch. 578. There is no estoppel between the indemnifying parties and the plaintiff in the action, although they have assisted in the action and paid the costs (*ibid.*).

(*p*) *Gray v. Lewis, Parker v. Lewis* (1873), 8 Ch. App. 1035, 1059. Where the party indemnified has given to the surety notice of the proceedings, and an opportunity of defending the action or paying the claim, the latter is bound by any settlement *bona fide* made by the former (*ibid.*, at p. 1059; *Jones v. Williams* (1841), 7 M. & W. 493; see also *Duffield v. Scott* (1789), 3 Term Rep. 374, *per* BULLER, J., at p. 377; *Smith v. Compton* (1832), 3 B. & Ad. 407.

(*q*) See *Keate v. Phillips* (1881), 18 Ch. D. 560, 577.

(*r*) *Re Defries, Norton v. Levy* (1883), 48 L. T. 703; compare *Farquharson v. Seaton* (1828), 5 Russ. 45 (second incumbrancer and mortgagor).

SECT. 2.

Parties
estopped
by RecordMembers of
class.

483. Members of a class are frequently bound by a judgment obtained against others suing or being sued in a representative capacity (s). Where a multitude of persons are interested in a general right, and individuals are selected, whether as plaintiffs or defendants, to represent the multitude to try the question of the existence of the right, everybody interested is bound (in the absence of fraud or collusion) by the decision, although not actually present, because he is present by representation: but it is open to any individual to show a special ground of exemption; the decree is only final against him so far as regards the general right (t).

Exceptional
right of
trustee in
bankruptcy.

484. It should be noted that although a trustee in bankruptcy is privy to the bankrupt, he is entitled and bound to inquire into the consideration for a judgment debt to see whether it is one which is properly provable (a). Similarly, the court may inquire into the merits of a judgment debt on which a bankruptcy petition is founded and refuse in its discretion to make a receiving order; but such refusal does not affect the *res judicata* of the debt, and, though it creates a *res judicata* on that petition, it is no bar to a fresh petition for the same debt (b), but in a proper case the court might decline to entertain such fresh petition as vexatious (c).

A trustee is not estopped from setting up a fraud which the bankrupt himself would be estopped from setting up, when it is also a fraud on the bankruptcy law—e.g., as being a fraudulent preference (d).

(s) *Brown v. Howard* (1701), 1 Bq. Cas. Abr. 163 (tenants of a manor); *Brown v. Booth* (1690), 1 Eq. Cas. Abr. 163; 2 Vern. 184 (representative miners).

(t) *Sewers Commissioners v. Gellatly* (1876), 3 Ch. D. 610, per JESSEL, M.R., at p. 616. An order appointing a person to represent a class does not affect one of the class who claims a distinct and independent right so far as regards that right (*Re Lart, Wilkinson v. Blades*, [1896] 2 Ch. 788, 793).

(a) *Re Tollemache, Ex parte Revell* (No. 1) (1884), 13 Q. B. D. 720, C. A.; *Re Tollemache, Ex parte Anderson* (1885), 14 Q. B. D. 606, C. A.; *Re Deerhurst, Ex parte Leaton* (1891), 64 L. T. 273, C. A., per Lord HALSBURY, at p. 274. In this case it was held in the court below (*ibid.*, p. 118) that an invitation by the debtor's solicitor to vote, in respect of a gaming debt, for a scheme of arrangement does not estop the trustee under the scheme from denying that the debt is provable, but this point was not dealt with in the Court of Appeal. See also *Re Dingle, Ex parte Butterfill, Ex parte Rashleigh* (1811), 1 Rose, 192; and title BANKRUPTCY, Vol. II., p. 234.

(b) *Re Vitoria, Ex parte Vitoria*, [1894] 2 Q. B. 386, C. A.; see title BANKRUPTCY, Vol. II., p. 57. The trustee's rejection of a proof would seem to be equally inefficacious to affect the *res judicata*; but the effect of s. 35 (2) of the Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), is to render the judgment in such cases unenforceable after annulment of the bankruptcy (*Brandon v. McIlenny*, [1891] 1 Q. B. 538, C. A.).

(c) *Re Vitoria, Ex parte Vitoria, supra*, per KAY, L.J., at p. 391; *Re Larard, Ex parte Yeomans and Heap* (1896), 3 Mans. 317, C. A.

(d) *Jones v. Yates* (1829), 9 B. & C. 532, 540; *Heilbut v. Nevill* (1869), L. R. 4 C. P. 354; affirmed (1870), L. R. 5 C. P. 478, Ex. Ch.; see Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 48. The judgments of COCKBURN, C.J., L. R. 5 C. P. at p. 481, and BLACKBURN, J., at p. 483, seem to suggest that, the trustee being innocent of the fraud and the defendant cognisant of it, the former was, independently of the question of fraudulent preference, subject to no estoppel; see, however, *Jones v. Yates, supra*.

SECT. 3.—*Who may take advantage of Estoppel.*SUB-SECT. 1.—*In General.*

485. This question is governed by the rule that estoppels ought to be mutual (e). Only those can take advantage of an estoppel by record who, if the decision had been the other way, would have been bound by it—that is to say, in case of a judgment *inter partes*, the parties and their privies. It is not enough that the person against whom the estoppel is set up was party or privy to the judgment relied on; each party to the later proceeding must have been party or privy to the earlier one (f). It follows that only those can take advantage of an estoppel who claim or defend in the same right in the later proceeding as they, or those to whom they claim to be privy, represented in the earlier (g).

486. But while it is true that estoppel by record must be reciprocal, yet a judgment in favour of a defendant, though equally conclusive as to what it actually decides, is not always as decisive in his favour on the points in issue as a judgment for a plaintiff. Where a plaintiff recovers judgment it almost necessarily follows that all the issues raised by the defendant have been determined in the plaintiff's favour: there must at least have been a decision on the merits. On the other hand, a judgment may have passed in favour of the defendant on dilatory grounds (h), or on one only of many alternative defences; and circumstances may have arisen entitling

SECT. 3.
Who may
take
advantage
of Estoppel.

Estoppel
must be
mutual.

Judgment
for defendant
not always
decisive.

(e) See p. 325, *ante*.

(f) *Shedden v. A.-G.* (1860), 30 L. J. (P. M. & A.) 217, 228, 231, where a suit for declaration of legitimacy to which the Attorney-General was a necessary party, and in which other parties were cited, was held not to be barred by a judgment of the Scotch court against the petitioner on proceedings between the petitioner and the cited parties in which the same question of legitimacy was in issue, because the Attorney-General was not a party to the earlier proceedings; *Petrie v. Nuttall* (1856), 11 Exch. 569 (conviction of obstructing highway cannot be pleaded as estoppel by third party in action by former defendant for trespass: as to mutuality, see *ibid.*, at p. 575); compare *Morton v. Westminster Improvement Commissioners* (1852), 7 Exch. 780; see also *Guunt v. Wainman* (1836), 3 Bing. (N.C.) 69 (widow cannot take advantage of estoppel by deed of her husband's tenant where she herself would not have been estopped); *Callow v. Jenkinson* (1851), 6 Exch. 666 (judgment against defendant sued jointly with others not conclusive in subsequent proceedings between same plaintiff and defendant alone); *Le Clerc v. Greene* (1873), 7 L. R. Eq. 371, 377; Co. Litt. 352 a.

(g) *Re Deeley's Patent*, [1895] 1 Ch. 687, C. A. Letters patent, which are matters of record, probably create, as to matters of fact stated therein, an estoppel between the grantee and the Crown; but they create none between the grantee and anyone else, for the latter is neither party nor privy to them (*Cropper v. Smith* (1884), 23 Ch. D. 700, 705, 708, 713, C. A., per FRY, L.J., at p. 712; affirmed, without giving reasons, *sub nom. Smith v. Cropper* (1885), 10 App. Cas. 249).

(h) An order of sessions quashing an order of removal of a pauper, though *prima facie* evidence between the parties that the pauper was not settled in the appellant parish, may be shown to have been made on some other ground (*R. v. Wick St. Lawrence (Inhabitants)* (1833), 5 B. & Ad. 526). If made on the merits, it is conclusive between them (*R. v. Evenwood and Barony (Inhabitants)* (1843), 3 Q. B. 370; *R. v. Clint (Inhabitants)* (1841), 11 Ad. & El. 624, n.; compare *Langmead v. Maple* (1865), 18 C. B. (N. S.) 255; *Palmer v. Temple* (1839), 9 Ad. & El. 508; *Jenkyns v. Merthyr Tydvil Urban District Council* (1899), 80 L. T. 600 (same principle applied in criminal proceeding).

SECT. 3.
Who may
take
advantage
of Estoppel.

Facts relied
 on must be
 pleaded.

the plaintiffs to judgment which were not in existence when the first action was brought (*i*).

SUB-SECT. 2.—Necessity of pleading Estoppel.

487. The old rule was that estoppel by record and deed must be pleaded if there were an opportunity (*k*). If the party against whom the record was used gave by his pleading the opportunity of pleading the estoppel, and this was not done, the record could not be relied on as conclusive (*l*), but as evidence only (*m*). It was otherwise if no such opportunity were given (*n*). Under the modern practice the facts relied on to establish an estoppel of any kind (including estoppels *in pais*) should be pleaded in any case in which it is intended to rely upon it (*o*), except in answer to a claim in ejectment (*p*), and in the cases (if any) in which "not guilty by statute" may still be pleaded (*q*), even though the doing so involves a special reply (*r*); if, as may occur in the exceptional cases referred to, or where the matter giving rise to the estoppel has occurred since the close of the pleadings (*s*), there is really no opportunity for the party relying on the estoppel to plead it, he need not do so. But if a plaintiff in ejectment relies on an estoppel as part of his title, it seems that he should plead it in his statement of claim (*t*).

(*i*) *National Bolivian Navigation Co. v. Wilson* (1880), 5 App. Cas. 175, 185, 198, 199; *Waine v. Crocker* (1862), 3 De G. F. & J. 421, C. A.; *Heath v. Waverham (Township) Overseers*, [1894] 2 Q. B. 108; *Hall v. Levy* (1875), 1 L. R. 10 C. P. 154; compare *R. v. North Eastern-Rail. Co.* (1901), 84 L. T. 502; *Hitchin v. Campbell* (1771), 2 Wm. Bl. 779, where a judgment for a defendant in trover on general issue pleaded was held on demurrer no answer to an action for money received for the same goods, since though it appeared that the goods were the same it did not appear that the question was the same. At the trial it appeared that the only question was the property in the goods, and it was held that the first action was a bar (*ibid.*, at pp. 827, 832); compare *Phillips v. Ward* (1863), 2 H. & C. 717; *Behrens v. Sieveking* (1837), 2 My. & Cr. 602; *Moss v. Anglo-Egyptian Navigation Co.* (1865), 1 Ch. App. 108; *R. v. May* (1880), 5 Q. B. D. 382; compare, as to judgment of acquittal in the Exchequer, *Cooke v. Sholl* (1793), 5 Term. Rep. 255, 256, citing *Bulter, Nisi Prius*, 245; and see pp. 354, 255, *post*.

(*k*) It was otherwise with estoppels *in pais* (*Freeman v. Cooke* (1848), 2 Exch. 654, 662; *Ashpitel v. Bryan* (1865), 3 B. & S. 474, 490, citing 1 Wms. Saund., 6th ed., 325 a, n. (d)).

(*l*) *Treviban v. Lawrence* (1704), 2 Ld. Raym. 1048, 1051; *Magrath v. Hardy* (1838), 4 Bing. (n. c.) 782; see *Potts v. Nixon* (1870), 5 L. R. C. L. 45; *Faversham (Lord) v. Emerson* (1855), 11 Exch. 385.

(*m*) *Vooght v. Winch* (1819), 2 B. & Ald. 662. A party relying on a deed might open the estoppel by putting in issue the facts which the deed was intended to conclude (*Wilson v. Butler* (1838), 4 Bing. (n. c.) 748).

(*n*) *Treviban v. Lawrence, supra*.

(*o*) R. S. C., Ord. 19, rr. 4, 6, 15; *Coppinger v. Norton*, [1902] 2 I. R. 232, 241. As to the necessity of pleading "judgment recovered," see *Edevain v. Cohen* (1889), 43 Oh. D. 187, C. A.; as to divorce practice, *Robinson v. Robinson* (1877), 2 P. D. 75, 77; and see title HUSBAND AND WIFE.

(*p*) R. S. C., Ord. 21, r. 21.

(*q*) See R. S. C., Ord. 19, r. 12; and title PLEADING.

(*r*) *Coppinger v. Norton, supra*.

(*s*) *Re Defries, Norton v. Levy* (1883), 48 L. T. 703.

(*t*) *Coppinger v. Norton, supra*, at p. 242. This proposition appears to have been conceded in the case cited (see *ibid.*, at p. 237). The fact that in ejectment a defendant can raise all legal defences under a plea of possession seems to have

SECT. 4.—*Matters preventing Existence of Estoppel.*SUB-SECT. 1.—*In General.*

488. Estoppels being frequently at least opposed to the admission of evidence of the truth have always been jealously regarded by the courts, and this practice found expression in the old maxim that "estoppels are odious" (a); and though this maxim hardly expresses the modern view, particularly with regard to estoppels by representation (b), yet the doctrine of estoppel by record is not to be extended beyond what there is authority for (c), and there are several matters which have always been and still are recognised as preventing the existence of such an estoppel.

SUB-SECT. 2.—*Fraud.*

489. Fraud is an extrinsic, collateral act, which vitiates the most solemn proceedings of courts of justice (d). A judgment obtained by fraud or collusion, even, it seems, a judgment of the House of Lords (e), may be treated as a nullity (f). An exception to the generality of these propositions should probably be made where a purchaser has acquired title to property *bonâ fide* and for value upon the faith of a judgment *in rem* (g). Apart from this they may be accepted without qualification in favour of persons who were not party to the judgment, whether it was *in rem* (h) or *in*

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Old maxim
"estoppels
are odious."

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where
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fraud.

been regarded as taking the case out of the ordinary rule that a plaintiff is not bound to anticipate a defence.

(a) See, for example, in *Baxendale v. Bennett* (1878), 3 Q. B. D. 525, C. A., *per* BRAMWELL, J.J., at p. 529.

(b) "A principle which courts of law have most usefully adopted" (*Cave v. Mills* (1862), 7 Ll. & N. 913, 927, 928; compare *Ashputel v. Bryan* (1863), 3 B. & S. 474, 492). In *Howard v. Hudson* (1853), 2 E. & B. 1, Lord CAMPBELL, C.J., at p. 10, says: "This conclusion shuts out the truth and is odious." CROMPTON, J., at p. 13, differs on this point, and adds "In many cases I think it extremely equitable."

(c) *Howlett v. Tarte* (1861), 10 C. B. (N. S.) 813, *per* WILLIAMS, J., at p. 825.

(d) *Kingston's (Duchess) Case* (1776), 2 Smith, L. C., 11th ed., 731, *per* DE GREY, C.J., at p. 738. Lord COKE said it avoids all judicial acts (*ibid.*).

(e) *Bandon (Earl) v. Becher* (1835), 3 Cl. & Fin. 479, 511, approving the argument of WEDDERBURN, S.-G., in the last-mentioned case.

(f) *Shedden v. Patrick* (1854), 1 Macq. 535, *per* Lord BROUGHAM, at p. 619; compare *Boswell v. Cooks* (No. 2) (1894), 66 Ll. T. 366, n. Lord ST. LEONARDS inclined to the opinion that an application should be made to the House itself (*Shedden v. Patrick*, *supra*, at p. 627). As to the effect of fraud on a foreign judgment, see *Vadala v. Lawes* (1890), 25 Q. B. D. 310, C. A.; and title CONFLICT OF LAWS, Vol. VI., p. 287.

(g) See *Castrique v. Imrie* (1870), L. R. 4 H. L. 414, *per* BLACKBURN, J., at p. 435; see also *The Belleairn* (1885), 10 P. D. 161; *Re Eytton, Bartlett v. Charles* (1890), 45 Ch. D. 458; *Smith v. Surridge* (1801), 4 Esp. 25 (sentence of foreign prize court pronounced without jurisdiction, but acquiesced in).

(h) See the examples given by DE GREY, C.J., of letters of administration fraudulently obtained and fraudulently revoked (*Kingston's (Duchess) Case*, *supra*, at p. 739; *Harrison v. Southampton Corporation* (1853), 4 De G. M. & G. 137, C. A. (decree of nullity of Ecclesiastical Court disregarded, because obtained by fraud and collusion, on the question of the legitimacy of the issue of the same marriage being raised fifty years later). In *Perry v. Meddowcroft* (1846), 10 Beav. 122, it was said that to make out such a case of fraud, collusion and concert between the parties must be established;

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Party to such
 judgment
 should get
 it set aside.

personam (i). On this principle the recovery of penalties, which it is not intended to enforce, in a friendly action instituted in order to prevent hostile actions is no bar to a second action by another party for penalties for the same offence (k).

490. Theoretically it may be true that even a party to a judgment which has been obtained by fraud is entitled to ask the court to disregard it in subsequent proceedings. It has been laid down, however, that a party to a consent judgment obtained by fraud should, in order to avoid the estoppel, make application to set the judgment aside (l). And in any case, a party who has taken no proceedings to do so, or has failed in such proceedings, would have great difficulty in establishing the fraud as a matter of fact. The old Court of Chancery always exercised jurisdiction to set aside a decree obtained by fraud (m). And this can now be done by the High Court in an action in the nature of the old bill of review (n), even (apparently) when the judgment complained of has been affirmed by the House of Lords (o); but the fraud alleged must be specific and material, and such as raises a reasonable prospect of success (p), and must have been discovered since the judgment complained of was given, or the action will be stayed or dismissed as vexatious (q).

and see *Medlowcroft v. Huguenin* (1844), 4 Moo. P. C. C. 386. These cases were before the Matrimonial Causes Act, 1873 (36 & 37 Vict. c. 31) (whereby a decree of nullity is required to be a decree *nisi* in the first instance); but this does not seem to affect the principle. On the other hand, a decree of nullity by a foreign court having jurisdiction on the ground of the husband's domicile, cannot, so long as it stands unimpeached in the country where it was given, be impeached here, even on the ground of fraud, at all events by third parties (*Bater v. Bater*, [1906] P. 209, C. A., see p. 228). See title CONFLICT OF LAWS, Vol. VI., p. 269.

(i) *Bandon (Earl) v. Becher* (1835), 3 Cl. & Fin. 479, 511 (action by remainderman not party to former proceedings).

(k) *Girdlestone v. Brighton Aquarium* (1878), 3 Ex. D. 137 (following *Chalchman v. Wright* (1606), Noy, 118). The defence here was not estoppel, but, in substance, *autrefois convict*.

(l) *Parker v. Simpson* (1869), 18 W. R. 204; compare *Priestman v. Thomas* (1884), 9 P. D. 70; affirmed, *ibid.*, 210, C. A. An action is necessary for this purpose (*Ainsworth v. Wilding*, [1896] 1 Ch. 673).

(m) *Lloyd v. Mansell* (1722), 2 P. Wms. 73.

(n) *Cole v. Langford*, [1898] 2 Q. B. 36; *Birch v. Birch*, [1902] P. 130, C. A.; *Priestman v. Thomas* (1883), not reported (see 9 P. D. 211); *Wyatt v. Palmer* [1899] 2 Q. B. 106 (consent judgment); *White v. Ivory* (1910), *Times*, April 28th. CHANNELL, J. The doubt expressed by JAMES and THESIGER, L.JJ., in *Flower v. Lloyd* (1879), 10 Ch. D. 327, C. A., must now therefore be regarded as removed. But the validity of a judgment debt whereon an adjudication in bankruptcy has been founded can only be contested by the bankrupt in the bankruptcy court. So long as the adjudication stands, any right of action to set aside the judgment is a *chose in action* vested in the trustee (*Boaler v. Power*, [1910] 2 K. B. 229, C. A.). See also p. 333, *ante*.

(o) *Boswell v. Coaks* (No. 2) (1894), 86 L. T. 365, n., H. L.; *Shedden v. Patrick* (1854), 1 Macq. 535.

(p) *Birch v. Birch*, *supra*; *Boswell v. Coaks* (No. 2), *supra*; *Shedden v. Patrick*, *supra*, per Lord CRANWORTH, L.O., at p. 615; compare *White v. Hall* (1806), 12 Ves. 321 (colonial judgment).

(q) *Birch v. Birch*, *supra*; *Boswell v. Coaks* (No. 2), *supra*; compare *Cotter v. Barrymore (Earl)* (1733), 4 Bro. Parl. Cas. 203.

SUB-SECT. 3.—*Lack of Jurisdiction.*

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No estoppel where no jurisdiction.

491. Wherever estoppel by record is said to arise out of a judgment, it is assumed that the court which pronounced the judgment had jurisdiction to do so. The lack of jurisdiction deprives the judgment of any effect, whether by estoppel or otherwise (*r*); and this rule applies even where the party alleged to be estopped himself sought the assistance of the court whose jurisdiction is impugned (*s*). A magistrate hearing a summons for the expenses of making up a new street under s. 150 of the Public Health Act, 1875 (*t*), or for trespass to land (*a*), and having jurisdiction for that purpose, may dismiss the summons on the express ground in the one case that the street was repairable by the inhabitants, or in the other that the defendant had established a title to the property; but though such finding is embodied in the order as drawn up, it creates no estoppel between the parties, for it relates to a matter which the magistrate had no jurisdiction directly and immediately to adjudicate upon, being at most incidentally cognisable, so far only as necessary to his decision on the actual question submitted (*b*). The absence of a condition necessary to found the jurisdiction to make an order, or give a decision, deprives the order or decision of any conclusive effect (*c*); but it is otherwise where

(*r*) *Rogers v. Wood* (1831), 2 B. & Ad. 245 (decree of court unknown to the law, composed of some members of the Court of Exchequer and other distinguished persons); *Dublin (Archbishop) v. Trimleston (Lord)* (1849), 12 L. Eq. R. 251.

(*s*) *Toronto Railway v. Toronto Corporation*, [1904] A. C. 809, 815, P. C.; see and distinguish *Wright v. London Omnibus Co.* (1877), 2 Q. B. D. 271; see also note (*h*), p. 337, *ante*.

(*t*) *R. v. Hutchings* (1881), 6 Q. B. D. 300, C. A.; followed in *Scott v. Lowe* (1902), 86 L. T. 421, a case under the Metropolis Management Act, 1855 (18 & 19 Vict. c. 120).

(*a*) *A.-G. for Trinidad and Tobago v. Eriché*, [1893] A. C. 518, P. C.

(*b*) Compare *Dover v. Child* (1876), 1 Ex. D. 172 (magistrate's refusal to order delivery up of goods under Metropolitan Police Courts Act, 1839 (2 & 3 Vict. c. 71), s. 40, is not an adjudication on title, which he has no jurisdiction to make); *Re Vitoria, Ex parte Vitoria*, [1894] 2 Q. B. 387, C. A. (refusal of receiving order no adjudication on the debt); applied, *King v. Henderson*, [1898] A. C. 720, 730, P. C.

(*c*) *Reed v. Nutt* (1890), 24 Q. B. D. 669 (certificate of dismissal of charge of assault without a hearing on the merits (Offences Against the Person Act, 1861 (24 & 25 Vict. c. 100), s. 44) is given without jurisdiction, and is no bar (under s. 45) to an action for the same cause); compare *Jungheim, Hopkins & Co. v. Fouklmann*, [1909] 2 K. B. 948 (arbitrator lacking qualification which was a condition of his appointment). The question of jurisdiction or no jurisdiction and its effect on estoppel is well illustrated by compensation cases. The verdict of a jury assessing compensation under the Lands Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 18), s. 50, and the signed judgment thereon of the sheriff, constitutes a record. The parties are not, however, estopped in subsequent proceedings as to the right to compensation, whether it turns on the claimant's title to the property (*R. v. London and North Western Rail. Co.* (1854), 3 E. & B. 443), or on the question whether any damage has been occasioned by the execution of the works (*Read v. Victoria Station and Pimlico Rail. Co.* (1863), 1 H. & C. 826), which matters the sheriff's jury has no jurisdiction to determine. But when once it is determined in an action on the judgment that any damage whatever has been sustained, the verdict of that jury is conclusive between the parties as to the amount (*Barber v. Nottingham Canal Co.* (1864), 15 Q. B. (N. S.) 726; 747; *Read v. Victoria Station and Pimlico Rail. Co.*, *supra*).

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the order is good on its face and the court adjudicating has jurisdiction to determine the existence or not of the condition, and the party denying its existence has neglected his opportunity of raising the objection at the hearing (*d*). Demurrers were frequently, under the old practice, allowed to pleas of *res judicata* on the ground that the latter did not show that the court adjudicating had jurisdiction to do so (*e*). The same principle has been applied where it has been sought to give effect, whether as a cause of action or a ground of defence, to foreign judgments (*f*).

SUB-SECT. 4.—Truth appearing in same Record.

No estoppel
 where truth
 appears on
 record
 relied on.

492. Where the truth appears in the same record (*g*) the question of estoppel can, it seems, hardly arise; for it is difficult to imagine a contention that a person was estopped from averring that which appeared, or could upon a correct construction be gathered, from the record relied on. The principle is illustrated by a modern decision of the Judicial Committee to the effect that the defendant is not estopped by the general terms of a judgment roll, drawn up at the instance of the plaintiff, but not in accordance with the written findings of the jury (*h*).

SUB-SECT. 5.—Allegation not inconsistent with Record.

No estoppel
 against
 allegation
 consistent
 with record.

493. That a party is not estopped from alleging that which is not inconsistent with a record seems also to be a truism. It is really only another way of stating that a judgment is conclusive only as to the point decided, and not as to matters which were neither put in issue nor admitted on the pleadings (*i*). As has already been pointed out (*k*), a judgment for the defendant may be consistent with the plaintiff having on another occasion a good cause of action for that which he failed to recover in the first instance. Thus, judgment for defendant in an action on a bill, on confession of

(*d*) *River Ribble Joint Committee v. Croston Urban District Council*, [1897] 1 Q. B. 251.

(*e*) *Harris v. Willis* (1855), 15 C. B. 710 (to plea of *res judicata* in Admiralty Court); *Briscoe v. Stephens* (1824), 2 Bing. 213 (in inferior court); see also *O'Grady v. Synan*, [1900] 2 L. R. 602, C. A.

(*f*) *Ferguson v. Mahon* (1839), 11 Ad. & El. 179 (Irish judgment); distinguished in *Reynolds v. Fenton* (1846), 3 C. B. 187, as to which see 1 Smith, L. C., 11th ed., at p. 792; *Price v. Dewhurst* (1838), 4 My. & Cr. 76 (judgment of foreign court purporting, without jurisdiction, to administer the estate of persons not domiciled in the foreign country); and see *Bank of Australasia v. Nias* (1851), 16 Q. B. 717, at p. 735. As to foreign judgments purporting to affect the matrimonial status of persons not domiciled within the jurisdiction of the courts pronouncing them, see p. 338, note (*g*), *ante*; and title CONFLICT OF LAWS, Vol. VI., p. 254.

(*g*) Co. Litt. 352 b. As to the truth appearing in the same deed as is relied on to support the estoppel, see *Morton v. Woods* (1869), L. R. 4 Q. B. 293, Ex. Ch.; and estoppel by deed, p. 367, *post*.

(*h*) *Wunt v. Moss* (1894), 70 L. T. 178, 179, P. C.; see *R. v. Carlile* (1831), 2 B. & Ad. 364, 365 (the minute of a verdict entered by the officer of the court "is considered by the court in which the proceeding takes place as evidence of the verdict, although the record may not have been regularly drawn up in proper form"); and compare *Colonial Bank v. Hepworth* (1887), 36 Ch. D. 36, 53.

(*i*) See pp. 355, 357, *post*.

(*k*) See p. 349, *ante*.

a plea of release under a composition deed, does not bar a second action on the same bill, based on an allegation of failure (subsequent to the confession) to pay an instalment, whereby the release became void (l). On the same principle judgment for a plaintiff is not necessarily conclusive on a matter which, though it might, if raised by way of defence or counterclaim, have afforded an answer to the action, can be and is made the subject of a later independent proceeding at the suit of the former defendant. Thus, a defendant who in foreclosure proceedings submitted to pay, and after decree paid what was found due, was not barred from subsequently proceeding by bill for repayment of part of the moneys on the ground that the transaction infringed the usury laws, that question not having been in dispute in the former suit, though a cross bill might have been filed (m). So, at common law, judgment for the plaintiff in an action for the price of goods is no answer to an action for damages for their inferior quality, though this might have been pleaded in reduction or extinction of the price (n).

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SUB-SECT. G.—*Matter on Record not then in Issue.*

494. Apart from the effect of express and implied admissions in pleadings (o), no estoppel arises as to matters which were not in issue in the proceedings the record of which is relied upon (p). It

Matter must
have been
in issue.

(l) *Hall v. Levy* (1875), L. R. 10 C. P. 151; *Hitchin v. Campbell* (1771), 2 Wm. Bl. 779; compare *Harris v. Mulkern* (1875), 1 Ex. D. 31; *Re Anglo-French Co-operative Society* (1880), 14 Ch. D. 533, 536; *Heath v. Weaverham (Township Overseers)*, [1891] 2 Q. B. 108; *R. v. Wye (Inhabitants)* (1838), 7 Ad. & El. 761; *Liverpool Corporation v. Chorley Waterworks Co.* (1852), 2 De G. M. & G. 852, C. A.; compare *Radcliffe v. Pacific Steam Navigation Co.*, [1910] 1 K. B. 685, C. A. (application to review under Workmen's Compensation Act, 1906 (6 Edw. 7, c. 38), Sched. 1.).

(m) *Moore v. Battie* (1759), Amb. 371, distinguished *Caird v. Moss* (1886), 33 Ch. D. 22, C. A., where after litigation involving the construction of an agreement between the parties as to the distribution of a fund in court, the court refused to entertain an action for rectification of the agreement, not because the question was *res judicata*, for it was not in issue, but because the court will not rectify an agreement which has been worked out, and *a fortiori* if the question might have been raised in, or contemporaneously with, the first action.

(n) *Davis v. Hedges* (1871), L. R. 6 Q. B. 687; distinguished in *Caird v. Moss*, *supra*; compare *Bigge v. Burbidge* (1846), 15 M. & W. 598, where the price had been paid into court in the first action; and *Hindley v. Haslem* (1878), 27 W. R. 61.

(o) See p. 357, *post*.

(p) See cases cited in notes (l), (m), (n), *supra*; *Blackham's Case* (1709), 1 Salk. 290; *Collins v. Gough* (1785), 7 Bro. Parl. Cas. 94; *St. Paul's (Minor Canons) v. Crickett* (1810), Wight. 30 (action for tithes for different years); *Jones v. Reynolds* (1836), 7 C. & P. 335 (successive actions for use and occupation); *Waine v. Crocker* (1862), 3 De G. F. & J. 421, C. A.; *Mackintosh v. Smith and Lowe* (1865), 4 Macq. 913; *Castrique v. Imrie* (1870), L. R. 4 H. L. 414, 434; *O'Grady v. Synan*, [1900] 2 I. R. 602, C. A.; *Clonitte v. Storey*, [1910] W. N. 163; compare *Mungana v. Wright*, [1909] 2 K. B. 958, at p. 975 (verdict for plaintiff on plea of justification, not conclusive as to fair comment and privilege, in action for repeating the libel); *Cleverley v. Gaslight and Coke Co.* (1907), 24 T. L. R. 93, H. L. (memorandum of agreement for weekly payments recorded under Workmen's Compensation Act, not conclusive as to cause of subsequent death); and see p. 332, *ante*. It was held by Sir J. P. WILDE that a prior verdict created no estoppel, even as to the same matters put in issue in a later suit, where the earlier and the later suit were triable on different principles, &

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is not sufficient that they were decided by implication (*q*). On this principle a plaintiff who has two heads of claim, and takes a verdict for one only, full relief not being open to him on the other, is not barred in a subsequent action as to the latter (*r*). But where relief is properly asked of a competent court, and after trial is not noticed in a judgment granting other relief, or where in an action brought for several demands there is judgment for one only, the other relief is presumed to have been refused, and its refusal is a bar to a subsequent action for the same cause (*s*).

What
evidence
admissible
to show what
in issue.

495. In order to ascertain what was in issue between the parties in the earlier proceedings, the judgment itself must of course be looked at (*t*), and the verdict, if any, on which it is founded (*a*); and where there have been pleadings, these should also be examined (*b*), being in fact part of the record. The same principle applies where an issue has been directed by the court. In short, whatever goes to make up the record must be looked at (*c*); and no evidence is in such case admissible to contradict the record (*d*), or to show that more was in issue than appears upon it (*e*). But

different species of evidence being admissible in each (*Bancroft v. Bancroft* (1864), 3 Sw. & Tr. 597; compare *Sopwith v. Sopwith* (1861), 30 L. J. (P. M. & A.) 131).

(*q*) *Brandlyn v. Ord* (1738), 1 Atk. 571; *Newall v. Elliott* (1896), 1 H. & C. 797; *Ruck v. Ruck*, [1896] P. 152 (finding that A. misconducted herself with B. without correlative finding, not conclusive against B.). See, however, note (*l*), p. 339; and *Humphries v. Humphries*, [1910] 1 K. B. 796; affirmed [1910] 2 K. B. 531, C. A. (an issue as to the existence of an agreement having been affirmed in a former action between the same parties, the defendant cannot object that it does not satisfy the Statute of Frauds (29 Car. 2, c. 3); because, although that defence was not pleaded, and therefore could not be relied on in the former action, there was an opportunity of pleading it); see also note (*q*), p. 332, *ante*; and compare *Saunders v. Vautier* (1841), Cr. & Ph. 240.

(*r*) *Hadley v. Green* (1832), 2 Cr. & J. 374 (promissory note and money received for value of stone, subsequent action for damages for quarrying the stone), following *Seddon v. Tutop* (1796), 6 Term Rep. 607; compare *Bagot (Lord) v. Williams* (1824), 3 B. & C. 235; *Grundy v. Townsend* (1888), 36 W. R. 531, C. A. (prohibition of action for goods sold no bar to subsequent action on account stated); *Bollard v. Spring* (1887), 51 J. P. 501 (same principle applied in criminal proceedings); see title CRIMINAL LAW AND PROCEDURE, Vol. IX., p. 356, and notes (*m*), (*n*), p. 355, *ante*.

(*s*) *Blake v. O'Kelly* (1874), 9 I. R. Eq. 54; *Gregory v. Molesworth* (1717), 3 Atk. 626; and see *Henderson v. Henderson* (1843), 3 Hare, 100, 114.

(*t*) *Huffer v. Allen* (1866), L. R. 2 Exch. 15; *Shoe Machinery Co. v. Cutlan* [1896] 1 Ch. 667; *Irish Land Commission v. Ryan*, [1900] 2 I. R. 565, C. A.

(*a*) *Want v. Moss* (1894), 70 L. T. 178, P. C.

(*b*) *Houston v. Sligo (Marquis)* (1885), 29 Ch. D. 448, C. A.; *Re South American and Mexican Co., Ex parte Bank of England*, [1895] 1 Ch. 37, C. A.

(*c*) *Robinson v. Duleep Singh* (1878), 11 Ch. D. 798, C. A., where the question being as to the effect of a verdict on an issue directed out of Chancery under the old practice, it was laid down that in order to ascertain what had been determined not only the findings of the jury, but the decree, the pleadings, and the order directing the issues must be looked at.

(*d*) *Whittaker v. Jackson* (1864), 2 H. & C. 926; *Keane v. O'Brien* (1871), 5 I. R. C. L. 531 (attempt to add that verdict was by consent).

(*e*) *Sintzenick v. Lucas* (1793), 1 Esp. 43; the judge's reasons cannot, it seems, be looked at for the purpose of discovering the grounds of his decision (*Re Bank of Hindustan, China, and Japan, Alison's Case* (1873), 9 Ch. App. 1, 26;

where, after trial in a court where there are no pleadings, the record of that court is relied upon, oral evidence is admissible to show what facts were in issue and determined as the basis of the judgment, and such determination is conclusive between the same parties (*f*); though it seems doubtful whether before the Judicature Acts it was pleadable as an estoppel (*g*).

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496. Where, however, the former judgment was a judgment by default, and the plaintiff has delivered no pleading, the estoppel is limited to what appears on the face of the judgment itself (*h*). On the same principle, a defendant who has consented to judgment before delivery of any pleading is not estopped as against the plaintiff from subsequently setting up matters which might have constituted a defence, because they have never been in issue (*i*); but it is otherwise with a defendant who has consented to judgment after pleading in his defence the matters which he seeks to set up in the later proceeding (*k*).

Judgment by default or consent.

497. The rules as to how far parties are concluded by their allegations and admissions in pleadings are as follows:—The facts actually decided by an issue cannot again be litigated between the same parties, and are evidence between them, and conclusive for the purpose of terminating litigation. So are the material facts alleged by one party which are directly admitted by the opposite party, or indirectly admitted by making a traverse on some other facts, but only if the traverse is found against the party making it. But the statements of a party in a declaration or plea, though for the purpose of the case he is bound by them, ought not to be treated as confessions of the truth of the facts stated (*l*).

Effect of statements in pleadings.

Re Allsop and Joy's Contract (1889), 61 L. T. 213, 215, *q.v.*, as to looking at the registrar's book to see what was done at the trial.

(*f*) *Flitters v. Alfrey* (1874), L. R. 10 C. P. 29, following *Routledge v. Hislop* (1860), 2 E. & E. 549.

(*g*) *Flitters v. Alfrey*, *supra*, at p. 41; and see *Irish Land Commission v. Ryan*, [1900] 2 I. R. 565, C. A., *per* HOLMES, I. J., at p. 580.

(*h*) *Irish Land Commission v. Ryan*, *supra*. As to effect of default of pleading, see *infra*.

(*i*) *Goucher v. Clayton* (1865), 34 L. J. (CH.) 239 (consent to injunction in patent action no estoppel against denying validity and infringement).

(*k*) *Thompson v. Moore* (1889), 23 L. R. Ir. 599, 631, 667, C. A. (validity and infringement denied in former proceeding).

(*l*) *Boileau v. Rutlin* (1848), 2 Exch. 665, *per cur.*, at p. 681; and see *Re Walters, Nelson v. Walters* (1889), 61 L. T. 872; reversed on other points (1890), 63 L. T. 328, C. A. It was said in *Carter v. James* (1844), 13 M. & W. 137, that the omission to traverse an allegation made in one action does not estop the party pleading from traversing it in another, the admission implied being for the purpose of that action only; but this statement appears to be too general in view of the passage quoted in the text; see *Hutt v. Morrell* (1849), 3 Exch. 210, *per* POLLOCK, C. B., and PARKE, B., at p. 241, and the remarks in 2 Smith, L. C., 11th ed., p. 763; compare, however, the passage quoted in the next note. As to an omission to plead the Statute of Frauds, see *Humphries v. Humphries*, [1910] 1 K. B. 796; affirmed [1910] 2 K. B. 531, C. A.; and note (*l*), p. 339, *ante*. It was at one time thought that a corporation by suing on a contract which required a seal would be estopped from afterwards objecting in a cross action that the contract was not binding on them (*Fishmongers' Co. v. Robertson* (1843), 5 Man. & G. 131, 192). But this *dictum* was commented on in *Boileau v. Rutlin*, *supra*, and a

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Default of pleading.

Confession of defence.

Payment into court, and taking out.

498. A party who has suffered judgment in default of defence is not estopped from pleading in a later action matters not inconsistent with the material averments in the statement of claim in the earlier one, *e.g.*, matters which might have been pleaded in confession and avoidance (*m*); and in any case an estoppel cannot be based on averments which are not a necessary part of the record, and are neither proved nor admitted (*n*).

But a plaintiff who has replied by confessing a defence of matters arising pending action (and the same rule would, it seems, apply to any other defence) is precluded from bringing a fresh action unless fresh circumstances arise; the matter is *res judicata* as to everything that might have been controverted at the time he so replied (*o*).

499. Where money has been paid into court in satisfaction of a particular cause of action without denial of liability, and taken out by the plaintiff, and judgment signed for his costs, it seems on the foregoing principles that the defendant is estopped from denying material averments in the statement of claim (*p*) and the plaintiff from denying the sufficiency of the amount (*q*); and the same

contrary opinion was expressed by Lord CAMPBELL, C.J., in delivering the judgment of the Queen's Bench in *Copper Miners' Co. of England v. Fox* (1851), 16 Q. B. 229, which opinion was treated as an overruling authority in *Kilderminster Corporation v. Harbord* (1873), L. R. 9 Exch. 13, 21, 23. Under the modern system a party is not bound, even for the purpose of the case, by an alternative pleading (*McConnell v. Murphy* (1873), L. R. 5 P. C. 203, 220 (defendant not estopped by pleading an alternative construction from relying upon the true construction of a contract set out in his defence); see R. S. C., Ord. 19, r. 24; *Berdan v. Greenwood* (1878), 3 Ex. D. 251, 255; and title PLEADING).

(*m*) *Howlett v. Tarte* (1861), 10 C. B. (N. S.) 813; compare *Davis v. Hedgcs* (1871), L. R. 6 Q. B. 687; and *Rigge v. Burbidge* (1846), 15 M. & W. 598. The language of FITZGIBBON, L.J., in *Irish Land Commission v. Ryan*, [1900] 2 L. R. 565, C. A. at p. 572, "The ground and extent of an estoppel arising on a judgment by default must be found on the face of the judgment itself, and cannot be deduced from the pleading of the party who has obtained the judgment, when the defendant has said nothing and done nothing, and merely allowed judgment to go by default," if it means that material averments in the statement of claim cannot be looked at, goes further than necessary for the decision of the case and seems inconsistent with the judgments of BYLES and WILLIAMS, JJ., in *Howlett v. Tarte*, *supra*.

(*n*) *Irish Land Commission v. Ryan*, *supra*, per HOLMES, L.J., at p. 583.

(*o*) *Newington v. Levy* (1870), L. R. 6 C. P. 180, Ex. Ch., per BRAMWELL, B., at p. 189; compare *Hull v. Levy* (1875), L. R. 10 C. P. 154, and *Sandwich Corporation v. R.* (1817), 10 Q. B. 571, Ex. Ch. (return by corporation of compliance with writ of mandamus to assess compensation for a discharged officer in respect of certain specified offices estops them, in proceedings to compel them to give a bond for the amount assessed, from denying that he held those offices). On an interpleader issue, all grounds of claim or defence are open, and therefore a party cannot after failing at the trial to raise any such ground do so in subsequent proceedings (*Re Hilton, Ex parte March* (1892), 67 L. T. 594; compare *Williams v. Richardson* (1877), 36 L. T. 505).

(*p*) But not from setting up other matters which might have constituted a defence (*Rigge v. Burbidge* (1846), 15 M. & W. 598). *Secus* also when liability is denied (*Coote v. Ford*, [1899] 2 Ch. 93, C. A.).

(*q*) See *Sanders v. Hamilton* (1907), 96 L. T. 679 (plaintiff, who had by mistake claimed too little and taken it out of court when paid in by the defendant, an amendment to increase the claim being disallowed, and judgment thereupon entered for the defendant, was barred from bringing an action for the alleged balance); compare *Haddow v. Morton*, [1894] 1 Q. B. 565, C. A.

result would seem to follow where the plaintiff, having taken out the money, merely abandons the action, and no judgment is signed; but where a sum is paid into court generally in satisfaction of several causes of action, and the plaintiff pursues the latter course, he is not estopped from proceeding for a particular item unless it appears on inquiry that the sum paid in included that item (*r*).

SECT. 4.
Matters
preventing
Existence
of Estoppel.

SUB-SECT. 7.—*Record of other than Final Judgment.*

500. As already stated, in order to give rise to an estoppel, the record must be that of a judgment which is final in substance if not in form—that is, not interlocutory merely (*s*). Thus the dismissal of an action for want of prosecution is no bar to a new action—it amounts to nothing (*t*); and this is so where such dismissal is by consent, if there was no compromise of the cause of action (*a*); and the acceptance of money paid into court with denial of liability creates no *res judicata*, and the parties are not precluded from reopening the matters in dispute, except so far as regards the damages for the particular cause of action in respect of which it is paid in (*b*). It has been seen that a verdict without judgment is ineffectual to raise an estoppel (*c*); *à fortiori* the discharge of a jury without finding on an issue submitted to them will not prevent the same issue being litigated again (*d*).

Interlocutory
judgments.

501. A sheriff's return to a writ of execution occupies a somewhat peculiar position (*e*). It certainly is not a final judgment, nor indeed a judgment at all; but it has been said to be of such high regard that no averment can be admitted against it (*f*). This proposition, however, must be limited to the proceeding in which the return is made, for the same authority points out that

Sheriff's
return.

(*r*) *Holland v. Clark* (1842), 1 Y. & C. Ch. Cas. 151; compare *Bayot (Lord) v. Williams* (1824), 3 B. & C. 235 (judgment by default, and subsequent action for further sum).

(*s*) See p. 326, *ante*; *Re Greaves, Ex parte Whitton* (1880), 43 L. T. 480. The same principle applies to foreign judgments (*Nourion v. Freeman* (1889), 15 App. Cas. 1); see title CONFLICT OF LAWS, Vol. VI., p. 282.

(*t*) *Byrne v. Frere* (1828), 2 Mol. 157, 180; compare *R. v. May* (1880), 5 Q. B. D. 382 (default of appearance on application to quash affiliation order); *Re Hampshire Co-operative Milk Co., Purcell's Case* (1880), 29 W. R. 170.

(*u*) *Magnus v. National Bank of Scotland* (1888), 57 L. J. (CH.) 902; compare the old practice in Chancery of dismissing a bill without prejudice to the plaintiff's right to sue at law; see *Seymour v. Nosworthy* (1670), 1 Cas. in Ch. 155; *Rochester Corporation v. Lee* (1849), 1 Mac. & G. 467, 470; *Langmead v. Maple* (1865), 18 C. B. (N. S.) 255; compare *Collins v. Cave* (1858), 27 L. J. (EX.) 116 (bill dismissed for want of equity); *Peters v. Tilly* (1886), 11 P. D. 115 (failure of probate action for want of evidence of contents of will).

(*b*) *Coote v. Ford*, [1899] 2 Ch. 93, C. A.

(*c*) See p. 326, *ante*; *O'Connor v. Malone* (1839), 6 Cl. & Fin. 572, 596; *Bancroft v. Bancroft* (1864), 3 Sw. & Tr. 597, 599.

(*d*) *Carnegie v. Carnegie* (1886), 17 L. R. Ir. 430, C. A.; *R. v. Charlesworth* (1861), 1 B. & S. 460 (prosecution for misdemeanour); see title CRIMINAL LAW AND PROCEDURE, Vol. IX., p. 356. Discontinuance without leave is no defence to a subsequent action (R. S. C., Ord. 26, r. 1). The withdrawal of a juror does not even put a legal end to the actual litigation (*Thomas v. Easter Flying Post Co.* (1887), 18 Q. B. D. 822).

(*e*) See title EXECUTION.

(*f*) Com. Dig. (ed. 1822), tit. Return, G; *Harrington v. Taylor*, (1812), 15 East, 378, 383; *R. v. Howe* (1694), Comb. 295.

SECT. 4.
Matters
preventing
Existence
of Estoppel.

the remedy is by action for a false return (*g*), so that in subsequent proceedings it may be controverted. Thus a return of rescue is in that proceeding so far conclusive against the rescuer that it was the practice of the courts to grant a rule absolute for attachment in the first instance, without allowing him to show cause, and this was the *ratio decidendi* of a modern case (*h*). Indeed, it is said to be itself a conviction against the rescuer (*i*). But in an action for a false return he may show that he was not a rescuer in fact and recover damages on that footing (*j*).

The return was always conclusive in a proceeding by *sci. fa.* against the sheriff as to the value of the goods seized (*k*); and if he return goods to the value of the debt, and that they have been rescued, he must answer to the value returned (*l*): because the defendant is discharged by the seizure, and the plaintiff has no other remedy (*m*). It is also conclusive against him as to the amount of fees taken by his bailiff, since he thereby recognises the act done as his own (*n*).

But a return that he has seized the goods of the judgment debtor is not conclusive that the goods seized were the judgment debtor's, even against the sheriff himself, in an action by the creditor for a false return; because if that were not the case the creditor sustained no damage (*o*). Nor is a sheriff estopped by a return of *fieri feci* from showing that the execution debtor had a defeasible title which has been defeated by matter subsequent (*p*). It need hardly be added that a return which is true as far as it goes is not

(*g*) Com. Dig. (ed. 1882), tit. Return, G, citing (1772), *Lofft*, 372; *Dave-
nant v. Salisbury (Bishop)* (1672), 1 Vent. 223, 224; see title SHERIFFS AND
BAILIFFS.

(*h*) *Gobby v. Dewes* (1833), 10 Bing. 112; *Brassey v. Maclean* (1875), L. R. 6
P. C. 398, 405.

(*i*) Com. Dig. tit. Rescous, D, 6; *R. v. Pember* (1735), Lee temp. Hard. 112;
2 Dyer, 212 a, pl. 36; *Fawcett v. Catten* (1674), T. Jo. 39; note to *Mildmay v.
Smith* (1671), 2 Saund. 343; 2 Wms. Saund. (ed. 1871), 739; *R. v. Philips* (1732),
Barnes, 429.

(*j*) *Brassey v. Maclean*, *supra*. In such an action the plaintiff need not prove
malice or want of probable cause. In other respects it has some analogy to an
action for maliciously instituting legal proceedings of such a kind as could not
terminate in favour of the person complaining of them, who is therefore not
required to prove such termination (*Steward v. Gromett* (1859), 7 C. B. (N. S.)
191); see title MALICIOUS PROSECUTION.

(*k*) The sheriff by his return is charged to the full value at all events, except
the goods be perishable, or lost by the act of God (*Clerk v. Withers* (1704), 6 Mod.
Rep. 290, *per* HOLT, C.J., at pp. 293, 296); see title SHERIFFS AND BAILIFFS.

(*l*) *Clerk v. Withers*, *supra*, at p. 299, following *Mildmay v. Smith*, *supra*.

(*m*) *Stimson v. Farnham* (1871), L. R. 7 Q. B. 175, 179, 180; *Slie v. Finch*
(1618), 2 Roll. Rep. 57.

(*n*) Com. Dig. (ed. 1822), tit. Return, G. Therefore he was liable in civil pro-
ceedings under stat. (1587) 29 Eliz. c. 4 (repealed by Sheriffs Act, 1887 (50 & 51
Vict. c. 55), s. 39), to treble damages at the suit of the party grieved, if it appeared
by his return that greater fees had been taken than that statute allowed (citing
ASHURST, J., *Woodgate v. Knatchbul* (1787), 2 Term Rep. 148, 154); distinguish
Scarfe v. Halifax (1840) 7 M. & W. 288.

(*o*) *Stimson v. Farnham*, *supra*, dissenting from the *dictum* of Lord CAMP-
BELL, C.J., in *Remmett v. Lawrence* (1850), 15 Q. B. 1004, at p. 1010.

(*p*) *Standish v. Ross* (1849), 3 Exch. 527, following *Brydges v. Walford* (1817),
8 M. & S. 42.

to be taken to mean more than it says, so as to estop the sheriff from denying what he never affirmed (*q*).

SUB-SECT. 8.—*Estoppel against Estoppel.*

502. It has been said by Lord Coke (*r*), and the statement has been repeated in text-books of authority (*s*), that “estoppel against estoppel doth put the matter at large.” In a recent case, however, the judge declined to act on this principle, for which he could “find no authority” other than text-books (*t*). The result of this decision is that an existing estoppel arising from a judgment *inter partes* is not affected by a subsequent judgment, even though it be *in rem*, at all events where the parties to the later judgment are different, or are not both representing the same interest as in the earlier proceedings (*a*). On the other hand, a high authority has suggested that had there been conflicting judgments *in rem* in the case under consideration as to the status of the same highway, the effect “might have been to set the whole matter at large” (*b*).

SECT. 4.
Matters
preventing
Existence
of Estoppel

Estoppel
against
estoppel.

SUB-SECT. 9.—*Second Action begun before Judgment in First.*

503. *A lis pendens* without judgment creates no estoppel (*c*), and it seems that a judgment cannot take effect as a *res judicata*, or an estoppel unless it was given before the proceedings in which it is relied upon were commenced (*d*).

Later action
begun before
determination
of earlier.

(*q*) *Scarfe v. Halifax* (1840), 7 M. & W. 288 (sheriff's return that he had levied of the plaintiff's chattels £67 does not affirm that £30 further, demanded for charges, was also the plaintiff's money). This is really an application of the maxim that “estoppels must be certain to every intent” (see p. 379, *post*); and see *Hemmett v. Lawrence* (1850), 15 Q. B. 1001, 1010.

(*r*) Co. Litt. 352 b.

(*s*) See, for example, 2 Smith, L. C., 11th ed., p. 750.

(*t*) *Poulton v. Adjustable Cover and Boiler Block Co.*, [1908] 2 Ch. 430, C. A., *per* PARKER, J. The only authorities cited appear to have been *Prestman v. Thomas* (1884), 9 P. D. 70, 210, C. A., and *R. v. Hutchings* (1881), 6 Q. B. 10. 300, C. A., of which the former, as the learned judge pointed out, did not rest on the doctrine in question, but upon the practice of the Probate Division as to the revocation of its own decrees; see note (*d*), p. 338, *ante*.

(*a*) *Poulton v. Adjustable Cover and Boiler Block Co.*, *supra*, where a party against whom judgment had been recovered for an injunction and an inquiry as to damages, in an action for infringement of a patent, the validity of which was in issue, having subsequently, suing as a member of the public, obtained an order (in the nature of a judgment *in rem*; see p. 328, *ante*) for revocation of the patent, was not allowed at the inquiry to set up the invalidity of the patent in extinction or reduction of damages; affirmed in C. A. on somewhat different grounds (*ibid.*).

(*b*) *R. v. Hutchings* (1881), 6 Q. B. D. 300, C. A., *per* Lord SELBORNE, L.C., at p. 303. As to the application of this doctrine to estoppel by representation, see *Dixon v. Kennaway & Co.*, [1900] 1 Ch. 833, *per* FARWELL, J., at p. 840; p. 381, *post*.

(*c*) *Hitchin v. Campbell* (1771), 2 Wm. Bl. 779, 830. But the pendency of another suit for the same cause might formerly be pleaded in abatement, not on the ground of estoppel, but for the prevention of vexatious litigation (see Bullen and Leake, *Precedents of Pleadings*, 3rd ed., p. 473, note (*c*); *Henry v. Goldney* (1846), 15 M. & W. 494). The object is now attained by application to stay; see *M'Henry v. Lewis* (1882), 22 Ch. D. 397, C. A.; and title PRACTICE AND PROCEDURE.

(*d*) *Houstoun v. Sligo (Marquis)* (1885), 29 Ch. D. 448, C. A. (Irish judgment); compare *The Delta* (1876), 1 P. D. 393 (foreign judgment).

Part III.—Estoppel Quasi of Record.

SECT. 1.

Judgments of Courts not of Record.

Principle of
estoppel
extended to
tribunals
not of record.

SECT. 1.—*Judgments of Courts not of Record.*

504. The doctrine of estoppel by record has been extended by analogy to the decisions of all tribunals which have jurisdiction, whether by the law of this country (*e*), or by the consent of parties (*f*), or by the law of the country to whose tribunals the parties have, or may be presumed from their conduct to have, submitted themselves (*g*).

The estoppel which arises from the decisions of such tribunals has been conveniently named "estoppel quasi of record" (*h*). The number and importance of estoppels of this character has been much diminished by modern legislation. The ecclesiastical courts are not courts of record; and down to 1857 the jurisdiction as to grants of probate and letters of administration, and matrimonial causes (not being proceedings for damages for *crim. con.*, or for divorce *a vinculo* for causes other than nullity) belonged to them. The decrees of the courts created in that year with jurisdiction in these matters, and those of the High Court of Justice, to which that jurisdiction has been transferred, are matters of record (*i*) and fall within the rules already discussed.

Ecclesiastical
courts.

But before the legislation referred to the final decrees of the ecclesiastical courts, whether relating to grants of probate and administration (*k*) or to matrimonial suits, were conclusive between the parties; and where they created or affected the status of a party, upon all persons, as being in the nature of judgments *in rem* (*l*); and the same principles are still applicable to the

(*e*) "The law hath respect, not only to courts of record and judicial proceedings there, but even to all other proceedings where the person who gives judgment or sentence hath judicial authority" (*Phillips v. Bury* (1694), 1 Ld. Raym. 5; see the judgment of Lord HOLT, C.J., 2 Term Rep. 346, at p. 357; compare *L. v. Graddon* (1775), 1 Cowp. 315).

(*f*) A decree to be admissible evidence must be that of a court known to the law of this country, or of competent jurisdiction, or must be founded on a voluntary submission; see *Rogers v. Wood* (1831), 2 B. & Ad. 245, 256. The decision of an arbitrator upon the construction of an agreement which was referred to him for interpretation is conclusive between the parties in an action for subsequent breaches of the same agreement (*Gueret v. Audouy* (1893), 62 L. J. (Q. B.) 633, C. A.).

(*g*) As to foreign judgments, see title CONFLICT OF LAWS, Vol. VI., pp. 284, 286.

(*h*) This expression seems to have been originated by the late Mr. J. W. Smith; see 2 Smith, L. O., 11th ed., p. 773.

(*i*) See Court of Probate Act, 1857 (20 & 21 Vict. c. 77), s. 23; Matrimonial Causes Act, 1857 (20 & 21 Vict. c. 85), s. 6; Judicature Act, 1873 (36 & 37 Vict. c. 66), s. 16.

(*k*) *Noel v. Wells* (1668), 1 Lev. 235; *Allen v. Dundas* (1789), 3 Term Rep. 125; *Allen v. M'Pherson* (1847), 1 H. L. Cas. 191.

(*l*) *Bunting v. Lepingwell* (1585), 4 Co. Rep. 29 a; *Kenn's Case* (1606), 7 Co. Rep. 42 b, 43 b; *Da Costa v. Villa Real* (1734), 2 Stra. 961; *Harrison v. Southampton Corporation* (1853), 22 L. J. (CH.), 372; reversed on the ground of fraud and collusion (*ibid.*, 722, C. A.). A decree in a jactitation suit, not in affirmation of the marriage, merely operated *in personam*; see *Kingston's (Duchess)*

degrees of ecclesiastical courts in matters over which they retain their jurisdiction (*m*).

505. The Admiralty Court was not a court of record (*n*), and the conclusiveness of its sentences rested on the general principle laid down by Lord Holt (*o*); but their conclusiveness (so far as the jurisdiction enabled them to give relief) (*p*) has never been doubted (*q*).

SECT. 1.
Judgments
of Courts
not of
Record.

Admiralty
courts.

506. It is assumed that the sentence of a court-martial might be pleaded by way of estoppel and relied on as conclusive between the parties (*r*); but there seems to be no direct decision upon the point (*s*). The order of a naval court under the powers conferred by the Merchant Shipping Act, 1894, is expressly made "in any subsequent legal proceedings conclusive as to the rights of the parties" (*t*). Therefore such an order made on the complaint of the master finding seamen guilty of wilful disobedience and neglect of duty, and ordering their discharge and forfeiture of their wages, is conclusive in subsequent proceedings between the seamen and their owners for wages and wrongful dismissal (*a*).

Courts-
martial
and naval
courts.

507. The principle of conclusiveness has been applied to decisions not of record in numerous cases, of which the following are examples:—A sentence of expulsion passed by a college (*b*); of deprivation by a college visitor (*c*); of trustees dismissing a

Domestic
tribunals.

Case (1776), 2 Smith, L. C., 11th ed., 731, 738. The case of *Jones v. Bow* (1692), Carth. 225, appears to conflict with this view, but though the sentence there relied on is said to have been in a jactitation suit, its form, that there was no marriage, and that the parties might marry separately, suggests a nullity suit (compare the sentence in *Kenn's Case* (1606), 7 Co. Rep. 42 b, 43 b). There may, therefore, be some error in the report; see also *Meadows v. Kingston (Duchess)* (1775), Amb. 756.

(*m*) *R. v. Grundon* (1775), 1 Cowp. 315, 322; see cases as to sentences of deprivation cited by Lord Holt, C.J., in *Phillips v. Bury* (1691), 2 Term Rep. 346, 354; *Kingston's (Duchess) Case*, *supra*.

(*n*) 3 Bl. Com., 4th ed., 69.

(*o*) See note (*e*), p. 362, *ante*.

(*p*) See *Nelson v. Couch* (1863), 15 C. B. (N. S.) 99.

(*q*) *Hughes v. Cornelius* (1681), 2 Show. 232; and see *Lindo v. Rodney* (1749), cited 2 Doug. (K. B.), 612, 617.

(*r*) *Hannaford v. Hunn* (1825), 2 C. & P. 148, *per* ABBOTT, C.J., at p. 155; and see 2 Smith, L. C., 11th ed., 783.

(*s*) See *R. v. Suddis* (1801), 1 East, 306, 316, 317; *Grant v. Gould* (*Sir Charles*) (1792), 2 Hy. Bl. 69, 100. The civil courts have no jurisdiction to inquire into the sentences of courts administering "martial law," but this rests upon a different principle; see *A.-G. for the Cape of Good Hope v. Van Reenen*, [1904] A. C. 114, P. C.; *Tilonko v. A.-G. of Natal*, [1907] A. C. 93, P. C.

(*t*) 57 & 58 Vict. c. 60, s. 483 (2).

(*a*) *Hutton v. Ras Steam Shipping Co., Ltd.*, [1907] 1 K. B. 834, C. A. The discharge would seem to be in the nature of a judgment *in rem*, and so perhaps the forfeiture (which might be described as a condemnation) of their wages; but not so the finding of guilty (*Caine v. Palace Steam Shipping Co.*, [1907] 1 K. B. 670, C. A.; affirmed *sub nom. Palace Shipping Co., Ltd. v. Caine*, [1907] A. C. 386; and see note (*j*), p. 344, *ante*).

(*b*) *R. v. Grundon* (1775), 1 Cowp. 315. The court of the vice-chancellor of a university, is, by reason of his power to imprison, a court of record (*Kemp v. Neville* (1861), 10 C. B. (N. S.) 523).

(*c*) *Phillips v. Bury* (1694), 1 Ld. Raym. 5.

SECT. 1.
Judgments
of Courts
not of
Record.

schoolmaster (*d*); an order of the General Medical Council (*e*); the award of an arbitrator (*f*). So orders of commissioners of sewers (not made between the parties litigant) have been held admissible as evidence of reputation, on the express ground that they were adjudications of a court of competent jurisdiction over the subject-matter (*g*).

It seems hardly necessary to mention that an estoppel quasi of record will be prevented from arising by any of the matters which would prevent estoppel by record (*h*).

SECT. 2.—Approbation and Reprobation.

Party may
not approbate
and reprobate.

508. On the principle that a person may not approbate and reprobate, a species of estoppel has arisen which seems to be intermediate between estoppel by record and estoppel *in pais*, and may conveniently be referred to here. Thus a party cannot, after taking an advantage under an order (*e.g.*, payment of costs), be heard to say that it is invalid and ask to set it aside (*i*), or to set up to the prejudice of persons who have relied upon it a case inconsistent with that upon which it was founded (*k*); nor will he be allowed to

(*d*) *Doe v. Davy v. Haddon* (1783), 3 Doug. (K. B.) 310, 312.

(*e*) *Hill v. Clifford*, [1907] 2 Ch. 236, 251, C. A.; affirmed on other points, *sub nom. Clifford v. Timms*, [1908] A. C. 12; see Medical Act, 1858 (21 & 22 Vict. c. 90), s. 29; Dentists Act, 1878 (41 & 42 Vict. c. 33), s. 13; and title MEDICINE AND PHARMACY.

(*f*) *Gueret v. Audouy* (1893), 62 L. J. (Q. B.) 633, C. A., cited p. 362, *ante*; but the award must be in respect of the very matter in dispute. It is not sufficient that it can be made by inference a decision upon it. Where by the submission to arbitration the arbitrators required certain qualifications, a party who took part in the proceedings in ignorance of the fact that an arbitrator appointed by the other party was not qualified was held not to be estopped from denying the validity of the award (*Jungheim, Hopkins & Co. v. Foukelmann*, [1909] 2 K. B. 948; see p. 389, *post*). The verdict of a jury assessing compensation under the Lands Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 18), and the signed judgment thereon of the sheriff, are constituted a record by s. 50 (*Newall v. Elliot* (1863), 1 H. & C. 797; and see note (*c*), p. 353, *ante*).

(*g*) *R. v. Leigh* (1839), 10 Ad. & El. 398, 411.

(*h*) See *Harrison v. Southampton Corporation* (1853), 4 De G. M. & G. 137, C. A. (fraud); *Harris v. Willis* (1855), 15 C. B. 710 (want of jurisdiction); *Blackham's Case* (1709), 1 Salk. 290 (matter not in issue); and other cases cited at pp. 351 *et seq.*, *ante*. As to estoppel by the judgments of foreign or colonial courts, including those of Scotland and Ireland, see title CONFLICT OF LAWS, Vol. VI., pp. 281—301. The following additional cases on the subjects there treated may also be referred to:—*Jeannot v. Fuerst* (1909), 100 L. T. 816 (submission to jurisdiction); *Emanuel v. Symon*, [1908] 1 K. B. 302, C. A.

(*i*) *Tinkler v. Hilder* (1849), 4 Exch. 187. In *Gandy v. Gandy* (1885), 30 Ch. D. 57, C. A., a husband who, after decree of judicial separation awarding the custody of children to his wife, had escaped an order for increase of alimony, on the ground, *inter alia*, that he was bound by a separation deed to provide for the children, was not allowed to contend that as a result of the order depriving him of their custody he had been released from his obligation under the deed; compare *Caird v. Moss* (1886), 33 Ch. D. 22, C. A.

(*k*) *Roe v. Mutual Loan Fund* (1887), 19 Q. B. D. 347, C. A. (a bankrupt having in his statement of affairs returned the defendants as secured creditors on the footing that their bill of sale was good, obtained the sanction of the court to a composition of 2s. 6d. in the £, thereby obtaining an advantage and inducing the creditors, including the defendants, to alter their position, was not allowed afterwards to say that the bill of sale was bad, and by suing the defendants

SECT. 2.

Approbation
and Repro-
bation.

go behind an order made in ignorance of the true facts to the prejudice of third parties who have acted on it (*l*). And conversely, it is contrary to good faith and equity for a person who, though not a party to the proceedings and not bound by the judgment therein, knowing all the circumstances and deliberately taking the benefit of the judgment, stood by when he might have taken steps, by becoming a party or otherwise, to controvert it, afterwards to raise the question determined by it a second time (*m*). But the mere fact of a man with two alternative remedies having in ignorance of his rights pursued one and received a payment thereby, will not prevent him from afterwards pursuing the other, if he is able and willing to restore what he has received so as to prevent any wrong being done to any person by his change of remedy (*n*). But a judgment creditor who, after succeeding in interpleader proceedings, takes out of court the money paid into court as representing the value of the goods to abide the event, cannot afterwards seize the same goods in respect of the unsatisfied balance of the same judgment debt, so as to get the value of the goods twice over (*o*).

Part IV.—Estoppel by Deed.

SECT. 1.—In General.

509. Estoppel by deed (*a*) is based on the principle that when a person has entered into a solemn engagement by deed under his

Estoppel
by deed.

on that footing to obtaining a further advantage applying the *dicta* of HONYMAN, J., in *Smith v. Baker* (1873), 1. R. 8 C. P. 350, at p. 357); followed, *Comitti v. Maher* (1905), 94 L. T. 158; compare *Scarf v. Jardine* (1882), 7 App. Cas. 345, 353, 360; *Hone v. Boyle* (1891), 27 L. R. Ir. 137, C. A.; *Neale v. Electric and Ordnance Accessories Co., Ltd.*, [1906] 2 K. B. 558, C. A.; *McIlhate v. Royal London Mutual Insurance Society, Ltd.*, [1910] 2 Ch. 169, C. A. (plaintiff cannot sue as member of a company on the footing that the resolution by which it was converted from a friendly society into a company was invalid).

(*l*) *Re Eytton, Bartlett v. Charles* (1890), 45 Ch. D. 458; compare *Re Bond, Ex parte Bacon* (1881), 17 Ch. D. 447, 451, C. A.

(*m*) *Re Lart, Wilkinson v. Blades*, [1896] 2 Ch. 788, 795; compare *Roberts v. Maddocks* (1843), 13 Sim. 519, 558, 559. See also *Tredegar (Lord) v. Windus* (1875), 1. R. 19 Eq. 607 (a party having sued in equity on a policy alleging it to be void in law, and his suit having been dismissed on the merits, restrained from afterwards suing at law on the footing that the policy was legally valid); following *Phelps v. Prothero* (1855), 7 De G. M. & G. 722 (plaintiff after successfully suing in equity for specific performance restrained from suing at law for damages, but granted an inquiry in the equity suit for the same purpose, although the facts afforded no defence to an action at law, which was for relief different from that sought in equity; see *Phelps v. Prothero* (1855), 16 C. B. 370; compare *Bushby v. Ellis* (1853), 17 Beav. 279).

(*n*) *Re Collie, Ex parte Adamson* (1878), 8 Ch. D. 807, 818, C. A.; compare *Curtis v. Williamson* (1874), 1. R. 10 Q. B. 57.

(*o*) *Haddow v. Morton*, [1894] 1 Q. B. 565, C. A.

(*a*) Co. Litt. 352 b; 2 Bl. Com. 295; Bac. Abr., tit. Leases and Terms for Years, O, ed. 1832, pp. 850 *et seq.*; Shep. Touch. 53 showing that estoppel is not confined to indentures, but may be raised by a deed poll. There is no case of estoppel by deed poll; but see *Right d. Jefferys v. Bucknell* (1831), 2 B. & Ad. 278, per Lord TENNENT, C. J., at p. 282; *Re Ghost's Trusts* (1883), 49 L. T. 588, 590.

SECT. 1.
In General.

**A rule of
evidence.**

hand and seal as to certain facts, he shall not be permitted to deny any matter which he has so asserted (*b*). It is a rule of evidence according to which certain evidence is taken to be of so high and conclusive a nature as to admit of no contradictory proof (*c*). The estoppel being a rule of common law, must be "certain to every intent" without any ambiguity (*d*); but the averment relied upon to work an estoppel may be contained in the recital or in any part of the deed (*e*).

**Effect of
recitals.**

510. A person is bound by the recitals in a deed to which he is a party (*f*) whenever they refer to specific facts (*g*), and are certain, precise, and unambiguous (*h*). He is not bound by inferences which

In *Cropper v. Smith* (1884), 26 Ch. D. 700, C. A. (an action arising upon the assignment of a patent), COTTON, L.J., at p. 705, seems to assume that an estoppel may arise on a deed poll; BOWEN, L.J., however, at p. 708, held that there was no estoppel by deed "because the people who claim against [the patentee] are not parties or privies to the deed," but this principle would clearly apply to all deeds poll; FRY, L.J., at p. 713, expresses no opinion as to the validity of the argument "that estoppel may arise between the maker of a deed poll and all to whom it is addressed, in this case, all men." The court were unanimous that no estoppel arose on the facts, and on this they were affirmed (*Smith v. Cropper* (1885), 10 App. Cas. 249, 259), without reasons given; as to the meaning and effects of deeds in general, see title DEEDS AND OTHER INSTRUMENTS, Vol. X., p. 355.

(*b*) *Bowman v. Taylor* (1831), 2 Ad. & El. 278, per TAUNTON, J., at p. 291; *Bonner v. Wilkinson* (1822), 1 Dow. & Ry. (K. B.) 328; *Roberts v. Security Co., Ltd.* (1896), 13 T. L. R. 79, C. A., whose contents of a deed were approved but afterwards execution was refused and the deed not recognised, no estoppel arose as to matters recited; *Foligno v. Martin* (1852), 22 L. J. (Ct.) 502.

(*c*) Note 306 to Co. Litt. 352 b; *Simm v. Anglo-American Telegraph Co.* (1879), 5 Q. B. D. 188, per BRETT, L.J., at p. 206; *Low v. Bouverie*, [1891] 3 Ch. 82, 101, C. A.; and, among older cases, *Rainsford v. Smith* (1561), Dyer, 196 a; *Nash v. Turner* (1791), 1 Esp. 217; *Jones v. Williams* (1817), 2 Stark. 52; *Harding v. Ambler* (1833), 3 M. & W. 279.

(*d*) *Heath v. Crealock* (1874), 10 Ch. App. 22; *Re Holland, Gregg v. Holland* (1901), 85 L. T. 304. In ejectment by lessor to recover a cellar, it was held that plaintiff was not estopped by his lease from showing that the cellar was not comprised in it (*Doe d. Freeland v. Burt* (1787), 1 Term Rep. 701; see also *Doe d. Butcher v. Musgrave* (1840), 1 Mac. & G. 625).

(*e*) *Shelley v. Wright* (1737), Willes, 9; *Lainson v. Tremere* (1834), 1 Ad. & El. 792; *Bowman v. Taylor*, *supra*, at p. 293; *Crofts v. Middleton* (1855), 2 K. & J. 194. But *quære* whether the words coming after "in witness whereof" are part of the deed (*Pearce v. Morrice* (1834), 2 Ad. & El. 84). The statement of the date is no estoppel, because a deed operates from date of delivery (*Taylor v. M'Calmont* (1855), 4 W. R. 59).

(*f*) 1 Roll Abr., Estoppel, P, pl. 1, citing *Doddington's Case* (1594), 2 Co. Rep. 32 b, 33 b, 7; *Shelley v. Wright*, *supra*; *Lainson v. Tremere*, *supra*; *Bowman v. Taylor*, *supra*, per Lord DENMAN, C.J., at p. 290, expressly overruling Co. Litt. 352 b [h]; *Jones v. Williams* (1817), 2 Stark. 52; *Pearl Life Assurance Co. v. Johnson*, [1909] 2 K. B. 288, Div. Ct.

(*g*) *Salter v. Kidley* (1689), 1 Show. 58; *Bensley v. Burdon* (1830), 8 L. J. (o. s.) (Ct.) 85, as explained in *Right d. Jefferys v. Bucknell* (1831), 2 B. & Ad. 278, per Lord TENTERDEN, C.J., at p. 282; *Bulley v. Bulley* (1874), 9 Ch. App. 739, 751. Recital of devise held to give rise to estoppel (*Clarke v. Hall* (1888), 24 L. R. Ir. 316, C. A., affirming S. C. 22 L. R. Ir. 383, per MORRIS, C.J., at p. 387). Recital that father entitled in fee binding a son party with father to mortgage deed (*Guardian Assurance Co. v. Avonmore (Viscount)* (1872), 6 I. R. Eq. 391); and see title BONDS, Vol. III., p. 90.

(*h*) *Right d. Jefferys v. Bucknell*, *supra*; *Heath v. Crealock* (1874), 10 Ch. App. 22, 30, C. A.

may be drawn from the statements in a deed (*i*), and a recital which is true so far as it goes, though incomplete, does not prevent the party from averring what is necessary to complete the truth (*k*).

SECT. I.
In General.

511. Nothing is to be taken by way of "intendment," so that there is no such thing as an estoppel by something implied (*l*); and the averment relied upon to work an estoppel must be of something particular, not of a generality (*m*). A covenant that a man has a thing is not equivalent to a positive statement that he has it, and consequently a recital of title in order to work an estoppel must aver precisely that the person entitled is seised in fee or has the legal estate (*n*), and thus the operative words of an ordinary conveyance by grant create no estoppel (*o*).

No estoppel
by implication.

512. Where the truth appears by the same instrument there can be no estoppel (*p*), unless a clear intention is expressed in the deed to disregard the rule (*q*).

Where the
truth appears.

513. And a person who knows the truth of the circumstances under which a deed has been executed, whether he has acquired

When
estoppel can
be set up.

(*i*) *Crofts v. Middleton* (1855), 2 K. & J. 194, 204; *General Finance, Mortgage and Discount Co. v. Liberator Permanent Benefit Building Society* (1878), 10 Ch. D. 15; *Onward Building Society v. Smithson*, [1893] 1 Ch. 1, C. A.; *Williams v. Pinckney* (1897), 67 L. J. (CH.) 34, C. A.

(*k*) *Lovett v. Lovett*, [1898] 1 Ch. 82.

(*l*) *Bowman v. Taylor* (1834), 2 Ad. & El. 278, 292; *Right d. Jefferys v. Bucknell* (1831), 2 B. & Ad. 278, 282; compare *Doe d. Shelton v. Shelton* (1835), 3 Ad. & El. 265, 283, where it was held that a person executing a deed of conveyance is not estopped by recitals contained in anterior deeds which go to make up his title; and *Outler v. Bower* (1818), 11 Q. B. 973, 988; *Gillett v. Abbott* (1838), 7 Ad. & El. 783.

(*m*) *Twinson v. Tremere* (1834), 1 Ad. & El. 792, per Lord DENMAN, C.J., at p. 801, quoting 1 Roll. Abr., Estoppel, P, pl. 1 (see p. 366, note (*f*), *ante*), and following *Salter v. Kidley* (1689), 1 Show. 58; and *Binsley v. Burdon* (1830), 8 L. J. (O. S.) (CH.) 85.

(*n*) *General Finance, Mortgage and Discount Co. v. Liberator Permanent Benefit Building Society*, *supra*, following *Right d. Jefferys v. Bucknell*, *supra*; *Heath v. Crealock* (1871), 10 Ch. App. 22, C. A., followed by *Williams v. Pinckney*, *supra*; *Re Horton*, *Horton v. Perks*, *Horton v. Clark* (1884), 51 L. T. 420, 423; compare *Doe d. North v. Webber* (1837), 3 Bing. (N. C.) 922; and *Rayson v. Adcock* (1863), 9 Jur. (N. S.) 800, for application of the principle in the case of copyholds.

(*o*) *Heath v. Crealock*, *supra*; compare *Crofts v. Middleton* (1855), 2 K. & J. 194, for the case of lease and release. In an innocent conveyance there can be no estoppel (*Lovett v. Lovett*, *supra*, per ROMER, J., at p. 88). As to the meaning of the words "give" or "grant" in a deed, see title DEEDS AND OTHER INSTRUMENTS, Vol. X., p. 48.

(*p*) *Right d. Jefferys v. Bucknell*, *supra*, following Co. Litt. 352 b; Com. Dig., Estoppel, E, 2; *Hermitage v. Tomkins* (1699), 1 Ld. Raym. 729; *Pargeter v. Harris* (1845), 7 Q. B. 708; *Saunders v. Merryweather* (1865), 3 H. & C. 902.

(*q*) *Jolly v. Arbuthnot* (1859), 4 De G. & J. 224; followed in *Morton v. Woods* (1869), L. R. 4 Q. B. 293, Ex. Ch. In this case it was held that where one party executes a deed whereby he attorns tenant to the other so as to give him a right of distress, he is estopped from denying the existence of that right although the instrument shows on its face that there is no reversion in the other party which would support it. A mortgagor's right of distress is now provided for under the Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), s. 18, so that the number of cases to which the above rule would apply is still further limited.

SECT. 1.
In General.

such knowledge personally or through his agent, cannot set up an estoppel in his own favour, if the circumstances were such as to make the deed invalid between the original parties (r).

Principal and
agent.

514. Estoppel may be set up against a principal by which he is concluded from repudiating alterations made by his agent in a deed subsequent to its execution by the principal, if in consequence of the alterations the person setting up the estoppel has altered his position (s). And he may even be estopped from relying upon the terms of a deed for its true interpretation when both his agent and the person setting up the estoppel have acted under the deed in a manner at variance with the exact terms of the deed (t).

SECT. 2.—Upon whom binding.

Effect of
estoppel.

515. Estoppel only binds the parties (including their privies) (a), or one or other of them, to the deed containing the representation relied upon, and does not affect the rights of strangers to the deed (b), and for this reason it is said that estoppel by deed ought to be mutual or reciprocal. And a person may be a stranger to his own deed when he is suing, or being sued, not in his own right, but in right of another (c).

When a recital is intended to be a statement which all the parties to a deed have mutually agreed to admit as true, it is an estoppel upon all; but when it is intended to be the statement of one party only, the estoppel is confined to that party. The intention is a question of construction in each case (d).

(r) *Burgis v. Constantine*, [1908] 2 K. B. 484, C. A., per GORELL BARNES, P., at p. 492 (quoting and approving BIGHAM, J., in the court below), wherein the circumstances were such as to make the deed invalid between the original parties; compare *Heath v. Crealock* (1873), L. R. 18 Eq. 215, 242. In any case it is doubtful if a third party can set up an estoppel upon an invalid deed; see note (h), p. 369, post. If a person consents to join in a conveyance, being told generally there are objections, it must be taken that he has inquired into the nature of the objections, and he cannot afterwards raise any question as to the extent of his information; see *Cholmondeley v. Clinton* (1817), 2 Mer. 171, per GRANT, M.R., at p. 355, following *Braybrooke (Lord) v. Inskip* (1803), 8 Ves. 417; *Joyce v. Rawlins* (1870), 40 L. J. (CH.) 105. This is properly part of the doctrine of notice.

(s) *Holdsworth v. Lancashire and Yorkshire Insurance Co.* (1907), 23 T. L. R. 521.

(t) *Ibid.*; *Hough v. Guardian Fire and Life Assurance Co.* (1902), 18 T. L. R. 273. Both these are cases on policies of insurance involving questions of agency, and the ground of the decision in each is the principle of estoppel in pais rather than any principle peculiar to estoppel by deed.

(a) As to privies, see p. 343, ante, and Co. Litt. 352 a. One claiming under a grantor is estopped from taking advantage of a technical defect in grant (*Howard v. Shrewsbury (Earl)* (1867), L. R. 3 Eq. 218). A person who executes a memorandum indorsed on a deed may be bound by recitals in the deed as if he were a party (*Doe d. Gainsford v. Stone* (1846), 3 C. B. 176).

(b) *Paine v. Jones* (1874), L. R. 18 Eq. 320; *Movatt v. Castle Steel and Iron Works Co.* (1886), 34 Ch. D. 58, 63, C. A.; *Doe d. Marchant v. Errington* (1840), 6 Bing. (N. C.) 79; *Gaunt v. Wainman* (1836), 3 Bing. (N. C.) 69; *Cracknall v. Janson* (1879), 11 Ch. D. 1, C. A., per FRY, J., at p. 11.

(c) *Metters v. Brown* (1863), 1 H. & C. 686, 693, following *Doe d. Hornby v. Glen* (1834), 1 Ad. & El. 49, where it was held that an agreement entered into by an executor *de son tort* did not bind him after he had become rightful administrator.

(d) *Carpenter v. Buller* (1841), 8 M. & W. 209; *Young v. Raincock* (1849), 7

SECT. 8.—*Exceptions.*SUB-SECT. 1.—*Fraud.*SECT. 8.
Exceptions.

516. In so far as a deed is void on the ground that it was obtained by fraud, force, or other foul practice, or is a forgery, no estoppel can arise upon it (*e*). But upon the principle that no one can allege his own fraud in order to invalidate his own deed, it follows that a person will be precluded from opening an estoppel arising from admissions in a deed he has fraudulently obtained (*f*).

Exceptions
to creation
of estoppel.

517. Although the circumstances in which a deed has been executed may be such as to justify the plea as between the parties of "*non est factum*" (*g*), it is still a doubtful question whether, if there be a false representation respecting the contents of a deed, a person who is an educated person, and who might, by very simple means, have satisfied himself as to what the contents of the deed really were, may not, by executing it negligently, be estopped as between himself and a person who innocently acts upon the faith of the deed being valid, and who accepts an estate under it (*h*). So, too, it has been questioned whether a person can be permitted to rely on an estoppel by deed in his own favour when the party against whom the estoppel is being set up was induced to make the representations relied on by the fraud of a third party acting, or pretending to act, on behalf of the person setting up the estoppel as well as on his own behalf, even though the person setting up the estoppel was wholly innocent of any complicity in the fraud (*i*).

False
representa-
tion of
contents of
deed.

518. A difficult problem occurs in connection with deeds which are illegal or made for an illegal purpose, for in certain cases such

Illegality

C. B. 310; followed in *Stroughill v. Buck* (1850), 14 Q. B. 781, and *Wiles v. Woodward* (1850), 5 Exch. 557. The good sense of the much-quoted *dictum* of Co. Litt. 47 b and 352 a, that estoppel by deed should be mutual, is questioned in Bac. Abr., Leases and Terms for Years, O, ed. 1832, p. 851, on the ground that an estoppel may arise upon a deed poll, and it is clearly inconsistent with the proposition in the text. The *dictum* serves, perhaps, to express the principle that there can be no operation of estoppel by deed collateral to the operation of the deed itself; see p. 372, *post*.

(*e*) 2 Bl. Com. 309; *Ruben v. Great Fingall Consolidated*, [1906] A. C. 439, 446. For the circumstances under which a deed may be shown to be void, see title DEEDS AND OTHER INSTRUMENTS, Vol. X., pp. 404 *et seq.*

(*f*) *Montefiori v. Montefiori* (1762), 1 Wm. Bl. 363; *Doe d. Roberts v. Roberts* (1819), 2 B. & Ald. 367.

(*g*) As to the plea of "*non est factum*," see title DEEDS AND OTHER INSTRUMENTS, Vol. X., p. 404; *Howatson v. Webb*, [1908] 1 Ch. 1, C. A., affirming S. C. [1907] 1 Ch. 537.

(*h*) *Hunter v. Walters* (1871), 7 Ch. App. 75, *per* MELLISH, L.J., at p. 87; approved by FARWELL, L.J., in *Howatson v. Webb*, *supra*, at p. 3, distinguishing *Swan v. North British Australasian Co.* (1862), 7 H. & N. 603, which applied to the case of a forged transfer of shares the principles of representation by conduct established by *Pickard v. Sears* (1837), 6 Ad. & El. 469, as explained by *Freeman v. Cooke* (1848), 2 Exch. 654; *Lloyds Bank, Ltd. v. Bullock*, [1896] 2 Ch. 192; *King v. Smith*, [1900] 2 Ch. 425; as to the execution of a deed, see title DEEDS AND OTHER INSTRUMENTS, Vol. X., pp. 382 *et seq.*, and in the case of a blind or illiterate person, *ibid.*, p. 393.

(*i*) *Balkis Consolidated Co. v. Tomkinson*, [1893] A. C. 396, *per* Lord MACNAGHTEN, at p. 410, quoted by Lord DAVEY in *Ruben v. Great Fingall Consolidated*, *supra*; compare *Sheffield Corporation v. Barclay*, [1905] A. C. 392.

SECT. 3. deeds may be set aside (*k*) and any estoppel arising therein will be opened (*l*). Moreover, where a statement is made in a deed for the purpose of concealing an illegal contract, the whole matter is opened on the ground that persons cannot be allowed to escape from the law by making a false statement (*m*).

Exceptions. Consequently under the Bills of Sale Acts there can be no estoppel so as to prevent a person asking the court to go behind the form of the instrument in order to discover the real nature of the transaction (*n*).

Effect on parties.

On the other hand, though a deed may be bad on the ground that it has been executed to effect a purpose made illegal by statute, yet as between the parties it may not be competent to either to set up its invalidity, on the principle that the policy of the law always is not to make contracts void to a greater extent than the mischief to be remedied renders necessary. Estoppel, it may be presumed, continues as an incident of only so much of the deed as the law preserves (*o*).

SUB-SECT. 2.—*Mistake.*

Mistake.

519. A mere mistake in a deed common to all parties, or on account of which no one has acted to his detriment or altered his position, will not create an estoppel (*p*). But it must be a genuine mistake, and not disputed by either party (*q*). What the court will hold to be a mistake so as to open an estoppel must depend upon the circumstances of each case. The reported cases do not afford any clear principle of distinction (*r*).

Must be genuine.

SUB-SECT. 3.—*Infants, Married Women, Corporations.*

No estoppel against infants.

520. There can be no estoppel by deed against an infant, because an infant's deed is never good(*s*); and though an infant may be

(*k*) *Collins v. Blantern* (1767), 1 Smith, L. C., 11th ed., 369.

(*l*) *Pairston v. Mytton v. Gilbert* (1787), 2 Term Rep. 169, 171; *Stratford and Moreton Rail. Co. v. Stratton* (1831), 2 B. & Ad. 518, 526; *Hill v. Manchester and Salford Water Works Co.* (1831), 2 B. & Ad. 544, 553; *Doe d. Preece v. Howells* (1831), 2 B. & Ad. 744; *Doe d. Chandler v. Ford* (1835), 3 Ad. & El. 649; *Prole v. Wiggins* (1836), 3 Bing. (N. C.) 230; *Doe d. Levy v. Horne* (1842), 3 Q. B. 757, 766.

(*m*) *Doe d. Williams v. Lloyd* (1839), 5 Bing. (N. C.) 741; *Horton v. Westminster Improvement Commissioners* (1852), 7 Exch. 780; *Re Holland, Gregg v. Holland* (1901), 85 L. T. 304, per FARWELL, J., at p. 308.

(*n*) *Mudell v. Thomas & Co.*, [1891] 1 Q. B. 230, C. A.; compare *Bittleston v. Cooke* (1856), 25 L. J. (Q. B.) 281; *Kevan v. Mawson* (1871), 24 L. T. 395.

(*o*) *Phillipotts v. Phillipotis* (1850), 10 Q. B. 85, per JERVIS, C.J., at p. 97, following *Bessey v. Windham* (1844), 6 Q. B. 166, approved by WATSON, B., in *Bowes v. Foster* (1858), 27 L. J. (EX.) 262; compare *Burkinshaw v. Nicolls* (1878), 3 App. Cas. 1004 (illegal issue of shares as fully paid up to a vendor to a limited company. The company was estopped as against a subsequent transferee from denying that the shares were fully paid up); *Hull Flax Co. v. Wellesley* (1860), 6 H. & N. 38; *Barrow Mutual Ship Insurance Co. v. Ashburner* (1885), 54 L. J. (Q. B.) 377, C. A.

(*p*) *Scholesfield v. Lockwood* (1863), 33 L. J. (CH.) 106, per ROMILLY, M.R., at p. 110 (this was a case of mere clerical error. It was subsequently reversed, but not on this point); *Brooke v. Haymes* (1868), 1 L. R. 6 Eq. 25 (a mistake of fact as to the amount of legacy duty payable, common to all parties).

(*q*) Compare *Harding v. Ambler* (1838), 3 M. & W. 279.

(*r*) *Skipwith v. Green* (1724), 8 Mod. Rep. 311; *Re Simpson, Ex parte Morgan* (1876), 2 Ch. D. 72, 93, C. A.; *Mellor v. Walmesley*, [1905] 2 Ch. 164, C. A., following *Roberts v. Karr* (1809), 1 Taunt. 495; and *Easley v. Wilkes* (1872), L. R. 7 Exch. 298; see title MISTAKE.

(*s*) *Smith v. Low* (1739), 1 Atk. 489.

sued upon a covenant by deed for the price of necessaries, the case must be treated exactly as if there had been no deed (*l*).

521. A married woman can be bound by an estoppel arising out of admissions made in a deed, provided she is competent to make the deed, in the same way as a *feme sole* (*a*). But a married woman who is entitled to property for her separate use without power of anticipation cannot get rid of the restraint by telling an untruth, whether or not under seal, so as to induce some third person to act on the faith of that untruth and to set up an estoppel against her, as, but for the peculiar incidents attached to such restraint, he would be entitled to do (*b*).

522. A corporate body cannot be estopped by deed or otherwise from showing as between itself and the other parties to the deed that it had no power to do that which it purported to have done (*c*). But trustees for a public purpose, including commissioners of a body corporate, are not by the nature of their office protected from becoming subject to estoppel as against the assignees of the original parties to the deed in question (*d*): the estoppel in such a case is of the nature of estoppel *in pais* rather than by deed (*e*).

SECT. 4.—Operation of Deeds by Estoppel.

523. Where a deed of conveyance—whether by way of mortgage or otherwise—contains within itself a receipt for consideration money, or has a receipt indorsed upon it, the vendor or mortgagor (*f*) is estopped as between himself and a person who innocently acts upon the faith of such a representation from averring that a less sum or no sum at all has been received by him (*g*).

SECT. 3. Exceptions.

Married woman can be bound if competent party.

Corporation.

Receipt for consideration money.

(*t*) *Cooper v. Simmons* (1862), 7 H. & N. 707, *per* MARTIN, B., at p. 719; followed in *Waller v. Everard*, [1891] 2 Q. B. 369, C. A., *per* Lord ESNER, M.R., at p. 373.

(*a*) *Re Fiddley (A Solicitor), Jones v. Frost* (1872), 7 Ch. App. 773.

(*b*) *Stanley v. Stanley* (1878), 7 Ch. D. 589; followed in *Bateman (Lady) v. Faber*, [1898] 1 Ch. 141, C. A.

(*c*) *Fairtitle d. Mytton v. Gilbert* (1787), 2 Torm Rep. 169; *Blackburn and District Benefit Building Society v. Cunliffe, Brooks & Co.* (1885), 29 Ch. D. 902, C. A.; *British Mutual Banking Co. v. Charnwood Forest Rail. Co.* (1887), 18 Q. B. D. 714, C. A., *per* FRY, L.J., at p. 719; *Re Companies Acts, Ex parte Watson* (1888), 21 Q. B. D. 301, *per* CAVE, J., at p. 302.

(*d*) *Doe d. Levy v. Horne* (1842), 3 Q. B. 757, *per* Lord DENMAN, C.J., at p. 766; *Webb v. Herne Bay Commissioners* (1870), L. R. 5 Q. B. 642; *Higgs v. Assam Tea Co.* (1869), L. R. 4 Exch. 387; *Re Romford Canal Co., Pocock's Claim, Trickett's Claim, Carew's Claim*, [1883] W. N. 115.

(*e*) As to when the improper use of the corporate seal amounts to a forgery, see title DEEDS AND OTHER INSTRUMENTS, Vol. X., p. 392.

(*f*) There can, it is submitted, be no estoppel in favour of the purchaser or mortgagee who has not paid the purchase-money. But see *Bottrell v. Summers* (1828), 2 Y. & J. 407, *per* HULLOCK, B., at p. 412: "A general release is an estoppel in point of law, and that, notwithstanding the doubt expressed by Lord Mansfield, although no money is paid, an absolute release under seal will preclude the party from disputing the payment." Here, too, the principle is rather that of estoppel *in pais* than by deed. A receipt not under seal does not give rise to estoppel, except as to a person who has thereby been induced to alter his position; see *Graves v. Key* (1832), 3 B. & Ad. 313; *Skaipe v. Jackson* (1824), 3 B. & C. 421; see note (*l*), p. 383, *post*.

(*g*) As to receipt clauses in deeds generally, see title DEEDS AND OTHER INSTRUMENTS, Vol. X., p. 464; *Rice v. Rice* (1854), 2 Drew. 73, 83; *Re*

SECT. 4.

Operation of Deeds by Estoppel.

Receipt by solicitor for vendor or mortgagor.

Covenant as to power to convey.

Condition in bond.

No estoppel where action not founded on deed.

And similarly where the solicitor for the vendor or for the mortgagor receives the consideration money (*h*), the vendor or the mortgagor is estopped from denying the authority of the solicitor to receive it (*i*).

524. A mere covenant that a person has the power to convey an estate is not sufficient to raise an estoppel so as to prevent him from denying that he was seised in fee or had the legal estate (*k*).

525. In all cases where the condition of a bond has reference to any particular thing, the obligor shall be estopped from saying there is no such thing (*l*), but the estoppel must be certain to every intent (*m*).

526. There can be no estoppel arising out of a deed where the action is not founded on the deed, but is wholly collateral to it (*n*). In such cases the recitals in the deed, though certainly evidence of the facts to which they relate, are not of so high and conclusive a nature as to admit of no contradictory proof, and evidence of the circumstances in which the admissions contained in the deed were made is receivable to show that the admission was inconsiderately made and not entitled to weight as proof of the fact it is used to establish (*o*).

Forsyth (1863), 11 Jur. (N. S.) 213; *Bickerton v. Walker* (1885), 31 Ch. D. 151, C. A.; *Lloyds Bank, Ltd. v. Bullock*, [1896] 2 Ch. 192; *Bateman v. Hunt*, [1904] 2 K. B. 530, C. A.; *Powell v. Browne* (1907), 24 T. L. R. 71, C. A.; compare *Harding v. Ambler* (1838), 3 M. & W. 279; and *Kinmer v. Webster*, [1902] 2 Ch. 163, *per* FARWELL, J., at p. 174, distinguishing *Curritt v. Real and Personal Advance Co.* (1889), 42 Ch. D. 263. Where the transaction is between a solicitor and his client, a subsequent purchaser who has knowledge of the fact is thereby put upon inquiry; see title DEEDS AND OTHER INSTRUMENTS, Vol. X., p. 465.

(*h*) Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), s. 56.

(*i*) *King v. Smith*, [1900] 2 Ch. 425.

(*k*) See cases in note (*n*) on p. 367, *ante*. As to covenants running with estates by estoppel, see title LANDLORD AND TENANT; and *Spencer's Case*, (1583), 1 Smith, L. C., 11th ed., 55, 95 *et seq.* As to how far a person is bound by covenants in a deed, see title DEEDS AND OTHER INSTRUMENTS, Vol. X., pp. 475 *et seq.*

(*l*) *Lainson v. Tremere* (1834), 1 Ad. & El. 792, *per* Lord DENMAN, C.J., at p. 801, adopting 1 Roll. Abr., 872, Estoppel P, pl. 1, following *Stroud v. Willis*, (1594), Cro. Eliz. 362; *Rainsford v. Smith* (1561), Dyer, 196 a; *Shelley v. Wright* (1737), Willes, 9; *Burgis v. Constantine*, [1908] 2 K. B. 484, C. A.; see title BONDS, Vol. III., p. 90.

(*m*) *Kepp v. Wiggett* (1850), 10 C. B. 35, *per* WILLIAMS, J., at p. 53.

(*n*) *Carpenter v. Buller* (1841), 8 M. & W. 209; *Carter v. Carter* (1857), 3 K. & J. 617, 645; *Fraser v. Pendlebury* (1861), 31 L. J. (O. P.) 1; *Re Simpson, Ex parte Morgan* (1876), 2 Ch. D. 72, C. A.; compare *Trinidad Asphalt Co. v. Coryat*, [1896] A. C. 587, P. C., *per* Lord HOBHOUSE, at p. 592. Where pecuniary legatees who had not received legacies in full executed a release to the trustees acknowledging receipt of legacies, it was held that they were not estopped from claiming the balance, on the subsequent falling in of other funds (*Re Ghost's Trusts* (1883), 49 L. T. 588).

(*o*) *South Eastern Rail. Co. v. Watson* (1861), 6 H. & N. 520, 528; and compare *Burnand v. Rodocanachi* (1882), 7 App. Cas. 335, as to the limits of estoppel for determining the amount of a constructive total loss under a policy of insurance. As to the circumstances under which a cancelled deed may be used as evidence of the facts to which it relates, see title DEEDS AND OTHER INSTRUMENTS, Vol. X., p. 410.

527. A lease or other interest in land is created by estoppel when the grantor or lessor has nothing in the land at the time of the grant (*p*), and though a title by estoppel, such as the lessor or grantor in this case possesses, is only good against the person estopped by his own deed (namely, the lessee or the grantee), and imports from its very existence the idea of no real title at all, yet as against the person estopped it has all the elements of a real title (*q*).

A tenant therefore who holds under a lease by indenture is estopped from disputing his lessor's title or the title of the lessor's assignee (*r*).

SECT. 4.
Operation
of Deeds
by Estoppel.

Estoppel by grant of lease or other interest in land.

528. When, however, the grantor or lessor has some interest in the land, but purports to grant or to lease a larger interest than he has, the grantee or the lessee does not hold by estoppel, for an interest passed, and his tenure is of that interest, whatever it may be; and consequently a tenant is not estopped at a date subsequent to the creation of the lease from proving that the lessor's title has determined, nor a grantee that the grantor's interest has ceased, in order to establish a title under the Statute of Limitations (*s*).

Grant or lease of interest larger than estate of grantor.

But this doctrine only applies to the durability and not to the quantity of the estate, and where a grantor or lessor is properly entitled only to part of the premises demised, but not to the whole, then as no interest passed out of part of the demise the grantor or lessor has a good title by estoppel in respect of that part (*t*).

Doctrine applies to durability and not to quantity of estate.

529. Where the grantor or lessor subsequently acquires a title to the premises which he has purported to demise, the interest is said to feed the estoppel, and the grant or the lease then takes effect in interest and not by estoppel (*u*). But the grantor or the lessor

Subsequent acquisition of title by grantor or lessor.

(*p*) Bac. Abr., tit. Leases and Terms for Years, O, ed. 1832, p. 850; *Walton v. Waterhouse* (1672), 2 Wms. Saund. 415 c, 419, notes; *Bristowe v. Pegge* (1785), 1 Term Rep. 758, n., per LORD MANSFIELD, C.J., at p. 760, n.; *Cuthbertson v. Irving* (1859), 4 H. & N. 742, 757; affirmed (1860), 6 H. & N. 135.

(*q*) *Davis v. Bank of England* (1824), 2 Bing. 393, 407; *Bensley v. Burdon* (1830), 8 L. J. (o. s.) (CH.) 85; *Richards v. Johnston* (1859), 4 H. & N. 660; *Richards v. Jenkins* (1887), 18 Q. B. D. 451, 456, C. A.; *Bank of England v. Cutler*, [1908] 2 K. B. 208, 234, C. A.

(*r*) See p. 402, post.

(*s*) Co. Litt. 45 a; *Walton v. Waterhouse*, *supra*; *Treport's Case* (1594), 6 Co. Rep. 15 a; *Rawlin's Case* (1587), Jenk. 254; *Doe d. Hyginbotham v. Barton* (1840), 11 Ad. & El. 307; *Serjeant v. Nash, Field & Co.*, [1903] 2 K. B. 304, C. A., per COLLINS, M.R., at p. 312; and compare *Neave v. Moss* (1823), 1 Bing. 360; *Alchorne v. Gomme* (1824), 2 Bing. 54; *Fenner v. Duplock* (1824), 2 Bing. 10; *Doe d. Strode v. Seaton* (1835), 2 Cr. M. & R. 728; *Beer v. Beer* (1852), 12 C. B. 60, 81; *Delaney v. Fox* (1857), 2 C. B. (N. S.) 768, 774; *Langford v. Selmes* (1857), 3 K. & J. 220.

(*t*) *Williams v. Burrell* (1845), 1 C. B. 402, distinguishing *Andrew v. Pearce* (1805), 1 Bos. & P. (N. R.) 158; *Weeks v. Birch* (1893), 69 L. T. 759. Tenants in common having several and distinct estates cannot make a joint lease of the whole estate; but such lease shall be taken to be the lease of each for his respective share, and the cross confirmation of each for the part of the other with no estoppel on either part (*Beer v. Beer* (1852), 12 C. B. 60, per WILLIAMS, J., at p. 81, quoting Comyn's Landlord and Tenant, p. 22, following the authorities therein recited, namely, 1 Roll. Abr. 877, Estoppel, B, pl. 3, 4; Bac. Abr., Joint Tenants, II, pl. 1; *Mantle v. Wollington* (1607), Cro. Jac. 166; *Heatherley d. Worthing v. Weston* (1764), 2 Wils. 232; compare Co. Litt. 45 a.

(*u*) Co. Litt. 47 b; *Webb v. Austin* (1844), 7 Man. & G. 701, per TINDAL, C.J.,

SECT. 4.

Operation
of Deeds
by Estoppel.

Effect of
estoppel as
against (1)
remainder-
man ;
(2) privies
in estate of
tenant for
life.

Effect of
ineffectual
devise.

Effect when
there is
neither title
nor effectual
devise.

is estopped from saying that he had no interest at the time of the grant or lease (b).

530. Where possession has been acquired ostensibly under a conveyance or testamentary disposition creating a life interest in property to which the grantor had no title, and the intended tenant for life subsequently obtains against the true owner a title under the Statute of Limitations, he is estopped from setting up that title against anyone interested in remainder under the same instrument. This estoppel binds all persons who are privy in estate to such tenant for life, so that his heir-at-law is estopped against the remainderman or those claiming under him from denying that the instrument is valid (c).

But when a testator had a good title to property in his lifetime, though no power of testamentary disposition, and nevertheless purported to devise such property, a person entering under such devise or, in case of intestacy, as heir-at-law is not estopped from setting up a title under the Statute of Limitations against the person properly entitled, or those claiming under him (d) ; nor is a tenant for life under an invalid devise, or those claiming under him, estopped from disputing the title of the remainderman under the same invalid devise (e), because the devise itself, and not merely the title, is invalid and of no effect.

It would appear that when the testator neither had a good title nor in fact purported to devise certain property, but a person enters ostensibly under the will or under a settlement purporting to be made in pursuance of the will, that person is estopped from setting up a title under the Statute of Limitations (f).

at p. 724; followed in *Cuthbertson v. Irving* (1859), 4 II. & N. 743, per MARTIN, B., at p. 754; *Booth v. Alcock* (1873), 8 Ch. App. 663, 667; *Rowbotham v. Wilson* (1857), 8 E. & B. 123, 145, Ex. Ch.; and see title EASEMENTS ETC., Vol. XI., p. 245. But in *Keate v. Phillips* (1881), 18 Ch. D. 560, at p. 577, this doctrine was not allowed to operate on a fraudulent conveyance by a trustee, so as to defeat the interest of the *cestui que trust*. Compare the doctrine of *Noel v. Beuley* (1829), 3 Sim. 103, per SHADWELL, V.-C., at p. 116: "If a person has conveyed a defective title and he afterwards acquires a good title, this court will make that good title available to make the conveyance effectual"; followed in *Re Bridgwater's Settlement*, *Partridge v. Ward*, [1910] 2 Ch. 342; compare *Smith v. Baker* (1842), 1 Y. & C. Ch. Cas. 223; *Re Hoffe's Estate Act*, 1885 (1900), 82 L. T. 556.

(b) *Hayne v. Maltby* (1789), 3 Term Rep. 438; *Rowbotham v. Wilson*, *supra*, per WATSON, B., at p. 145; *General Finance, Mortgage and Discount Co. v. Liberator Permanent Benefit Building Society* (1878), 10 Ch. D. 15; *Hamill v. Murphy* (1883), 12 L. R. Ir. 400. In the case of a conveyance by a contingent remainderman the happening of the contingency feeds the estoppel (*Doe d. Christmas v. Oliver* (1829), 5 Man. & Ry. (K. B.) 202; 2 Smith, L. C., 11th ed., 724; *Heath v. Crealock* (1873), L. R. 18 Eq. 215).

(c) *Hawksbee v. Hawksbee* (1853), 11 Hare, 230; *Anstee v. Nelms* (1856), 1 H. & N. 225, per MARTIN, B., at p. 232; *Asher v. Whitlock* (1865), L. R. 1 Q. B. 1; *Board v. Board* (1873), L. R. 9 Q. B. 48; *Dalton v. Fitzgerald*, [1897] 2 Ch. 86, C. A.

(d) *Paine v. Jones* (1874), L. R. 18 Eq. 320; *Re Anderson, Pegler v. Gillat*, [1905] 2 Ch. 70; compare *Dalton v. Fitzgerald*, [1897] 2 Ch. 86, per LINDLEY, L.J., at p. 92, explaining *Re Stringer's Estate*, *Shaw v. Jones-Ford* (1877), 6 Ch. D. 1, 10, C. A.

(e) *Re Stringer's Estate*, *Shaw v. Jones-Ford*, *supra*, at p. 10.

(f) *Dalton v. Fitzgerald*, *supra*, per LINDLEY, L.J., at p. 91, commenting on *Paine v. Jones*, *supra*.

Part V.—Estoppel in Pais.

SECT. 1.—*Its Early Signification.*

SECT. 1.

Its Early Signification.

Acceptance or surrender of estate.

531. The nature and general characteristics of estoppel *in pais* have been already briefly described (*g*). This phrase has a much wider application now than it had in Coke's day. The acts *in pais* to which he referred as binding parties by way of estoppel were few, and were acts of notoriety not less formal and solemn than a deed, *e.g.*, livery, entry, acceptance of an estate (*h*). Thus, surrender by operation of law occurs where the owner of a particular estate has been a party to some act the validity of which he is by law afterwards estopped from disputing, and which would not be valid if his particular estate had continued to exist, *e.g.*, where a lessee accepts a new lease from his lessor (*i*), or assents to the grant of a new lease to a third person, to whom he gives up possession (*k*). But

(*g*) See p 323, *ante*.

(*h*) *Lyon v. Reed* (1844), 13 M. & W. 285, 309, citing Co. Litt. 352a; *Doe d. Nepean v. Budden* (1822), 5 B. & Ald. 626 (copyholder having done fealty cannot dispute lord's title to manor); compare *Hoodtitle d. Faulkner v. Morse* (1789), 3 Term Rep. 366; *Morse v. Faulkner* (1792) 1 Anst. 11. To this class of matter *in pais* must apparently be referred the register, flag, and pass of a ship, which raise a presumption of nationality against which the owner is not permitted to aver (*Dionissis v. R.*, *The Laura* (1866), 3 Moo. P. C. C. (N. S.) 181).

(*i*) *Lyon v. Reed*, *supra*, at p. 306; Bac. Abr., tit. Leases and Terms for Years, S, 2; *Pulmerston v. Steward* (1554), Plowd. 102, 106; *Fenner v. Blake*, [1900] 1 Q. B. 426. The acceptance of a void lease will not work a surrender (*Davison d. Bromley v. Stanley* (1768), 4 Burr. 2210; *Roe d. Berkeley (Earl) v. York (Archbishop)* (1805), 6 East, 86); and though the acceptance of a voidable lease, which is afterwards made void according to the contract, may work an absolute surrender (see *Doe d. Rochester (Bishop) v. Bridges* (1831), 1 B. & Ad. 847, 860), the acceptance of such a lease, which is afterwards made void contrary to the intention of the parties, works a surrender, subject to the implied condition that it shall be void in case the new grant shall fail (*Doe d. Biddulph v. Poole* (1848), 11 Q. B. 713, 716, 718); and see *Doe d. Egremont (Earl) v. Courtenay* (1848), 11 Q. B. 702; *Easton v. Penny* (1892), 67 L. T. 290; *Knight v. Williams*, [1901] 1 Ch. 256, 257). The rule that a transfer of possession, actual or constructive, by a tenant to his landlord, either pursuant to express agreement or under such circumstances that an agreement to terminate the tenancy may be inferred, works a surrender by operation of law has also been referred to the doctrine of estoppel *in pais* (see 2 Smith, L. C., 11th ed., p. 837), either because such an act is inconsistent with the continuance of the tenancy (*Oastler v. Henderson* (1877), 2 Q. B. D. 575, C. A.), or on the ground of the notoriety of the act; see *Phené v. Popplewell* (1862), 12 C. B. (N. S.), *per* WILLES, J., at p. 340. The earlier decisions leave it in doubt whether they are not rather founded upon there having been an agreement which has been fully performed; see *Dodd v. Acklom* (1843), 6 Man. & G. 672, 682, explaining *Grinman v. Legge* (1828), 8 B. & C. 324; *Gore v. Wright* (1838), 8 Ad. & El. 118; and *Phené v. Popplewell*, *supra*, *per* BYLES, J., at p. 342; *Re Panther Lead Co.* (1896), 65 L. J. (CH.) 499. Whatever the principle, acceptance by the landlord of possession, actual or constructive, is essential (*Mollett v. Brayne* (1809), 2 Camp. 103; *Whitehead v. Clifford* (1814), 5 Taunt. 518; *Doe d. Huddleston v. Johnston* (1825), M'Cle. & Yo. 141; *Johnstons v. Huddleston* (1825), 4 B. & C. 922, and cases cited *supra*; and see notes to *Thursby v. Plant* (1669) (1 Saund. 237); 1 Wms. Saund., ed. 1871, p. 296).

(*k*) *Nickells v. Atherstone* (1841), 10 Q. B. 944, following *Thomas v. Cook* (1818), 2 B. & Ald. 119; *Walker v. Richardson* (1837), 2 M. & W. 882; *Rees v. Williams* (1835), 2 Cr. M. & R. 581; *Stone v. Whiting* (1817), 2 Stark. 235; and dissenting from the observations of the Court of Exchequer in *Lyon v. Reed*

SECT. 1.
Its Early
Significa-
tion.

the mere consent of a lessee for years, who has sub-demised the land, in which therefore he retains only a reversion, to the grant by his lessor of a fresh lease to a stranger, does not amount to a surrender by operation of law of his reversion, so as to enable the stranger to recover rent from the sub-lessee (l).

SECT. 2.—Estoppel by Representation.

SUB-SECT. 1.—In General.

Estoppel by
representation.

532. The branch of estoppel most frequently invoked in modern times, and presenting itself in infinite variety, is that form of estoppel *in pais* which is generally known as estoppel by representation (m). This form of estoppel *in pais* is not distinguishable in principle from what is sometimes spoken of in courts of equity as equitable estoppel: the principle is one equally of law and equity (n). The only distinctions seem to be that in equity it was apparently applied only to cases where a person had entered into a contract on the faith of the representations made, which might have been made either by a party to the contract or by a third person (o); and that whereas the common law phrase was that

(1844), 13 M. & W. 285, 308, 309, on *Thomas v. Cook* (1818), 2 B. & Ald. 119. The decisions in *Thomas v. Cook*, *supra*, and *Nickells v. Atherstone* (1847), 10 Q. B. 944, were treated as law in *Darison v. Gent* (1857), 1 H. & N. 744. The transfer of possession by the old tenant to the new pursuant to the grant of the new lease is the distinguishing element, absent in *Lyon v. Reed*, *supra*, and present in the other cases, which enables them all to be reconciled (*Wallis v. Hunds*, [1893] 2 Ch. 75); and see *Reere v. Bird* (1834), 1 Cr. M. & R. 31; *Euston v. Penny* (1892), 67 L. T. 290. The same result may in some cases be reached on the modern principles of estoppel by representation; see *Nickells v. Atherstone*, *supra*, at p. 949; *Penner v. Blake*, [1900] 1 Q. B. 426 (see, however, the criticism in 2 Smith, L. C., 11th ed., p. 816, on the last-mentioned case, which is difficult to reconcile with *Wallis v. Hunds*, *supra*). It seems that the doctrine of *Thomas v. Cook*, *supra*, does not apply to a lease for lives (an estate of freehold), though the case may be one in which the assenting party is compellable in equity to give effect to the new lease by a legal transfer of his interest, on the principle mentioned on p. 396, *post* (*Creagh v. Blood* (1845), 3 Jo. & Lat. 133, 152, 160, approving *Lyon v. Reed*, *supra*, and dissenting from *Lynch's Lessee v. Lynch* (1843), 6 I. L. R. 131). The surrender may be vitiated by the fraud of the tenant at whose request it was accepted, so that he remains liable for the rent (*Bruce v. Ruler* (1828), 2 Man. & Ry. (K. B.) 3). It is otherwise where the surrender is procured by innocent misrepresentation; but the latter, if amounting to a breach of contract, may give rise to a liability for damages, of which the rent is the measure (*Gray v. Owen*, [1910] 1 K. B. 622).

(l) *Lyon v. Reed*, *supra*.

(m) As recently as 1853 Lord CAMPBELL, C.J., and WIGHTMAN, J., doubted whether this was properly called estoppel; the former preferred the expression "conclusion" (*Howard v. Hudson* (1853), 2 E. & B. 1, 10, 11) see *Carr v. London and North Western Rail. Co.* (1875), L. R. 10 O. P. 307, 317. A very high authority has questioned the advantage of reducing the principles of estoppel by representation to rules (*Whitechurch (George), Ltd. v. Curanagh*, [1902] A. C. 117, *per* Lord MACNAGHTEN, at p. 130; see also *Comitti v. Maher* (1905), 94 L. T. 158, *per* KIRKEWICH, J., at p. 159); but the definition is undeniably useful in practice.

(n) *Jorden v. Money* (1854), 5 H. L. Cas. 185, *per* Lord CRANWORTH, L.C., at p. 210.

(o) In the early cases the contracts were all marriage contracts; see *Gule v. Lindo* (1687), 1 Vern. 475 (Lord JEFFREYS, L.C.); *Montefiori v. Montefiori* (1762), 1 Wm. Bl. 363 (Lord MANSFIELD, C.J.) (a common law case arising on the award

the person who made the representations was not allowed to deny their truth, the phrase of equity was that he must "make his representations good" (p).

533. A representation to form the basis of an estoppel may be made either by statement or by conduct; and conduct includes negligence (q). But certain general propositions are applicable, in whatever manner the representation is made.

534. In order to found an estoppel a representation must be of an existing fact (r), not of a mere intention (s). In the case of something future there is no occasion to apply the rule as to estoppel, because the party to whom the representation is made has only to say

SECT. 2.
Estoppel by Representation.

Necessary elements of representation.

It must be of existing fact.

of an arbitrator): *Neville v. Wilkinson* (1782), 1 Bro. C. C. 543 (Lord THURLOW, L.C.). And see *Jorden v. Money* (1854), 5 H. L. Cas. 185. For later applications of the same doctrine in equity to other contracts, see *Burrowes v. Lock* (1805), 10 Ves. 470, as explained in *Low v. Bouverie*, [1891] 3 Ch. 82, C. A.; *Dalbiac v. Dalbiac* (1809) 16 Ves. 116, 125; *Piggott v. Strallon* (1859), 1 De G. F. & J. 33, C. A., where the representation was by a party to the contract; *Davies v. Davies* (1860), 6 Jur. (N. S.) 1320; *Mansel-Lewis v. Rees* (1910), 102 L. T. 237; compare *Edmonds v. Best* (1862), 7 L. T. 279.

(p) Lord SELBORNE, L.C., defines "equitable estoppel by representation" in *Citizens' Bank of Louisiana v. First National Bank of New Orleans* (1873), 11 R. 6 H. L. 352, at p. 360, in terms differentiated from the common law doctrine only by the use of those words, and cites in support of his definition decisions of common law courts usually cited in that connection, namely, *Jorden v. Money*, *supra*; *Pickard v. Sears* (1837), 6 Ad. & El. 469; and *Freeman v. Cooke* (1818), 2 Exch. 654; see also *Whitechurch (George), Ltd. v. Cavanagh*, [1902] A. C. 117, *per* Lord MACNAGHTEN, at p. 130; *Mills v. Fox* (1887), 37 Ch. D. 153, 164. In *Lovett v. Lovett*, [1898] 1 Ch. 82, ROMER, J., uses the expression "equitable estoppel" in contradistinction to "estoppel at law," by which it is quite clear from the context he means "estoppel by deed," to the recital and the operative part of which he refers. His proposition, founded on the definition by Lord SELBORNE, L.C., referred to above, that equitable estoppel is not applied in favour of a volunteer, is only another form of the common law rule that in order to take advantage of a representation as an estoppel, one must show that he has altered his position on the faith of it. See also title EQUITY, *ante*.

(q) *Freeman v. Cooke*, *supra*, at p. 664.

(r) A person who fraudulently represented himself to be a trader, was held to be estopped from denying he was a trader for the purpose of escaping bankruptcy (*Re Leslie, Ex parte Leslie* (1856), 25 L. J. (boy.) 37, C. A.). One having only a partial interest in an estate, but contracting to sell as if he had the entire interest, was held to be estopped from denying as against the purchaser that he had the entire interest (*Mortlock v. Buller* (1804), 10 Ves. 292, 315, see *Meredith v. Saunders* (1814), 2 Dow, 514, H. L., *per* Lord ELDON, L.C., at p. 518). A vendor on contracting to sell land represented that there were no rectorial tithes. Subsequently, having discovered that he was himself the lay impropriator, he sued the purchaser for those tithes; held he was estopped by his representation from succeeding (*Mansel-Lewis v. Rees*, *supra*). *R. v. South Eastern Rail. Co.* (1910), 8 L. G. R. 401, C. A., affirming S. C. (1909), 7 L. G. R. 1171, appears at first sight to conflict with the proposition in the text. The report, however, is very brief; and the effect seems to be that a party to a written agreement may by a representation as to the meaning of an ambiguous expression, estop himself from averring that it has another meaning.

(s) *Jorden v. Money*, *supra*; approved, *Citizens' Bank of Louisiana v. First National Bank of New Orleans*, *supra*; *Maddison v. Alderson* (1883), 8 App. Cas. 467, 473, overruling *Loffus v. Maw* (1862), 3 Giff. 592; *Chadwick v. Manning*, [1896] A. C. 231, P. C.; *Whitechurch (George), Ltd. v. Cavanagh*, *supra*; *Coleman v. North* (1898), 47 W. R. 57, 58; compare *Farmeloe v. Bain* (1876), 1 C. P. D. 445; *Re Fickus, Farina v. Fickus*, [1900] 1 Ch. 331, 335.

SECT. 2.
Estoppel by
Representation.

"enter into a contract," and all difficulty is removed (*t*). It is true that the state of a man's mind is a fact, and in that sense a man who makes a false statement as to his intention makes a false representation of fact (*u*); but estoppel is not a cause of action, but a rule of evidence, available where there is a cause of action, to prevent a person from denying what he has once said (*v*): he is to be put in the same position as if the statement were true, but no worse (*w*); and had the statement of intention been true, he who made it would have been at liberty to change his mind. But the representation of an existing state of things as being of a continuous nature is more than a statement of intention, and one who has made such representation cannot, after getting rid of that state of things, take advantage of its removal to the prejudice of another who has acted on the representation (*x*).

May include
 representation
 of law.

535. A representation may be a representation of fact, although it involves and includes that which is also matter of law. Thus directors of a company, by drawing a bill in the company's name, may represent that there is a private Act of Parliament giving the company the requisite powers (*a*), or by issuing debentures that the company's powers are not exhausted (*b*). But a true statement of facts, accompanied by an erroneous inference of law, will not estop the person who made it from afterwards denying the correctness of that inference (*c*); and although one who has by a

(*t*) *Citizens' Bank of Louisiana v. First National Bank of New Orleans* (1873), 11 R. 6 H. L. 352, *per* Lord SELBORNE, L.C., at p. 361, quoting *Jorden v. Money* (1854), 5 H. L. Cas. 185.

(*u*) "The state of a man's mind is as much a fact as the state of his digestion" (*Edgington v. Fitzmaurice* (1885), 29 Ch. D. 459, C. A., *per* BOWEN, L.J., at p. 483).

(*v*) *Low v. Bouverie*, [1891] 3 Ch. 82, C. A., *per* LINDLEY and BOWEN, L.J.J., at pp. 101, 105. Thus an innocent misrepresentation does not by estoppel become a cause of action (compare *Dickson v. Reuter's Telegram Co.* (1877), 3 C. P. D. 1, C. A.; *Brett v. Clowser* (1880), 5 C. P. D. 376); but it may become conclusive evidence of title in an action for conversion (*Knights v. Wiffen* (1870), 11 R. 5 Q. B. 660), or of a contract (*Cornish v. Abington* (1859), 4 Ll. & N. 549; *Thomas v. Brown* (1876), 1 Q. B. D. 714, 722).

(*w*) See *Bishop v. Bulkis Consolidated Co.* (1890), 25 Q. B. D. 512, C. A., *per* LINDLEY, L.J., at p. 521; *Beatty v. Ebury (Lord)* (1872), 7 Ch. App. 777 (affirmed on other grounds (1874), L. R. 7 H. L. 102); *Canterbury Corporation v. Cooper* (1908), 99 L. T. 612, *per* CHANNELL, J., at p. 615; affirmed (1909), 100 L. T. 597, C. A.). But it may happen that his hearer is indirectly put in a better position; see *Ogilvie v. West Australian Mortgage and Agency Corporation*, [1896] A. C. 257, P. C., *per* Lord WATSON, at p. 270; see p. 385, *post*.

(*x*) *Piggott v. Stratton* (1859), 1 De G. F. & J. 33, C. A. (grantor of leasehold property stated truly that his own lease restrained him from obstructing the view; he afterwards surrendered his lease and took a new one without the restraint); but was held to his statement as being a representation of a continuous restraint (distinguished on this point, *M'Evoe v. Drogheda Harbour Commissioners* (1867), 16 W. R. 34, 38).

(*a*) *West London Commercial Bank v. Kitson* (1884), 13 Q. B. D. 360, C. A.; compare *R. v. South Eastern Rail. Co.* (1910), 8 L. G. R. 401, C. A. (representation as to meaning of ambiguous expression).

(*b*) *Rashdall v. Ford* (1866), L. R. 2 Eq. 750, 754.

(*c*) *Morgan v. Couchman* (1853), 14 C. B. 100 (party who set out in an affidavit facts showing cross dealings between himself and another, describing them as "payment," not estopped from showing there was no payment).

fraudulent statement of the legal effect of an instrument obtained some advantage will not, it seems, be allowed to retain it (*d*), a mere misrepresentation of a matter of legal inference from facts which are known to both parties cannot, it is submitted, be a ground of estoppel (*e*).

SECT. 2.
Estoppel by Representation.

536. A representation, to found an estoppel, must be clear and unambiguous; not necessarily susceptible of only one interpretation, but such as will reasonably be understood in the sense contended for, and for this purpose the whole of the representation must be looked at (*f*). This is merely an application of the old maxim applicable to all estoppels, that they "must be certain to every intent" (*g*). A statement, true as far as it goes, is not to be taken to mean more than it says. Thus a statement that there are certain incumbrances on a fund is not (in the absence of a duty to give full information) to be construed as a representation that there are no others (*h*). Again, the mere parting with possession does not estop the owner of a chattel (*i*) or of a title deed (*k*) from setting up his title against a purchaser for value. And this is so even where the possession was parted with for the fraudulent purpose of defeating creditors, provided it is not necessary for the owner to prove the fraudulent transaction as part of his title (*l*).

It must be unambiguous.

537. A party cannot by representation any more than by other means (*m*) raise against himself an estoppel so as to create a state of things which he is under a legal disability from creating.

Result must not be *ultra vires*.

(*d*) *Hirschfeld v. London, Brighton and South Coast Rail. Co.* (1876), 2 Q. B. D. 1, 4, 5; *Molloy v. Mutual Reserve Life Insurance Co.* (1906), 94 L. T. 756, 760, C. A.

(*e*) *Beatty v. Ebury* (Lord) (1872), 7 Ch. App. 777, 802 (affirmed (1874), L. R. 7 H. L. 102 on other grounds), approving *Rashdall v. Ford* (1866), L. R. 2 Eq. 750, 751.

(*f*) *Low v. Bouverie*, [1891] 3 Ch. 82, C. A. (see especially *per* BOWEN, L.J., at p. 106), following *Freeman v. Cooke* (1848), 2 Exch. 651 (conflicting statements), approved, *Whitechurch (George), Ltd. v. Cavanagh*, [1902] A. C. 117, 145; *Re Lewis, Lewis v. Lewis*, [1904] 2 Ch. 656, C. A.; *Onward Building Society v. Smithson*, [1893] 1 Ch. 1 (representation contained in a deed).

(*g*) Co. Litt. 352 a.

(*h*) *Low v. Bouverie*, *supra*; compare *McKenzie v. British Linen Co.* (1881), 6 App. Cas. 82; *British Linen Co. v. Cowan* (1906), 8 F. (Ct. of Sess.) 704 (mere silence no estoppel unless duty to communicate); *Scarfe v. Halifax* (1840), 7 M. & W. 288 (sheriff's return that he had levied of the plaintiff's goods £67 does not affirm that £30 further, paid for charges, was the plaintiff's money).

(*i*) *Weiner v. Gill*, [1905] 2 K. B. 172, 183 (applying *Farquharson Brothers & Co. v. King, & Co.*, [1902] A. C. 325); affirmed, [1906] 2 K. B. 574; *Meggy v. Imperial Discount Co.* (1878), 3 Q. B. D. 711, C. A.; *Price v. Groom* (1848), 2 Exch. 542; see also *Kingsford v. Merry* (1856), 1 H. & N. 503, Ex. Ch.; considered in *Henderson & Co. v. Williams*, [1895] 1 Q. B. 521, C. A.; *Johnson v. Crédit Lyonnais Co.* (1877), 3 C. P. D. 32, C. A.; *Hollins v. Fowler* (1875), L. R. 7 H. L. 757, 764; *Truman v. Attenborough* (1910), 54 Sol. Jo. 682; and see us to unauthorised dealings by trustees, p. 393, *post*.

(*k*) *Brooklesby v. Temperance Building Society*, [1895] A. C. 173, *per* Lord HERSCHELL, L.C., at p. 180, following *Martinez v. Cooper* (1826), 2 Russ. 198; and see *Lloyds Bank, Ltd. v. Bullock*, [1896] 2 Ch. 192; *Colonial Bank v. Cady and Williams* (1890), 15 App. Cas. 267.

(*l*) *Bowes v. Foster* (1858), 2 H. & N. 779; followed, *Taylor v. Bowers* (1876), 1 Q. B. D. 291, 298, C. A.

(*m*) Compare note (*g*), p. 327, *ante*.

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Representation.

Thus, a corporate body cannot be estopped from denying that they have entered into a contract which it was *ultra vires* for them to make (*n*). No corporate body can be bound by estoppel to do something beyond its powers (*o*), or to refrain from doing what it is its duty to do (*p*); and the same principle applies to individuals. No person can by his conduct, or otherwise, waive or renounce a right to perform a public duty, or estop himself from insisting that it is right to do so (*q*). And a married woman protected by a restraint on anticipation cannot, either by deed or innocent representation, nor (it seems) even by fraudulent representation, or admission resulting in a judgment (*r*), estop herself from denying facts which, if true, would put an end to the restraint (*s*).

Irregularities.

538. A distinction must be made between acts which are *ultra vires* and those for the validity of which certain formalities are

(*n*) *Canterbury Corporation v. Cooper* (1909), 100 L. T. 597, C. A.; *British Mutual Banking Co. v. Charnwood Forest Rail. Co.* (1887), 18 Q. B. D., 714, C. A., *per* BOWEN, L. J., at p. 718; compare *Markham and Darter's Case*, [1899] 1 Ch. 414, 431 (affirmed without discussing this point [1899] 2 Ch. 480, C. A.); *A.-G. v. Dublin Corporation* (1841), 1 Dr. & War. 545. But although a man cannot be estopped from denying the existence of a contract which is prohibited, or made illegal, by Act of Parliament, this does not apply where penalties are attached if it is not made in a certain way. Therefore a member of a mutual insurance company may be estopped from pleading, in an action for calls, that they were for losses paid on contracts which were unstamped and not contained in a policy (*Barrow Mutual Ship Insurance Co. v. Ashburner* (1885), 54 L. J. (Q. B.) 377, C. A.); compare *Re Coltnan, Coltnan v. Coltnan* (1881), 19 Ch. D. 64, C. A.

(*o*) *British Mutual Banking Co. v. Charnwood Forest Rail. Co.*, *supra*, *per* FRY, L. J., at p. 719. This principle was applied (but with doubt, and as the Court of Appeal held in the circumstances, wrongly) by VAUGHAN WILLIAMS, J., in *Bishop v. Balkis Consolidated Co.* (1890), 25 Q. B. D. 77, 84; affirmed on other grounds, *ibid.*, p. 512, C. A.; see p. 411, *post*.

(*p*) *Islington Vestry v. Hornsey Urban Council*, [1900] 1 Ch. 695, C. A.

(*q*) *MacAllister v. Rochester (Bishop)* (1880), 5 C. P. D. 191. But a local authority may, by a notice which is *intra vires*, intended to be acted on or not at the receiver's option, conclusively elect to proceed in a particular way if it is not complied with (*Gould v. Bacup Local Board* (1881), 50 L. J. (M. C.) 44). STEPHEN, J., speaks of this as estoppel, but there was no representation of any fact.

(*r*) *Bateman (Lady) v. Faber*, [1898] 1 Ch. 144, C. A., *per* LINDLEY, M. R., at p. 149, *per* VAUGHAN WILLIAMS, L. J., at p. 151.

(*s*) *Ibid.*, *per* LINDLEY, M. R.; distinguished in *Macnaghten v. Paterson*, [1907] A. C. 483, P. C., but without touching the principle (see *ibid.*, at p. 492). At common law a married woman could not, by describing herself as widow on a negotiable instrument, estop herself from pleading coverture (*Cannam v. Farmer* (1849), 3 Exch. 698). But (apart from restraint on anticipation) a married woman who had contracted as a *feme sole* was estopped in equity from denying that she had charged her separate estate (*McHenry v. Davies* (1870), L. R. 10 Eq. 88; following *Johnson v. Gallagher* (1861), 3 De G. F. & J. 494, 521, C. A.); and, because of the fraud involved, a disability was not in equity an excuse for knowingly standing by and allowing money to be paid for an interest in property in ignorance of the true title (*Savage v. Foster* (1723), 9 Mod. Rep. 35); see p. 397, *post*, and title EQUITY, *ante*. On the same principle, an infant cannot (nor at common law could a married woman before the Married Women's Property Acts; see *Earle v. Kingscote*, [1900] 2 Ch. 585, C. A.) be made liable for a fraudulent representation, e.g., that he is of age, inducing a contract (*Johnson v. Pye* (1665), 1 Sid. 258, cited in *Stikeman v. Dawson* (1847), 1 De G. & Sm. 90, 113; see titles HUSBAND AND WIFE; INFANTS AND CHILDREN.

necessary. In the latter case persons dealing without notice of any informality are entitled to presume *omnia rite esse acta* (t). Accordingly a company which, possessing the requisite powers, so conducts itself in issuing debentures as to represent to the public that they are legally transferable, cannot set up any irregularity in their issue against an equitable transferee for value who has no reason to suspect it (u).

SECT. 2.
Estoppel by Representation.

539. A representation will be deprived of any effect as an estoppel if the making of it has been contributed to by some breach of duty on the part of the person seeking to take advantage of it. This principle is not confined to cases of wilful misrepresentation by such persons. No representation can be relied on as an estoppel if induced by the concealment of any material fact on the part of the person who wishes to use it as such; and if the person to whom it is made knows something calculated to influence the other to hesitate or seek further information, and has withheld that knowledge, the representation ought not to be treated as an estoppel (b). And the same principle has been applied where there has been perfectly innocent conduct amounting to a misrepresentation (c), inviting the conduct relied on as an estoppel; but whether in this case it rests upon the doctrine of "estoppel against estoppel" (d), or upon

Representation must not be induced by party complaining.

(t) *Royal British Bank v. Turquand* (1856), 6 E. & B. 327, Ex. Ch.; *Re Land Credit Co. of Ireland, Ex parte Overend, Gurney & Co.* (1869), 4 Ch. App. 460; *Mahony v. East Holyford Co.* (1875), L. R. 7 H. L. 869; *County of Gloucester Bank v. Rudry Merthyr Stream and House Coal Colliery Co.*, [1895] 1 Ch. 629, C. A.; *Biggerstaffe v. Rowatt's Wharf, Ltd.*, [1896] 2 Ch. 93, C. A.; distinguish *Premier Industrial Bank, Ltd. v. Carlton Manufacturing Co., Ltd.*, and *Crabtree, Ltd.*, [1909] 1 K. B. 106.

(a) *Re Romford Canal Co., Pocock's Claim, Trickett's Claim, Carew's Claim* (1883), 24 Ch. D. 85, applying *Fontaine v. Carmarthen Rail. Co.* (1868), L. R. 5 Eq. 316 (irregularity cannot be set up against an original holder who has a right to presume that the issue was regular, which he would not have if the issue were *ultra vires*); *Webb v. Herve Bay Commissioners* (1870), L. R. 5 Q. B. 642, where the plaintiff was the legal assignee; compare *Higgs v. Assam Tea Co.* (1869), L. R. 4 Exch. 387, where the company having dealt with the plaintiff assignee on the footing that debentures were assignable free from equities, were estopped from asserting their right to set off calls due from the assignor. But though a company may be estopped from showing that the issue of certain debentures was invalid, the holders of admittedly valid debentures issued before the estoppel arose are not affected by it, and as against them the holders of the invalid debentures will be postponed, although their security purports to rank *pari passu* with the valid issue (*Morrell v. Castle Steel and Iron Works Co.* (1886), 34 Ch. D. 58, 63, C. A.; distinguished, *Robinson v. Montgomeryshire Brewery Co.*, [1896] 2 Ch. 841, 849, where the validity of the debentures was not in question).

(b) *Whitechurch (George), Ltd. v. Cammash*, [1902] A. C. 117, per Lord BRAMPTON, at p. 145; approved and followed, *Porter v. Moore*, [1904] 2 Ch. 367 (trustee lulled into security before making erroneous statement that trust fund was unincumbered).

(c) This was one of the grounds of decision in *Simm v. Anglo-American Telegraph Co.* (1879), 5 Q. B. D. 188, C. A., as explained in *Balkis Consolidated Co. v. Tomkinson*, [1893] A. C. 396, by Lord HERSHELL, L.C., at p. 406; see also per Lord MACNAGHTEN, at p. 411, approved by Lord DAVEY in *Ruben v. Great Fingall Consolidated*, [1906] A. C. 439, at p. 446; and see p. 410, post.

(d) See *Dixon v. Kennaway & Co.*, [1900] 1 Ch. 833, per FARWELL, J., at p. 840.

SECT. 2.
Estoppel by Representation.

Must be, or appear to be, intended to be acted on.

that of "implied warranty," or contract to indemnify, appears to be open to question (c).

540. It is not necessary that the representation should be false to the knowledge of the party making it, though in the early cases this appears to have been the law (f), provided that (i.) it is intended to be acted upon in the manner in which it was acted upon, or (ii.) the person who makes it so conducts himself that a reasonable man would take the representation to be true, and believe that it was meant that he should act upon it in that manner (g); and it has been added that the doctrine of estoppel by representation ought not in most cases to be applied unless the representation is such as to amount to the contract or licence of the party making it (h). An unfounded assumption may form the basis of estoppel, though neither party believed it to be true, but both have knowingly acted upon a conventional hypothesis. "Where two parties agree that a commercial instrument shall be taken as founded on a certain fact, and the position of one by that agreement is altered, the other ought not to be admitted to deny it" (i).

(c) See *Ruben v. Great Fingall Consolidated*, [1906] A. C. 439, per Lord DAVEY, at p. 446, citing *Sheffield Corporation v. Barclay*, [1905] A. C. 392.

(f) *Gale v. Lindo* (1687), 1 Vern. 475; *Montefiori v. Montefiori* (1762), 1 Wm. Bl. 363; *Neville v. Wilkinson* (1782), 1 Bro. C. C. 543; cited in *Jorden v. Money* (1854), 5 H. L. Cas. 186, at p. 212.

(g) *Freeman v. Cooke* (1848), 2 Exch. 654, 663 (explaining the rule in *Pickard v. Sears* (1837), 6 Ad. & El. 469, 474), approved in *Jorden v. Money*, *supra*; *Sheffield and Manchester Rail. Co. v. Woodcock* (1841), 7 M. & W. 574, 583; *Howard v. Hudson* (1853), 2 E. & B. 1; *Swan v. North British Australasian Co.* (1863), 2 H. & C. 175, 181, Ex. Ch., and see per COCKBURN, C.J., at p. 188; *Citizens' Bank of Louisiana v. First National Bank of New Orleans* (1873), L. R. 6 H. L. 352, 360; *McKenzie v. British Linen Co.* (1881), 6 App. Cas. 82; *Sarat Chunder Dey v. Gopal Chunder Laha* (1892), 56 J. P. 741, P. C.; and see *Cornish v. Abington* (1859), 4 H. & N. 549, approved in *Thomas v. Brown* (1876), 1 Q. B. D. 714, 722; *Carr v. London and North Western Rail. Co.* (1875), L. R. 10 C. P. 307, 316, 317, approved in *Coventry v. Great Eastern Rail. Co.* (1883), 11 Q. B. D. 776, C. A.; *Seton v. Lafone* (1887), 19 Q. B. D. 68, C. A.; *Farguharson Brothers & Co. v. King & Co.*, [1901] 2 K. B. 697, 713, C. A. (reversed, [1902] A. C. 325, without touching this point); see *Re Bentley (Henry) & Co. and the Yorkshire Breweries, Ltd., Ex parte Harrison* (1893), 69 L. T. 201, C. A. The language of BRETT, J., in *Carr v. London and North Western Rail. Co.*, *supra*, imports that where the representation is false to the knowledge of the party making it, it is not necessary that he should intend it to be acted on. Although the intention, or conduct from which it may be reasonably inferred, is certainly necessary to found an action of deceit (see title TORT), this language is consistent with that used by PARKE, B., in *Freeman v. Cooke*, *supra*, who does not, however, lay down the rule in terms. The point is not, perhaps, important, since where a deliberately false statement is acted on there is usually little difficulty in inferring the intention that it should be, and where the intention is made out, and the intended result follows, the person who made the representation is not permitted to question that it contributed to the result (*Smith v. Kay* (1859), 7 H. L. Cas. 750, 759, 770; followed in *Gordon v. Street*, [1899] 2 Q. B. 641, 646, C. A.). A mere puffing exaggeration of value by a vendor in negotiating a sale is not, in the absence of fraud, a representation which he is afterwards estopped from denying (*Martin v. Douglas* (1867), 16 W. R. 268).

(h) *Freeman v. Cooke*, *supra*, at p. 664, approved in *Clarke and Chapman v. Hart* (1858), 6 H. L. Cas. 633, 656; applied in *Palmer v. Moore*, [1900] A. C. 293, 298, P. C. (representation of inability to contribute to expenses of a mine, agreement or licence to co-adventurers to work it for their own benefit).

(i) *Ashpitel v. Bryan* (1863), 3 B. & S. 474, per CROMPTON, J., at p. 492;

541. The representation must have been acted upon as true (*k*) by the party to whom it was made (*l*) (including in this expression a member of the public, or of a class, where it was made to the public or to a class of persons, *e.g.*, to the customers of a particular firm (*m*)). A representation made to one person, and acted on by him, cannot be taken advantage of by another to whom it was not made and who has not acted on it (*n*). And it is not sufficient that the party complaining acted in a manner consistent with the truth of the representation if it appears that he was not influenced by it (*o*). But if he really has relied upon the truth of the representation it is no answer to say that if he had thought about it he must have known that it was untrue; the representation itself was what put him off his guard (*p*).

A representation does not, by reason of having been acted on, become irrevocable; there is nothing to prevent the party who made it from withdrawing it and requiring the other, for the future, to act as if it had not been made (*q*).

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Must have
been acted
upon by the
party to
whom it
was made.

affirmed (1864), 5 B. & S. 723, Ex. Ch. (bill drawn and indorsed by arrangement between the parties in the name of a dead person); compare *Glenie v. Smith*, [1907] 2 K. B. 507; affirmed on somewhat different grounds, [1908] 1 K. B. 263, C. A.; and see the judgment in *McCance v. London and North Western Rail. Co.* (1861), 3 H. & C. 313, 315, Ex. Ch.

(*k*) In the class of cases last referred to, where the parties have agreed to assume a conventional state of facts, the words "as true" must be understood as meaning "as if it were true." In all other cases the truth of the representation must be relied upon.

(*l*) *Freeman v. Cooke* (1848), 2 Exch. 654; *Howard v. Hudson* (1853), 2 E. & B. 1; *Edmundson v. Thompson* (1861), 31 L. J. (ex.) 207. An ordinary receipt does not as between immediate parties estop the person who gave it from showing that the money was not paid (*Skaife v. Jackson* (1821), 3 B. & C. 421; *Graves v. King* (1832), 3 B. & Ad. 313; *Bones v. Foster* (1858), 2 H. & N. 779), though it might do so as against a third party who had acted in reliance on it; *Oliver v. Nautilus Steam Shipping Co.*, [1903] 2 K. B. 639, C. A., per VAUGHAN WILLIAMS, L.J., at p. 648; *Ellen v. Great Northern Rail. Co.* (1901), 17 T. L. R. 453, C. A. (receipt evidence of accord and satisfaction); *Huckle v. London County Council* (1910), 26 T. L. R. 580, 581; *King v. Smith*, [1900] 2 Ch. 425; distinguish, however, the cases of agents charging themselves in account, see p. 358, *post*. Compare *Moss v. London and North Western Rail. Co.* (1874), 22 W. R. 532 (payment to a contractor of money which is due on completion does not estop him from denying that the work was complete). It is not enough that a person to whom an untrue representation was made acted upon it as true after he had notice that it was not (*Dunston v. Paterson* (1857), 2 C. B. (n. s.) 495).

(*m*) See *Suan v. North British Australasian Co.* (1863), 2 H. & C. 175, Ex. Ch., per BLACKBURN, J., at p. 182.

(*n*) *Heane v. Rogers* (1829), 9 B. & C. 577, 586; *R. v. Ambergate etc. Rail. Co.* (1853), 1 E. & B. 372; *Miles v. McIlwraith* (1883), 8 App. Cas. 120, 134, P. C., approving *Freeman v. Cooke*, *supra*, *Farquharson Brothers & Co. v. King & Co.*, [1902] A. C. 325, 341; *Burgis v. Constantine*, [1908] 2 K. B. 484, 499, 500, C. A.

(*o*) *Lebeau v. General Steam Navigation Co.* (1872), L. R. 8 C. P. 88 (representation as to contents of case not relied on by master, who signed bills of lading "contents unknown"); *Markham and Darter's Case*, [1899] 1 Ch. 414, 430; affirmed without discussing this point, [1899] 2 Ch. 480, C. A.; *Cropper v. Smith*, (1884) 26 Ch. D. 700, C. A.; affirmed without discussion (1885), 10 App. Cas. 249 (statement as to novelty in petition for letters patent); and see *Russo-Chinese Bank v. Li Yau Sam*, [1910] A. C. 174, P. C.; *Mordaunt Brothers v. British Oil and Cake Mills, Ltd.* (1910), 51 Sol. Jo. 654.

(*p*) *Bloomenthal v. Ford*, [1897] A. C. 156, per Lord HERSCHELL, L.C., at pp. 168—170.

(*q*) *White v. Greenish* (1861), 11 C. B. (n. s.) 209, 232.

SECT. 2.
Estoppel by Representation.

And in the manner intended

Party misinformed must have suffered prejudice.

It must have been acted on in the manner in which it was meant to be acted on, or in such manner as a reasonable man would suppose it was meant to be acted on (*r*). A railway company's advice note to a consignee is not intended to be acted upon by his selling the goods (*s*), but the company must be supposed to know that delivery orders in the usual form are documents with a mercantile meaning attached to them, and may have credit given to them as documents of title (*t*). So those who issue bills of lading must be supposed to contemplate that purchasers of the goods therein described will act upon the statements they find there (*a*).

542. It is further necessary to estoppel by representation that in acting upon it the party to whom it was made should have altered his position to his prejudice (*b*). A representation made to a person after he has altered his position cannot give rise to an estoppel, though if made earlier, and acted on, it might have done so (*c*). But it is a sufficient alteration of position if he is induced by the representation to take no step to protect himself, or to retrieve his position until, owing to the insolvency of some person against whom he has a remedy, or for other reason, it is too late (*d*). The mere payment of money under a mistake of fact induced by the representation in circumstances where there is not the slightest difficulty in getting it back is not such damage or prejudice as will give rise to an estoppel (*e*); but the parting with money, and being out of it for a certain period of time, coupled with the trouble and possible expense of establishing the right to get it back, may

(*r*) *Freeman v. Cooke* (1848), 2 Exch. 654; *Gillman, Spencer & Co. v. Carbutt & Co.* (1889), 61 L. T. 281, 282, 283, C. A.

(*s*) *Carr v. London and North Western Rail. Co.* (1875), L. R. 10 C. P. 307, 317; compare *Farmeloe v. Bain* (1876), 1 C. P. D. 445.

(*t*) *Coventry v. Great Eastern Rail. Co.* (1883), 11 Q. B. D. 776, C. A.

(*a*) *Compania Naviera Vasconzada v. Churchill and Sim*, [1906] 1 K. B. 237, 247; *Howard v. Tucker* (1831), 1 B. & Ad. 712.

(*b*) *Freeman v. Cooke*, *supra*, at p. 633; *Newton v. Liddiard* (1848), 13 Q. B. 924; *Carr v. London and North Western Rail. Co.* (1875), L. R. 10 C. P. 307, 317, 318; *MacFarlane v. Giannacopulo* (1858), 3 H. & N. 860; *Re Collie, Ex parte Adamson* (1878), 8 Ch. D. 807, 817, C. A.; *Simm v. Anglo-American Telegraph Co.* (1879), 5 Q. B. D. 188, 208, C. A.; *Whitechurch (George), Ltd. v. Cavanagh*, [1902] A. C. 117, 135; *Bell v. Marsh*, [1903] 1 Ch. 528, 543, C. A.; *Imperial Bank of Canada v. Bank of Hamilton*, [1903] A. C. 49, P. C.; *Re Lewis, Lewis v. Lewis*, [1904] 2 Ch. 656, C. A.

(*c*) *Horsfall v. Halifax and Huddersfield Union Banking Co.* (1883), 52 L. J. (CH.) 593 (defendants after the plaintiff had made advances on the shares of one of its shareholders told him that they had no charge on them); *McKenzie v. British Linen Co.* (1881), 6 App. Cas. 82, 109 (supposed drawer of forged bill, on learning of the forgery after the bank had made advances, omitted to give prompt information); *Morrison v. Universal Marine Insurance Co.* (1873), L. R. 8 Exch. 197, Ex. Ch. (underwriters, after loss of ship became known, delayed repudiation of policy); compare *Bell v. Marsh*, [1903] 1 Ch. 528, C. A.

(*d*) *Knights v. Wiffen* (1870), L. R. 5 Q. B. 660; discussed, *Simm v. Anglo-American Telegraph Co.* (1879), 5 Q. B. D. 188, 212, C. A.; and followed, *Dixon v. Kennaway & Co.*, [1900] 1 Ch. 833; and see *Ogilvie v. West Australian Mortgage and Agency Corporation*, [1896] A. C. 257, P. C.

(*e*) *Carr v. London and North Western Rail. Co.*, *supra*, at pp. 317, 318, as explained in *Compania Naviera Vasconzada v. Churchill and Sim*, *supra*, per CHANNELL, J., at p. 250.

amount to an alteration of position to the payer's prejudice within the rule (f).

543. When prejudice or damage is made out, the other circumstances being such as to create an estoppel, its consequences are not necessarily measured by the amount of prejudice or damage sustained. Thus, if a customer of a bank is estopped from asserting that a cheque with which he has been debited is a forgery, by his neglect to give such timely information as would have enabled the bank to have recourse to the forger, the debit will stand for the whole amount, and not for so much only as would have been recovered from the forger had the customer not allowed the bank to remain in ignorance of the facts (g); and in an action of trover founded on an estoppel the plaintiff is entitled to the full value of the goods, though it may be more than the actual damage sustained by the representation (h); and one who, in an action against ship-owners for delivery of goods in a damaged condition, succeeds by reason only that the latter are estopped from denying that the goods were "shipped in good order and condition," can recover the whole of the damage which on delivery the goods were found to have suffered, without regard to the fact that he has a right, which he may still exercise, to recover the same damages from the shippers (i).

544. A representation made by an agent will be as effectual for the purpose of estoppel as if it had been made by his principal; thus, a company may be estopped by representations made by its officer in the ordinary way of business (k). But it is equally clear that no estoppel can arise from the representation of an agent, unless it is within his actual or ostensible authority to make it (l). And the knowledge of the agent, acquired when acting within the scope of his authority, is that of his principal, so that the latter

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Estoppel is not measured by damage.

Representation by agent

(f) *Compania Naviera Vasconzada v. Churchill and Sim*, [1906] 1 K. B. 237, 250.

(g) *Ogilvie v. West Australian Mortgage and Agency Corporation*, [1896] A. C. 257, 270, P. C.; compare *M'Kenzie v. British Linen Co.* (1881), 6 App. Cas. 82, 100. As to the right to recall a representation before being further acted upon, see *White v. Greenish* (1861), 11 C. B. (N. S.) 209.

(h) *Henderson & Co. v. Williams*, [1895] 1 Q. B. 521, C. A.

(i) *Compania Naviera Vasconzada v. Churchill and Sim*, *supra*, at pp. 250, 251, following *Henderson & Co. v. Williams*, *supra*.

(k) See, e.g., *Bishop v. Balkis Consolidated Co.* (1890), 25 Q. B. D. 512, C. A.; *Manchester and Oldham Bank v. Cook & Co.* (1883), 49 L. T. 674 (bank manager). See further as to estoppel on companies, p. 408, *post*.

(l) *Barnett v. South London Tramways Co.*, (1887), 18 Q. B. D. 815, C. A., quoting *Newlands v. National Employers Accident Association* (1885), 51 L. J. (Q. B.) 428, C. A.; approved, *Whitechurch (George), Ltd. v. Cavanagh*, [1901] A. C. 117, 124; *Ruben v. Great Fingull Consolidated*, [1906] A. C. 439 (all these cases relate to secretaries of companies, whose authority to make representations is very limited); *Postmaster-General v. Green* (1887), 51 J. P. 582 (post office clerk). The master of a ship has authority to make statements in a bill of lading as to the condition of the goods (*Compania Naviera Vasconzada v. Churchill and Sim*, *supra*); and whether freight is payable or not (*Howard v. Tucker* (1831), 1 B. & Ad. 712); but no one may assume that he has authority to sign for goods which have not been shipped (*Grant v. Norway* (1851), 10 C. B. 665); or to make representations as to their quality (*Cox v. Bruce* (1886), 18 Q. B. D. 147, C. A.).

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cannot be heard to say that in making a representation, or pursuing a course of conduct relied on as such, he did so in ignorance of facts so known to the agent (*m*). But this knowledge will not be imputed when the agent has been acting in fraud of the principal for the benefit of himself and the party seeking to set up an estoppel (*n*).

SUB-SECT. 2.—Estoppel by Statement.

Estoppel by statement.

545. Estoppel by actual statement is probably less common than estoppel by conduct or negligence. Instances occur, however, in every department of affairs, and are too miscellaneous to classify (*o*).

(*m*) *Wing v. Harvey* (1851), 5 De G. M. & G. 265, C. A.; *Bawden v. London, Edinburgh, and Glasgow Assurance Co.*, [1892] 2 Q. B. 534, C. A.; followed, *Hough v. Guardian Fire and Life Assurance Co.* (1902), 18 T. L. R. 273; *Holt'sworth v. Lancashire and Yorkshire Insurance Co.* (1907), 23 T. L. R. 521 (premiums retained by company, the collecting agent having knowledge of facts which would invalidate the policy); *Derley v. Lloyds Bank*, [1910] 1 Ch. 648, 672, 680, C. A. (If the facts be known, ignorance of their legal consequence is immaterial.)

(*n*) *Re Biggar and Rock Life Assurance Co.* (1901), 85 L. T. 636, following *New York Life Insurance Co. v. Fletcher* (1886), 117 United States Reps. 519; see, generally, title AGENCY, Vol. I., pp. 158, 192, 202.

(*o*) The following cases, in addition to many already cited, may be referred to as examples:—*Richards v. Johnston* (1859), 4 H. & N. 660 (false statement as to ownership of goods); *Seton v. Lafone* (1887), 19 Q. B. D. 68, C. A. (erroneous statement by warehousemen that certain goods lay at their warehouse, and were liable to be sold for charges, whereupon the plaintiff bought back the warrant from the person who hold it); *Woodley v. Coventry* (1863), 2 H. & C. 164; *Knights v. Wiffen* (1870), L. R. 5 Q. B. 660 (vendors of unappropriated goods estopped by statements recognising delivery orders as correct from denying that property passed); *M'Cance v. London and North Western Rail. Co.* (1861), 7 H. & N. 477; affirmed (1861), 3 H. & C. 343, Ex. Ch. (false declaration as to value of horses tendered for carriage. The grounds of decision in the two courts, though not inconsistent, were not the same); *Van Hasselt v. Sack, The Twentje* (1859), 13 Moo. P. C. C. 185 (shipping agents estopped by their accounts from appropriating certain freights to the prejudice of their principals, who, after settling with the owners on the footing of those accounts, became purchasers of the ship); *Harris v. Truman* (1882), 9 Q. B. D. 264, C. A. (agent who fraudulently represented that goods bought for himself were bought for his principals, and thereby obtained money to pay for them, estopped from saying that the goods were his, which estoppel bound his trustee in bankruptcy); *Middleton v. Pollock, Ex parte Witherall* (1876), 4 Ch. D. 49 (solicitor after advising client that he had invested his money on mortgage, estopped from denying that it was part of a larger sum invested on mortgage in the solicitor's name, so that the client gained priority in administration); *Deutsche Bank (London Agency) v. Beriro & Co.* (1895), 73 L. T. 669, C. A. (bankers, agents for collection of bill of exchange, having advised their indorsers (also agents) that the bill had been collected, and paid them the supposed proceeds, estopped after the latter had credited their principals from proving that the money was paid by mistake); *Manchester and Oldham Bank v. Cook & Co.* (1883), 49 L. T. 674 (bank estopped by its manager's representation, he having authority to arrange loans, that the board had approved a proposed loan, made subject to their approval); *Keith v. Gancia (R.) & Co., Ltd.*, [1904] 1 Ch. 774, C. A. (representation in licence to assign that mortgagee, who had foreclosed, was the person in whom the reversion on a sub-lease created by the mortgagor, before the Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), was vested, relying on which the sub-lessee had assigned, and his assignee had accepted the assignment). As to statements by warehousemen recognising the title of transferee of goods, see *Henderson & Co. v. Williams*, [1895] 1 Q. B. 521, C. A.; and p. 408, *post*. It has been held that a person who makes application for shares in a company in

546. As a class, perhaps, the most important are those statements which occur in documents to which credit is given in mercantile dealings as the *indicia* of title to goods (*p*), and of which the bills of lading may be regarded as typical. Long before the Bills of Lading Act, 1855 (*q*), it had been held that a shipowner was estopped as against the assignee of a bill of lading by an erroneous statement therein that freight had been paid in advance (*r*), and the principle has recently been applied to the statement that goods had been shipped in good order and condition (*s*); and now by virtue of that Act there is a statutory estoppel on the master or other person signing the bill of lading, against a consignee or indorsee for value without notice, from denying the shipment of the goods thereby represented to have been shipped (*t*).

SECT. 2.
Estoppel by Representation.

In bills of lading.

547. Another important class of estoppels resulting from actual statement arises upon transfers of shares and conveyances of real property, containing an acknowledgment of the receipt of purchase-money, upon which purchasers for value without notice of non-payment are entitled to rely; these, however, belong rather to the subject of estoppel by deed (*a*).

In transfers and conveyances.

a fictitious name, upon which application shares are granted, is estopped from denying that he is a shareholder, and liable to contribute as such (*Re Central Klondyke Gold Mining and Trading Co., Savigny's Case* (1898), 5 Mans. 336, following *Pugh and Shurman's Case* (1872), 1 L. R. 13 Eq. 366 (application in name of person under disability)). But estoppel was not mentioned in the latter case; and it seems that it is not the true ground for the decisions, for the shareholder was prevented, not from contradicting, but from affirming, his original misrepresentation. The principle involved seems rather to be "*ut res magis valeat*" etc.; compare *Kelner v. Baxter* (1866), 1 L. R. 2 C. P. 171. A person named in an invoice, not intended to be a contract, as the seller of goods, is not estopped against one who has not been misled from denying that he was so (*Holding v. Elliott* (1860), 5 H. & N. 117, dissenting from *Jones v. Littledale* (1837), 6 Ad. & El. 486).

(*p*) As to delivery orders, see *Coventry v. Great Eastern Rail. Co.* (1883), 11 Q. B. D. 776, C. A.; *Henderson & Co. v. Williams*, [1895] 1 Q. B. 521, 525, 529, C. A.; *Woolley v. Coventry* (1863), 2 H. & C. 164; distinguish *Carr v. London and North Western Rail. Co.* (1875), L. R. 10 C. P. 307, 317; *Farneloe v. Bain* (1876), 1 C. P. D. 445, 450, where it was pointed out that the documents relied on had no recognised mercantile significance.

(*q*) 18 & 19 Vict. c. 111, s. 3; see title SHIPPING AND NAVIGATION.

(*r*) *Howard v. Tucker* (1831), 1 B. & Ad. 712.

(*s*) *Compania Naviera Vasconzada v. Churchill and Sim*, [1906] 1 K. B. 237.

(*t*) This statutory estoppel does not bind the owner (*Brown v. Powell Coal Co.* (1875), 1 L. R. 10 C. P. 562, applying *McLean and Hope v. Fleming* (1871), 1 L. R. 2 Sc. & Div. 128), but the bill of lading is evidence (*Smith & Co. v. Bedouin Steam Navigation Co.*, [1896] A. C. 70), and may by agreement be conclusive evidence against him (*Lishman v. Christie* (1887), 19 Q. B. D. 333, C. A.). Nor is the master, in an action for lump sum freight against an indorsee, estopped by the statement of weight in the bill (at least where it is merely matter of measurement, which may vary after the goods are put on board) from proving that he delivered all the goods that were shipped (*Blanchet v. Powell's Llantriv Collieries Co.* (1874), L. R. 9 Exch. 74), though it might be otherwise in an action for short delivery (*ibid.*, p. 77). And in an action for non-delivery the person signing it is not estopped from showing that mere identification marks were incorrectly stated in the bill of lading. If the identity of the goods can be established by other means, such marks become immaterial (*Parsons v. New Zealand Shipping Co.*, [1901] 1 K. B. 548, C. A.); and see title SHIPPING AND NAVIGATION.

(*a*) *Rimmer v. Webster*, [1902] 2 Ch. 163, citing *Rice v. Rice* (1854), 2 Drow.

ESTOPPEL.

SECT. 2. **548.** A somewhat special case of estoppel by statement occurs in regard to agents accounting to their principals. An agent who in his account makes a false statement either increasing his apparent receipts (*b*), or reducing his apparent expenditure so as to swell the credit (*c*), or diminish the debit of his principals, does so at his peril, and is not at liberty, unless he shows that it was by mistake, afterwards to recover the amounts from them, and this though it does not appear that they have acted on his erroneous statement. If it is shown that they have done so, the same result follows on the ordinary principles of estoppel (*d*).

SUB-SECT. 3.—*Estoppel by Conduct.*

549. The question whether a course of conduct, negligent or otherwise, amounts to a representation, or is such as a reasonable man would take to be a representation meant to be acted on in a certain way, must vary with each particular case; and, with certain exceptions, no general rules can be laid down for answering it. The acceptance of money paid in consideration of the existence of a certain state of things often estops the receiver, in the absence of some cause unknown to him entitling him to terminate it, from denying the existence of that state of things, and affords conclusive evidence of a waiver of any objection to the contract or other matter in respect of which it is paid. Thus the acceptance of premiums with knowledge of circumstances entitling the insurer to avoid the policy estops him from averring that for that reason it is not a valid policy (*e*). But the acceptance of money is by no

What conduct
will create
estoppel.

73, 83; Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), ss. 55, 56; *Hunter v. Walters* (1871), 7 Ch. App. 75; *King v. Smith*, [1900] 2 Ch. 425; *Lloyds Bank, Ltd. v. Bullock*, [1896] 2 Ch. 192; see title DEEDS AND OTHER INSTRUMENTS, Vol. X., p. 464. As to estoppel on a company by a statement on a certificate for shares that they were fully paid up, see *Bloomenthal v. Ford*, [1897] A. C. 156; *Christchurch Gas Co. v. Kelly* (1887), 51 J. P. 374, and see p. 410, *ante*. An acknowledgment of receipt of premium in a marine insurance policy effected by a broker is conclusive between insurer and assured, but not between insurer and broker (Marine Insurance Act, 1906 (6 Edw. 7, c. 41), s. 54); see title INSURANCE; see also p. 371, *ante*.

(*b*) *Shaw v. Picton* (1825), 4 B. & C. 715.

(*c*) *Cave v. Mills* (1862), 7 H. & N. 913, applying *Shaw v. Picton*, *supra*.

(*d*) *Skyring v. Greenwood* (1825), 4 B. & C. 281, 290; *Cave v. Mills*, *supra*; see also *Andrew v. Robinson* (1812), 3 Camp. 199. Insurance broker who, in accordance with the usage of Lloyd's, has settled a loss by allowance in account in such manner as to deprive his principal of all remedy against the underwriter, cannot as against his principal deny the receipt of the money. A banker may be estopped by an error in a pass-book, acted on before it is corrected, from denying the customer's right to draw against the apparent balance, but not necessarily from afterwards charging him with the amount of the overdraft (in other words, correcting the mistake) (*Holland v. Manchester and Liverpool District Banking Co.* (1909), 14 Com. Cas. 241). But the receipt of a pass-book, and its return without complaint by the customer to the bank, is not conclusive evidence against the customer of a settled account (*Kepitagallu Rubber Estates, Ltd. v. National Bank of India, Ltd.*, [1909] 2 K. B. 1010, following *BOWEN, L.J.*, in *Vagliano Brothers v. Bank of England* (1889), 23 Q. B. D. 243, 263, C. A. (reversed on other points, *Bank of England v. Vagliano Brothers*, [1891] A. C. 107); see title BANKERS AND BANKING, Vol. I., p. 619.

(*e*) *Wing v. Harvey* (1854), 5 De G. M. & G. 265, C. A. (life); *Edwards v. Aberayron Mutual Ship Insurance Society* (1876), 1 Q. B. D. 563, Ex. Ch.; *Jones*

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means the only conduct which may be relied on as conclusive evidence of waiver of an irregularity, or other ground of objection to a case set up (*f*). Thus a man who, acting as director of a company, takes part in confirming the allotment of shares to himself, cannot, in an action for calls, be heard to say that his appointment as director, or the allotment of shares, was irregular and *ultra vires* (*g*). A trustee in bankruptcy, who has allowed the bankrupt to go on trading in his own name, may be estopped as against execution creditors from claiming his property (*h*). And parties to litigation who have continued the proceedings with knowledge (*i*) of an irregularity of which they might have availed themselves, are estopped from afterwards setting it up (*j*); and, *a fortiori*, on a

v. Bangor Mutual Shipping Assurance Society (1889), 61 L. T. 727; and cases cited notes (*m*), (*n*), p. 386, *ante*; see also *Foster v. Mentor Life Assurance Co.* (1854), 3 E. & B. 48, where the question was as to effect of recital in a policy by deed poll; *Herman v. Royal Exchange Shipping Co.* (1884), Cub. & El. 413 (persons, after accepting freight on goods shipped under bills of lading in their printed forms, estopped from saying that the ship was not theirs and the master not their agent, and the contract not with them); *Re Coltman, Coltman v. Coltman* (1881), 19 Ch. D. 64, C. A. (surety for loan by friendly society could not object that it was *ultra vires*); *Exchange Bank of Yarmouth v. Blethen* (1885), 10 App. Cas. 293, P. C. (acceptance of payment under composition deed stops from denying excoaction); compare *Dunn v. Wyman* (1881), 51 L. J. (Q. B.) 623 (creditor not allowed to say deed was void). As to estoppels between landlord and tenant, see p. 402, *post*; and as to the effect of acceptance of rent, in waiving a forfeiture, and creating a tenancy from year to year, see *Goodright v. Walter v. Davids* (1778), 2 Cowp. 803; *Hatroun v. Hawkins* (1875), L. R. 10 C. P. 342. As to acceptance of surrender after forfeiture by sub-letting, see *Great Western Rail. Co. v. Smith* (1876), 2 Ch. D. 235, C. A.; *Parker v. Jones*, [1910] 2 K. B. 32; and, generally, title LANDLORD AND TENANT.

(*f*) *E.g.*, *Thomas v. Brown* (1876), 1 Q. B. D. 714, 722 (estoppel by conduct in investigation of title from denying existence of contract); *Else v. Barnard* (1860), 2 L. T. 203 (purchaser estopped from objecting that sale was not by auction); *Burgoyne & Co. v. Gullfree & Co.* (1904), 22 R. P. C. 168, C. A. (the conduct of a shipper in selling wine branded with his name prevents his complaining of the act of a purchaser in selling it as the shipper's wine); *Derley v. Lloyds Bank*, [1910] 1 Ch. 618, 672, 680, C. A. (plaintiff, having induced defendants to release collateral security, estopped from saying that original security was discharged).

(*g*) *York Tramways v. Willows* (1882), 8 Q. B. D. 685, 699, C. A.; followed, *Faure Electric Accumulator Co. v. Phillipart* (1887), 58 L. T. 525; *Benson v. Hadfield* (1844), 4 Hare, 32 (insufficiency of board); *Jones v. North Vancouver Land and Improvement Co.*, [1910] A. C. 317, P. C.; compare *Hull Flux Co. v. Wellesley* (1860), 6 H. & N. 38 (receipt of dividends estoppel in action for calls; but here there was also estoppel by deed); *Re St. George's Steam Packet Co., Maguire's Case* (1894), 3 De G. & Sm. 31; *Barrow Mutual Ship Insurance Co. v. Ashburner* (1885), 54 L. J. (Q. B.) 377, C. A.; distinguish *Tyne Mutual Steamship Assurance Association v. Brown* (1896), 74 T. L. 283, where there was really no representation at all; see title COMPANIES, Vol. V., p. 325.

(*h*) *Engelback v. Nixon* (1875), L. R. 10 C. P. 645, as explained in *Wadling v. Oliphant* (1875), 1 Q. B. D. 145, 149; see title BANKRUPTCY, Vol. II., p. 166.

(*i*) The knowledge is essential: thus, a party is not estopped by appearing and conducting proceedings before the other party's arbitrator, in ignorance that he was not properly qualified, from afterwards denying his jurisdiction, and this though his own arbitrator is not qualified either; but he would not be allowed to deny the jurisdiction of the latter (*Jungheim, Hopkins & Co. v. Fouclermann*, [1909] 2 K. B. 948, 956); and see *Toronto Railway v. Toronto Corporation*, [1904] A. C. 809, 815, P. C. (objection of want of jurisdiction not waived by party having set the tribunal in motion).

(*j*) *Tyerman v. Smith* (1856), 6 E. & B. 719; *Andrews v. Elliott* (1855), 5

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Representa-
tion.

Agency by
estoppel.

somewhat different principle, such a party cannot take advantage of an error to which he has himself contributed (*k*).

550. The doctrine of estoppel by conduct is constantly applied where one person has held out another as his agent to do a certain class of acts, either by allowing him to appear as his agent when he was not so (*l*), or as having a greater authority than he in fact has (*m*), or by omitting to give notice that his authority has been withdrawn. Whenever, for example, a company through their directors hold a person out to the world as their agent for a particular purpose, ratifying his conduct as such, the purpose being one which the constitution of the company enables them to authorise, they cannot afterwards dispute acts done by him within the scope of such countenanced agency (*n*). But in order that a person may

E. & B. 502; affirmed (1856), 6 E. & B. 338, Ex. Ch.; and see R. S. C., Ord. 70, r. 2; compare *Huines v. East India Co.* (1856), 11 Moo. P. C. C. 39 (party in custody under *ca. sa.* who acquiesced in arrangement whereby he was released on the ground of ill health, but remain under sheriff's supervision, estopped from denying that he was all the time in custody); see also p. 364, *ante*, and cases there cited.

(*k*) *Meredith v. Hodges* (1807), 2 Bos. & P. (N. R.) 453; *Price v. Harwood* (1811), 3 Camp. 108; *Walker v. Willoughby* (1816), 6 Taunt. 530; *Reeves v. Slater* (1827), 7 B. & C. 486; *Cox v. Cannon* (1838), 4 Bing. (N. C.) 453; *Fisher v. Maynay* (1844), 5 Mann. & G. 778; and see *Jungheim, Hopkins & Co. v. Foukelmann*, [1909] 2 K. B. 948, 957; compare *Hewlett v. London County Council* (1908), 24 T. L. R. 331.

(*l*) *Asin Cornish v. Abington* (1859), 4 H. & N. 549; *Waller v. Drakeford* (1853), 1 E. & B. 749; compare *Miles v. Furber* (1873), L. R. 8 Q. B. 77. As to partnership by estoppel, see *Mollwo, March & Co. v. Court of Wards* (1872), L. R. 4 P. C. 119, 435, P. C.; Partnership Act, 1890 (53 & 54 Vict. c. 39), s. 14. As to agency by estoppel, see title AGENCY, Vol. I., p. 168.

(*m*) *Trickett v. Tomlinson* (1863), 13 C. B. (N. S.) 683; *Re Bentley (Henry) & Co. and Yorkshire Breweries, Ex parte Harrison* (1893), 69 L. T. 201, C. A.; see also *Little v. Spreadbury* (1910), 102 L. T. 829; distinguish *Re Consort Deep Level Gold Mines, Ltd., Ex parte Stark*, [1897] 1 Ch. 575, C. A. There can be no such holding out to one who knows the precise limits of the agent's authority, even though the principal's methods are such as to facilitate frauds by the agent (*Russo-Chinese Bank v. Li Yau Sam*, [1910] A. C. 174, P. C.). A patentee may be estopped by holding out an agent as authorised to sell a patented article free from conditions from insisting as against a purchaser from the agent that he had no such authority (*Incandescent Gas Light Co. v. Cantelo* (1895), 12 R. P. C. 262, as explained in *Badische Anilin und Soda Fabrik v. Isler*, [1906] 1 Ch. 605, *per* BUCKLEY, J., at p. 611; affirmed, [1906] 2 Ch. 443, C. A.).

(*n*) *Wilson v. West Hartlepool Harbour and Rail. Co.* (1861), 31 Beav. 187, 193; affirmed (1865), 2 De G. J. & Sm. 475, C. A., on the ground of particular ratification only. Where the agent is a managing director he may be presumed to have, in the company's commercial business, all the powers which he purports to exercise, provided the articles, of which all the world must be taken to have notice (*Mahony v. East Holyford Mining Co.* (1875), L. R. 7 H. L. 869, 893; and see *Whitechurch (George), Ltd. v. Cavanagh*, [1902] A. C. 117, 141), enable them to be given to him (*Biggerstaff v. Rowatt's Wharf, Ltd.*, [1896] 2 Ch. 93, C. A.; distinguished, *Premier Industrial Bank, Ltd. v. Carlton Manufacturing Co., Ltd., and Crabtree, Ltd.*, [1909] 1 K. B. 106), having regard to the requirements as to negotiable instruments of the Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 77. But he cannot be presumed to have powers in relation to what will confer a title to its shares (*Whitechurch (George), Ltd. v. Cavanagh*, *supra*, at p. 130). The payment of a single bill accepted without authority will not estop the party paying from denying a similar signature to a second bill (*Morris v. Bethell* (1869), L. R. 5 C. P. 47); *secus*, where a course of business has been made to appear (*Barber v. Gingell* (1800), 3 Esp. 60).

be bound by the unratified contract of an agent without real authority it must appear that his supposed authority was ostensible to the other contracting party, and relied on by him when he made his contract. It is not enough that the agent has at one time had authority which was secretly withdrawn (*o*), or that he has authority to contract with certain individuals (*p*), if these facts were not known to the other party.

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551. Agency by estoppel is the foundation of the liability of a retired partner to those who have contracted with the firm in ignorance of his retirement, and on the faith of his continuing authority (*q*); and where a new partner has joined the firm in his place, those who afterwards contract with it in ignorance of the change have the option of looking either to the members of the new firm, who are liable as the real principals in the transaction, or to the members of the old one, who are liable by estoppel; but members of the old firm and the new firm are not jointly liable; the other contracting parties cannot sue both, and having once made their election, with full knowledge, are concluded by it (*r*).

Liability as partner.

552. A statutory extension of the doctrine of agency by estoppel has been effected by the Factors Acts (consolidated by the Factors Act, 1889 (*s*)). These have established an exception to the rule that mere parting with possession of a chattel or a document of title does not estop the owner from setting up his title against a purchaser. Their effect is to enable a "mercantile agent," acting in the ordinary course of his business as such, who is with the consent of the owner in possession of goods or documents of title to goods, to make a valid disposition of them by way of pledge, sale, or exchange, to persons taking in good faith, and without notice of any want of authority (*t*). And for this purpose a consent once given is available, after it is withdrawn, to a person having no notice of withdrawal, and extends to documents obtained in exchange for goods or other documents held with such consent (*u*).

Factors Act, 1889.

553. Corresponding provisions have been made for the protection of persons dealing with others who are intrusted with goods for consignment or sale (*a*); with vendors who are suffered to retain

Other cases.

(*o*) *Miles v. McIlwraith* (1883), 8 App. Cas. 120, 133, P. C., approving *Freeman v. Cooke* (1848), 2 Exch. 654, 664; compare *Burgis v. Constantine*, [1908] 2 K. B. 484, 499, 500, C. A.; *Edmundson v. Thompson* (1861), 31 L. J. (ex.) 207.

(*p*) *Farquharson Brothers & Co. v. King & Co.*, [1902] A. C. 325, 333.

(*q*) *Freeman v. Cooke*, *supra*; Partnership Act, 1890 (53 & 54 Vict. c. 39), s. 36; and see title PARTNERSHIP. Conversely, an agent who signs a bill in a firm's name may, by having held himself out as a partner, render himself personally liable on it (*Gurney v. Evans* (1858), 3 H. & N. 122); see also title AGENCY, Vol. I., pp. 159, 215.

(*r*) *Scarf v. Jardine* (1882), 7 App. Cas. 345; followed, *Jones v. Ashwin* (1883), Cab. & El. 159; compare *Fell v. Parkin* (1882), 52 L. J. (q. b.) 99.

(*s*) 52 & 53 Vict. c. 45.

(*t*) *Ibid.*, s. 2 (1), 5.

(*u*) *Ibid.*, s. 2 (2), (3).

(*a*) *Ibid.*, s. 7.

SECT. 2.
Estoppel by
Representation.

Estoppel as
 to scope of
 authority.

possession of goods or documents of title (*h*); and buyers who are given premature possession of them (*c*).

554. A further development of the doctrine of agency by estoppel is that one who provides an authorised agent with the *indicia* of an authority in excess of his actual authority cannot, as against persons who have, in dealing with him *bonâ fide*, altered their position on the faith of such *indicia*, deny that he had the larger authority. This rule has been illustrated in the case of negotiable instruments. Thus, if a man signs a blank stamped paper and hands it to an agent with authority to fill it up as a promissory note or bill of exchange for a limited sum, and the agent inserts a larger sum, but not exceeding what the stamp will cover, he will be estopped as against a *bonâ fide* holder for value who has taken the instrument after completion (*d*) from denying the agent's authority to fill it up for that amount (*e*). The same principle is applicable where a negotiable instrument is issued with any material part left in blank (*f*), and has been embodied, though perhaps not in its entirety, in the Bills of Exchange Act, 1882 (*g*), which establishes a statutory estoppel in favour of a "holder in due course" to whom the completed instrument is negotiated (*h*). Similarly, where an owner or pledgee of goods hands a delivery order with blanks in it to an agent with authority to fill them up, he will be estopped as against the warehouseman who has acted on it from proving that the authority was subject to a limit which has been exceeded (*i*).

(*b*) Factors Act, 1889 (52 & 53 Vict. c. 45), s. 8; Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 25 (1), amending the law as laid down in *Johnson v. Crédit Lyonnais Co.* (1877), 3 C. P. D. 32, C. A.

(*c*) Factors Act, 1889 (52 & 53 Vict. c. 45), s. 9; Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 25 (2); compare *Gillman, Spencer & Co. v. Carbutt & Co.* (1889), 61 L. T. 281, C. A.; but *quære* whether this case would be followed having regard to the difference between the sections cited, and Factors Act, 1877 (40 & 41 Vict. c. 39), s. 5, for which they were substituted; *M'Ewan v. Smith* (1849), 2 H. L. Cas. 309, on which it was founded, was decided long before the date of the last-mentioned enactment; see title SALE OF GOODS.

(*d*) See *France v. Clark* (1884), 26 Ch. D. 257, 262, C. A.; *London and South Western Bank v. Wentworth* (1880), 5 Ex. D. 96.

(*e*) *Lloyds Bank, Ltd. v. Cooke*, [1907] 1 K. B. 794, C. A., applying *Brooklesby v. Temperance Building Society*, [1895] A. C. 173; and see *Swan v. North British Australasian Co.* (1863), 2 H. & C. 183, 185, Ex. Ch.; *Young v. Grote* (1827), 4 Bing. 253, as explained in *Scholfield v. Londesborough (Earl)*, [1896] A. C. 514, by Lord HALSBURY, J.C., at p. 522; *Collis v. Emmett* (1790), 1 H. Bl. 313; *Russel v. Langstaffe* (1780), 2 Doug. (K. B.) 514; *Schultz v. Astley* (1836), 2 Bing. (N. C.) 544.

(*f*) *France v. Clark*, *supra*; *Foster v. Mackinnon* (1869), L. R. 4 C. P. 704, 712; and see *Crutchley v. Mann* (1814), 5 Taunt. 529. As to the effect of executing a blank form of transfer, see *France v. Clark*, *supra*, at p. 263; *Bentinck v. London Joint Stock Bank*, [1893] 2 Ch. 120, C. A.

(*g*) 45 & 46 Vict. c. 61.

(*h*) *Ibid.*, s. 20 (2). In *Herdman v. Wheeler*, [1902] 1 K. B. 361, it was held that a note was not "negotiated" to a payee so as to give him the benefit of this section; and in *Lewis v. Clay* (1897), 67 L. J. (Q. B.) 224, that a payee being an immediate party to the note was not a "holder in due course." The former of these cases was much considered in *Lloyds Bank, Ltd., v. Cooke*, *supra* (see especially the judgment of MOULTON, L.J.); and neither of them, so far as it dealt with these points, can now be relied on with confidence.

(*i*) *Union Credit Bank v. Mersey Docks and Harbour Board*, [1899] 2 Q. B.

555. And although, as has been seen, mere parting with possession of a chattel (*j*), or of a document of title (*k*) other than a negotiable instrument (*l*), does not estop the owner from setting up his title against a purchaser for value, it is otherwise where an owner either by giving authority to some person to deal with goods as his own (*m*), or by neglect of some duty of precaution which he owes to those who may deal with that person, enables him to hold himself out as having not the possession only, but the property (*n*). Where, for example, a person hands to another a document, purporting on its face to be transferable by delivery, he thereby represents that it will pass with a good title to anyone who takes it in good faith and for value, and is estopped as against such from denying its negotiability (*o*).

SECT. 2.
Estoppel by Representation.

Authority to deal with goods.

556. The principles under discussion have frequently been applied to dealings by trustees and others in whom property is legally vested for special purposes. A trustee is not an agent: the fact that he has the legal estate is not a representation that he has authority to deal with it by mortgage or sale, which will prevent the *cestui que trust* from setting up his equitable title against that of a borrower or purchaser without notice of the trust, for trusts are an ordinary incident of life. Such persons can protect themselves by getting in the legal estate, but not on any ground

To deal with securities.

205, applying *Young v. Grote* (1827), 4 Bing. 253, as explained by Lord HALSBURY, in *Scholfield v. Londesborough (Earl)*, [1896] A. C. 514; and dissenting from the “*semble*” in the head-note to *Swan v. North British Australasian Co.* (1863), 2 H. & C. 183, Ex. Ch., in so far as it states that estoppel by executing instruments in blank is confined to negotiable instruments.

(*j*) *Weiner v. Gill*, [1905] 2 K. B. 172, 183; affirmed, [1906] 2 K. B. 574, C. A.; see p. 379, *ante*; if it were otherwise, as pointed out by BRAY, J., there would have been no necessity for the Factors Acts; *Truman v. Attenborough* (1910), 54 Sol. Jo. 682.

(*k*) *Kingsford v. Merry* (1856), 1 H. & N. 503, Ex. Ch.; see note (*i*), p. 379, *ante*.

(*l*) *Miller v. Race* (1759), 1 Burr. 452; Bills of Exchange Act, 1882 (15 & 46 Vict. c. 61), s. 38 (2).

(*m*) See *Weiner v. Harris*, [1910] 1 K. B. 285, C. A., per FARWELL, L.J., at p. 295.

(*n*) *Henderson & Co. v. Williams*, [1895] 1 Q. B. 521, 525, 529, C. A.; *Babcock v. Lawson* (1879), 4 Q. B. D. 394; affirmed, but not on this point (1880), 5 Q. B. D. 284, C. A.; *National Mercantile Bank v. Hampson* (1880), 5 Q. B. D. 177; *Low v. McGill* (1864), 10 L. T. 495; compare per MARTIN, B., *Higgins v. Burton* (1857), 26 L. J. (ex.) 342, 343; *Waller v. Drakeford* (1803), 1 B. & R. 749; *Kingsford v. Merry*, *supra*, seems to have been decided on a view of the facts which did not sufficiently regard this aspect of them; see *Henderson & Co. v. Williams*, *supra*, at pp. 526, 527. See also *Brance v. Clark* (1884), 26 Ch. D. 257, 264, C. A.; *Fine Art Society v. Union Bank of London* (1886), 17 Q. B. D. 705, C. A., per Lord ESHER, M.R., at p. 710.

(*o*) *Goodwin v. Roberts* (1876), App. Cas. 476; *Runhall v. Metropolitan Bank* (1877), 2 Q. B. D. 191. This proposition was one of the grounds of decision in both these cases; in neither, however, was it a necessary ground, as the documents were in each case held to be in fact negotiable; and its correctness was doubted in *Colonial Bank v. Cady and Williams* (1890), 15 App. Cas. 267, by Lord BRAMWELL, at p. 282; compare *Re South Essex Estuary Co., Ex parte Chorley* (1870), L. R. 11 Eq. 157 (company having transferred Lloyd's bonds to a contractor with the intention that they should be assignable, estopped from disputing his title as against a purchaser from him); and see *Crouch v. Crédit Foncier of England* (1873), L. R. 8 Q. B. 374, 384 (the decision in which case was

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tion.

of estoppel (*p*). But where a person has been intrusted with title deeds with authority to raise money on them, the owner of the deeds cannot take advantage of any limitation of amount which he placed upon the authority to raise money, as against a lender who had no notice of it and who has relied on the deeds (*q*); and this result is not affected by the fact that the borrower resorted to forgery for the purpose of carrying out the transaction, provided the lender is not compelled to rely on the forged document for his security (*r*). And the same principle has been applied where the person intrusted with the deeds having authority not to borrow, but to deal with them by way of sale, uses them to obtain an advance for himself (*s*).

Representa-
tions implied
from signa-
ture to
negotiable
instruments.

557. The commercial law attributed to those who put their names to negotiable instruments certain representations as necessarily implied from their conduct in doing so, and as every *bonâ fide* holder of such instruments is deemed to have given faith to the signatures on the bill when he took it, each of the previous signatories is estopped as against him from denying the truth of those representations. This branch of estoppel is now embodied in the Bills of Exchange Act, 1882, the provisions of which have been fully dealt with elsewhere, and it is not necessary to repeat them (*a*).

Estoppel by
accrediting
fictitious
bill.

558. The act of a man in signing as acceptor a fictitious document in the shape of a bill of exchange expressed to be

treated as overruled by *Goodwin v. Roberts*, *supra*, in *Bechuanaland Exploration Co. v. London Trading Bank*, [1898] 2 Q. B. 658; see title **BILLS OF EXCHANGE ETC.**, Vol. II., pp. 568, 569.

(*p*) *Shropshire Union Railways and Canal Co. v. R.* (1875), L. R. 7 H. L. 496, *per* Lord CAIRNS, L.C., at pp. 507—509; *Rimmer v. Webster*, [1902] 2 Ch. 163, 170; *Burgis v. Constantine*, [1908] 2 K. B. 484, 503, C. A.

(*q*) *Brooklesby v. Temperance Building Society*, [1895] A. C. 173, following *Perry Herrick v. Attwood* (1837), 2 De G. & J. 21, also followed, *Robinson v. Montgomeryshire Brewery Co.*, [1896] 2 Ch. 841; *Briggs v. Jones* (1870), L. R. 10 Eq. 92; *Marshall v. National Provincial Bank of England* (1892), 66 L. T. 525; compare *McLennan v. Davies* (1870), L. R. 10 Eq. 88.

(*r*) *Brooklesby v. Temperance Building Society*, *supra*, at p. 184.

(*s*) *Rimmer v. Webster*, *supra*. FARWELL, J., puts the disability of the true owner to set up his title on the ground of negligence, but it seems rather to rest on a breach of duty to persons who may be invited to deal with his agent. In this case the transferor was also estopped by his acknowledgment in the transfer of the receipt of full purchase-money, as to which see p. 371, *ante*; *Lloyds Bank, Ltd. v. Bullock*, [1896] 2 Ch. 192. Distinguish *Burgis v. Constantine*, *supra*, where the authority had come to an end without being exercised.

(*a*) Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), ss. 54 (2), 55, 88 (2); see title **BILLS OF EXCHANGE ETC.**, Vol. II., pp. 517, 518, 520. Reference may also be made to the following cases: *Collis v. Emmet* (1790), 1 Hy. Bl. 313 (drawer of bill payable to fictitious payee); *Drayton v. Dale* (1823), 2 B. & C. 293 (capacity of payee of note to indorse); *Ashpitel v. Bryan* (1864), 5 B. & S. 723, Ex. Ch. (drawing and indorsement in name of dead person, to knowledge of acceptor); *Cooper v. Meyer* (1830), 10 B. & C. 468, 471 (acceptor and drawer's signature); *Pitt v. Chappelou* (1841), 8 M. & W. 616 (capacity of drawer); *Sanderson v. Collman* (1812), 4 Man. & G. 209, 219 (general principle stated); *Phillips v. Im Thurn* (1863), 18 C. B. (N. S.) 694, 701 (acceptance for honour); *MacGregor v. Rhodes* (1856), 6 E. & B. 266 (indorser and prior indorserment); *Beeman v. Duck* (1843), 11 M. & W. 251; and *Garland v. Jacomb* (1873), L. R. 8 Exch. 216, Ex. Ch. (capacity of drawer to indorse, but not the actual indorsement).

payable at his bank, so accredits the document as genuine that the banker is entitled as his agent to be indemnified by his customer against the consequences of payment to a person presenting the document with the apparent indorsement of the supposed payee; and the case is strengthened where, besides attaching his signature to the bill, the customer has advised the bank that it is coming forward for payment (b).

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559. As, on the one hand, a person may estop himself from denying that a transaction entered into by an ostensible agent was for his account, so on the other a principal may be precluded from asserting that fact; and the rule (c) that one who purchases from or otherwise gives credit to an agent, under the belief induced by the conduct or authority of the principal that the agent is dealing on his own account, is entitled to set off his debt against the agent's debt to him rests on the doctrine of estoppel (d).

Protection of persons dealing with agent as principal.

560. Mere silence or inaction is not, in the absence of a duty to speak, such conduct as amounts to a representation (e). But it may be the duty of one whose consent to a particular act is required not to stand by, when he knows it has been done without his consent, so long as to induce others to do that from which otherwise they might have abstained; and he cannot afterwards question the legality of the act, to the prejudice of those who have so given faith to the fair inference to be drawn from his conduct (f).

Acquiescence inferred from silence.

A duty to speak arises whenever a person knows that another

(b) *Bank of England v. Vagliano Brothers*, [1891] A. C. 107, distinguishing *Roberts v. Tucker* (1851), 16 Q. B. 560, Ex. Ch. (payment of a genuine bill with a forged indorsement, to which the customer had not contributed), and applying *Ireland v. Livingston* (1872), L. R. 5 H. L. 395; see titles AGENCY, Vol. I., p. 164; BANKERS AND BANKING, Vol. I., p. 614.

(c) *George v. Clayett* (1797), 7 Term Rep. 359; 2 Smith, L. C., 11th ed., p. 138; see title AGENCY, Vol. I., p. 210. So an agent may estop himself from denying that he contracted as principal (*Gurney v. Evans* (1858), 3 H. & N. 122).

(d) *Cooke v. Eshelby* (1887), 12 App. Cas. 271, per Lord WATSON, at p. 278, quoting BOWEN, L.J., in S. C. (not reported); *dubitante*, Lord FITZGERALD. The rule was acted on in *Montagu v. Forwood*, [1893] 2 Q. B. 350, in favour of one who collected average contributions for an apparent principal who was indebted to him, applying *George v. Clayett*, *supra*; *Rabone v. Williams* (1783), 7 Term Rep. 360, n.; recognised in *Fish v. Kempton* (1849), 7 C. B. 687.

(e) *Proctor v. Bennis* (1887), 36 Ch. D. 740, 761, C. A. (patentee not bound to give notice of his patent rights unless he knows another person is acting and spending his money in ignorance of them); *Polak v. Everett* (1876), 1 Q. L. D. 669, 675, C. A., per BLACKBURN, J.; *Barton v. London and North Western Railway* (1889), 24 Q. B. D. 77 (not answering letter); *Re Lewis, Lewis v. Lewis*, [1904] 2 Ch. 656, C. A. (executor not bound to disclose gift over to himself); *Sheridan v. New Quay Co.* (1858), 4 C. B. (N. S.) 618, 648, 649; *Re Walker* (1910), 26 T. L. R. 260 (mere attendance of dissenting creditors at meeting called by trustee under deed of assignment does not estop from relying on deed as act of bankruptcy); compare *Provincial Insurance Co. of Canada v. Leduc* (1874), L. R. 6 P. C. 224.

(f) *Cairncross v. Lorimer* (1860), 3 Macq. 827, 829 (members of congregation precluded from maintaining an action for property which had been enjoyed by a Free Church minister, inducted with their acquiescence); compare *Rule v. Jewell* (1881), 18 Ch. D. 660, following *Prendergast v. Turlon* (1841), 1 Y. & C. Ch. Cas. 98; on appeal (1843), 13 L. J. (Ch.) 268, which was distinguished in *Clarke and Chapman v. Hart* (1858), 6 H. L. Cas. 633, the principle being approved, see per Lord WENLEYDALE, at p. 670, citing also *Norway v. Roue* (1812), 19 Ves. 141 (irregular forfeiture of shares in cost-book mining company); compare *Jones*

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Equitable
 doctrine of
 standing by.

is acting on an erroneous assumption of some authority given or liability undertaken by the former, or is dealing with or acquiring an interest in property in ignorance of his title to it (*g*). It is the duty of a man who knows that another is relying on a document bearing a counterfeit of his signature to give notice of the forgery without delay (*h*). So the receipt of an invoice indicating that a tradesman has been supplying goods in the erroneous belief that the recipient has authorised their purchase imposes on him the duty of at once correcting the error (*i*). *A fortiori*, it is the duty of a man who by his own mistake has led another into an erroneous belief to correct it as soon as the mistake has been discovered (*k*). And one who culpably stands by and allows another to hold himself out to the world as the owner of property, and thereby to sell it to a *bonâ fide* buyer, cannot afterwards assert his title against the latter (*l*). On a similar, but not identical principle, for they founded on their jurisdiction to relieve against fraud (*m*), courts of equity would not permit an owner of property who had knowingly allowed another person to enter into a contract for its purchase, or for the advance of money upon

v. North Vancouver Land and Improvement Co., [1910] A. C. 317, P. C. But in order that a person may be precluded by acquiescence from asserting his legal rights against another, it is necessary that he should be fully aware of the course which the latter is pursuing (*Lynch v. Commissioners of Sewers of City of London* (1885), 32 Ch. D. 72, C. A.). In considering whether silence or inaction is such as to give rise to an estoppel, it must be remembered that there is a distinction between executed and executory interests; where the assistance of a court of equity is invoked by a person for the purpose of giving effect to the latter the court will refuse relief if there is anything that amounts to *laches* on his part. It is far otherwise where executed interests are concerned (*Clarke and Chapman v. Hart* (1858), 6 H. L. Cas. 633, *per* Lord CHELMSFORD, L.C., at pp. 655, 656, citing with approval the limitations laid down in *Freeman v. Cooke* (1848), 2 Exch. 651, 664).

(*g*) *Stroud v. Stroud* (1814) 7 Man. & G. 417.

(*h*) *McKenzie v. British Linen Co.* (1881), 6 App. Cas. 82, 109 (but he may excuse himself for delay by showing that the other is in no worse position in consequence of it (*ibid.*)); and see *Ogilvie v. West Australian Mortgage and Agency Corporation*, [1896] A. C. 257, P. C.; *Evering (William) & Co. v. Dominion Bank*, [1904] A. C. 806, P. C.; and title **BILLS OF EXCHANGE ETC.**, Vol. II., p. 512.

(*i*) *Cornish v. Abington* (1859), 4 H. & N. 519.

(*k*) *Skyring v. Greenwood* (1825), 4 B. & C. 281 (army agents erroneously crediting customer with money not received); compare *Ashby v. Day* (1886), 54 L. T. 408, C. A. (duty of directors, guarantors of company's liability, to communicate change in the identity of the company; so that they were estopped from insisting that the guarantee had been put an end to by the change).

(*l*) *Gregg v. Wells* (1839), 10 Ad. & El. 90; *Low v. McGill* (1864), 10 L. T. 495; *Richards v. Johnston* (1859), 4 H. & N. 660; *Waller v. Drakford* (1853), 1 E. & B. 719. The difficulty arises in applying the principle, and determining what standing by is culpable. "Culpably" is not equivalent to "knowingly," though knowingly to stand by would be culpable, and in most cases fraudulent. It appears to mean "under circumstances creating a duty in the true owner to guard against the person in possession making a dishonest use of his opportunities"; see note (*t*), p. 398, *post*. See on the one hand *Henderson & Co. v. Williams*, [1895] 1 Q. B. 521, C. A.; and on the other *Kingsford v. Merry* (1856), 1 H. & N. 503, Ex. Ch.; and *Farquharson Brothers & Co. v. King & Co.*, [1902] A. C. 325.

(*m*) *Wilmott v. Barker* (1830), 15 Ch. D. 105; and see *Proctor v. Bennis* (1887), 36 Ch. D. 740, C. A., *per* BOWEN, L.J., at p. 761, as to the difference between estoppel and the equitable doctrine of acquiescence; and compare *De Bussche v. Alt* (1878), 8 Ch. D. 286, 314, C. A. (acquiescence must be before the act complained of is done, and before a cause of action accrues).

it (n), in ignorance of the former's title, afterwards to set up that title to the prejudice of the purchaser; and, because it was founded on fraud, the rule applied equally when the person guilty of it was under the disability of infancy or coverture (o); nor would they allow one who had stood by with the knowledge that another was expending money on his land under a mistaken belief as to his own rights, and in ignorance of those of the true owner, afterwards to assert his title without at least making compensation for the money so expended, or otherwise doing equity to him who had laid it out (p).

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561. The effect of silence or inaction in concluding a person has been considered in cases where there is a right of election between two courses. Here, again, mere silence does not amount to an election, but it is the duty of one who has to make an election not to lie by so long as to lead some other person, whether the party against whom the election is to be made or another, to alter his position in the belief that the first named has elected to let things remain as they are; and by so doing he will be precluded from making a different election (q).

Estoppel on
right of
election.

In this connection reference may be made to marine insurance cases. Underwriters on receiving notice of abandonment may elect whether to accept or reject it. In this case mere silence is equivalent to rejection, so they need not give notice of it; but they may so conduct themselves as to be precluded from denying that they have accepted (r).

Again, a person who gives credit to an agent whom he knows to have a principal behind him is entitled, though he does not know the latter's name, to rely on his credit, and, on discovering who he is, may elect whether to look to the principal or the agent; but if he has by his conduct led the principal to believe that he looked to the agent alone for payment, and has thereby induced him either to pay

(n) In *Edmonds v. Best* (1862), 7 L. T. 279, the contract was for a mortgage of chattels.

(o) *Savage v. Foster* (1723), 9 Mod. Rep. 35; *Mills v. Fox* (1887), 37 Ch. D. 153, 167; notes to *Burrowes v. Locke* (1805), 10 Ves. 470; 1 White & Tud. L. C., 7th ed., at p. 469; and note (s), p. 380, *ante*.

(p) *Oxford's (Earl) Case* (1616), 1 Rep. Ch. 1; 1 White & Tud. L. C., 7th ed., 730; notes to *Burrowes v. Locke*, *supra*; *Ramsden v. Dyson* (1866), L. R. 1 H. L. 129, 140, 141, 168. Where to the knowledge of the owner a person builds on the land in reliance upon an invalid lease, or a supposed right to call for a lease, the owner who knowingly allowed him to go on in that belief will be compelled to make it good (*ibid.*, at p. 142). See this subject fully treated under title EQUIT, pp. 166, 167, *ante*; also *Mold v. Wheatecroft* (1859), 27 Beav. 510; *Sheridan v. Barrett* (1879), 4 L. R. Ir. 223.

(q) *Clough v. London and North Western Rail. Co.* (1871), L. R. 7 Exch. 26, 35, Ex. Ch.; applied, *Morrison v. Universal Marine Insurance Co.* (1873), L. R. 8 Exch. 197, 204, Ex. Ch.; *Lindsay Petroleum Co. v. Hurd* (1874), L. R. 5 P. C. 221; *Aaron's Reefs v. Twiss*, [1896] A. C. 273, 290, 294; and see *Chynoweth's Case* (1880), 15 Ch. D. 13, C. A. (company estopped by delay and acting on fraudulent transfer from refusing to recognise it); *Brailey v. Rhodesia Consolidated, Ltd.*, [1910] 2 Ch. 95 (defective notice of dissent from reconstruction scheme); *Forman & Co. Proprietary v. Ship "Liddesdale,"* [1900] A. C. 190, P. C.; *Civil Service Musical Instrument Association v. Whiteman* (1899), 68 L. J. (Ch.) 484.

(r) *Provincial Insurance Co. of Canada v. Leduc* (1874), L. R. 6 P. C. 224, 237; *Hudson v. Harrison* (1821), 3 Brod. & Bing. 97; Marine Insurance Act, 1906 (6 Edw. 7, c. 41), s. 62 (5); see title INSURANCE.

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Representation.

Duty to use
 due care
 essential.

the agent or to leave money in his hands, he is precluded from afterwards suing the principal (s).

SUB-SECT. 4.—Estoppel by Negligence.

562. Before anyone can be estopped by a representation inferred from negligent conduct, there must be a duty to use due care towards the party misled, or towards the general public of which he is one. A person who does not lock up his goods, which are consequently stolen, may be said to be negligent as regards himself, but inasmuch as he neglects no duty which the law casts upon him, he is not in consequence estopped from denying the title of those who may have purchased those goods from the thief, unless it be in market overt (t).

(s) *Macfarlane v. Giannacopulo* (1858), 3 H. & N. 860; *Irvine v. Watson* (1880), 5 Q. B. D. 102, 414, C. A., per BOWEN, J., at p. 105, following *Held v. Kenworthy* (1855), 10 Exch. 739, 746, and commenting on the dicta in *Thomson v. Davenport* (1829), 9 B. & C. 78; *Wyatt v. Hertford (Marquis)* (1802), 3 East, 147. Where the creditor contracted with the agent in ignorance that he had a principal, so that he gave him exclusive credit in the first instance, the principal is relieved of liability, without the intervention of any misleading conduct on the part of the creditor, if before recourse is had to him he has settled in account with his agent (*Armstrong v. Stokes* (1872), L. R. 7 Q. B. 598, as explained by BOWEN, J., in *Irvine v. Watson*, *supra*, an authority which, however, seems to be still open to review (*Irvine v. Watson*, *supra*, at pp. 417, 421)); see title AGENCY, Vol. I., pp. 209, 210.

(t) *Swan v. North British Australasian Co.* (1863), 2 H. & C. 175, Ex. Ch., per BLACKBURN, J., at p. 181 (the exception is not a case of estoppel), quoting PARKE, B., in *Fremman v. Cooke* (1848), 2 Exch. 551, 657; approved, *Arnold v. Cheque Bank* (1876), 1 C. P. D. 578, 587; *Johnson v. Crédit Lyonnais Co.* (1877), 3 C. P. D. 32, 42, C. A.; *Bell v. Marsh*, [1903] 1 Ch. 528, 541, C. A.; see also *Bank of Ireland (Governor & Co.) v. Evans' Charities in Ireland (Trustees)* (1855), 5 H. L. Cas. 389, 410; *Schulfield v. Lonsborough (Earl)*, [1896] A. C. 514, 522, 537; *Union Credit Bank v. Mersey Docks and Harbour Board*, [1899] 2 Q. B. 205, 214; *Longman v. Bath Electric Tramways, Ltd.*, [1905] 1 Ch. 646, 735, C. A.; *Smith v. Prosser*, [1907] 2 K. B. 161, 746, C. A.; *Hall v. West-End Advance Co.* (1883), Cab. & Kl. 161, 165; and the judgments in *Re North British Australasian Co., Ex parte Swan* (1859), 7 C. L. (N. S.) 400, where the court was equally divided; compare *Le Lievre v. Gould*, [1893] 1 Q. B. 491, 497, C. A.; *Way v. Great Eastern Rail. Co.* (1876), 1 Q. B. D. 692, 695.

Much of the difficulty in applying the law of estoppel by negligence has arisen from a too literal acceptance of the broad principle laid down by ASHURST, J., in *Lickbarrow v. Mason* (1787), 1 Smith, L. C., 11th ed., 693, at p. 701, Ex. Ch. & H. L.; 2 Term Rep. 63, at p. 70, "that wherever one of two innocent persons must suffer by the acts of a third, he who has enabled such person to occasion the loss must sustain it." That case turned not upon estoppel, but upon the negotiable element of bills of lading, by reason of which the property they represented (though not any contract) was transferable by indorsement; but the decision might be supported on the ground of estoppel (indeed, ASHURST, J., though he does not use the expression, treats the bill of lading as being "negotiable by estoppel," just as the scrip was, according to the second ground of the decision, negotiable in *Goodwin v. Roberts* (1876), 1 App. Cas. 476), the bill of lading having been issued by the shipper with the intention that it should be acted on by a purchaser from the consignee, and it having been acted on by him in the manner intended by the shipper. Having regard to the facts before the Court, and to the rest of his judgment, the principle was stated by ASHURST, J., with sufficient accuracy for the purposes of that case; and it has been properly applied in many cases (see e.g., *Nash v. de Freville*, [1900] 2 Q. B. 72, 83, C. A.; *Rimmer v. Webster*, [1902] 2 Ch. 163, 173; and compare *Babcock v. Lawson* (1879), 4 Q. B. D. 394, 401, and *Burgis v. Constantine*, [1908] 2 K. B. 484, C. A.). On the other hand, there have been

Persons who issue documents with a certain mercantile meaning attached to them, *e.g.*, delivery orders, owe a duty to merchants and others likely to deal with those documents to use due care in their issue; and a railway company, or warehouseman, issuing duplicate orders for the same goods may be estopped from denying that they had two parcels, to the prejudice of one who has advanced money on the faith of the duplicate (*a*). So, if in the course of business a man volunteers a statement upon which in the like course another may probably act, it is his duty to take reasonable care that the statement is correct (*b*).

SECT. 2.
Estoppel by Representation.

563. But a corporation, which permits its secretary to have the custody of its seal, is not guilty of such negligence as will estop it against persons who have acted on unauthorised transfers executed by him under that seal from denying that they are forgeries; for it owes no duty to such persons in that regard (*c*).

No duty of special precaution against dishonesty.

occasions when a too literal acceptance of its terms has led to error (see *e.g.*, the dissentient judgment of KEATING, J., in *Swan v. North British Australasian Co.* (1863), 2 H. & C. 175, Ex. Ch.; *Farguharson Brothers & Co. v. King & Co.*, [1901] 2 K. B. 697, C. A.; reversed, [1902] A. C. 325), and the necessity for some qualification has been frequently recognised (see the judgment of FARWELL, J., in *Rimmer v. Webster*, [1902] 2 Ch. 163, at p. 169; *Farguharson Brothers & Co. v. King & Co.*, *supra*, per VAUGHAN WILLIAMS, L.J., at p. 713, and [1902] A. C. 325, per LORD LINDLEY, at p. 342; *Hall v. West-End Advance Co.* (1883), Cab. & El. 161, per WALKIN WILLIAMS, J., at p. 165). Lord HALSBURY (see *Farguharson Brothers & Co. v. King & Co.*, [1902] A. C. 325, 332, and *Henderson & Co. v. Williams*, [1895] 1 Q. B. 521, C. A., at p. 529) evidently prefers the expression of SAVAGE, C.J., in *Root v. French* (1835), 13 Wendell, 570, at p. 572: "When one of two innocent persons must suffer from the fraud of a third, he shall suffer who, *by his indiscretion*, has enabled such person to commit the fraud." The words in italics add an important qualification to the proposition laid down by ASHURST, J. But it is apparent, having regard to the principles stated in the text, and the numerous authorities referred to in the notes, that even they do not make it universally true. Probably the various conditions necessary to establish a case of estoppel by statement or by conduct cannot be more succinctly stated, having regard to the necessity of combining elasticity with precision, than in the judgments of PARKE, B., in *Freeman v. Cooke* (1848), 2 Exch. 654, and BLACKBURN, J., in *Swan v. North British Australasian Co.*, *supra*.

(a) *Coventry v. Great Eastern Rail. Co.* (1883), 11 Q. B. D. 776, C. A.

(b) *Seton v. Lafone* (1887), 19 Q. B. D. 68, C. A. (erroneous statement by defendant warehousemen that goods which in fact had been parted with lay at their warehouse, and were liable to be sold for charges. Plaintiff thereupon bought the warrant for the goods, and defendants were estopped from averring that they had not got them when they made the statement).

(c) *Bank of Ireland (Governor & Co.) v. Evans' Charities in Ireland (Trustees)* (1855), 5 H. L. Cas. 389 (explaining, at pp. 411, 414, *Coles v. Bank of England* (1839), 10 Ad. & El. 437, as a case of ratification); followed, *Merchants of the Staple of England (Mayor etc.) v. Bank of England (Governor & Co.)* (1887), 21 Q. B. D. 160, C. A.; compare *Arnold v. Cheque Bank* (1876), 1 C. P. D. 578 (alleged negligence in custody of draft, and in not sending separate letter of advice); *Brchuanaland Exploration Co. v. London Trading Bank*, [1898] 2 Q. B. 658 (negotiable instrument stolen by secretary who kept key); *Patent Safety Gun Cotton Co. v. Wilson* (1880), 49 L. J. (Q. B.) 713 (no duty to the public not to employ clerk who has been guilty of dishonesty; or while doing so, to lock up cheques); *Leves Sanitary Steam Laundry Co. v. Barclay & Co.* (1906), 95 L. T. 444; *Kepitigalla Rubber Estates, Ltd. v. National Bank of India, Ltd.*, [1909] 2 K. B. 1010 (alleged negligence in custody of rubber stamp, the property of one director, and in not checking pass-book).

SECT. 2.
Estoppel by
Representation.

So the acceptor of a bill of exchange owes no duty to subsequent holders to take precautions to prevent the amount from being fraudulently increased (*d*), and though, having regard to the contractual relation between them, there may be a duty owing by the customer of a bank to his banker, such that if the former, by any act of his (*e*), or by neglect of some act usual in the course of dealing between them, induces the banker to act on a forged document, he may be prevented from setting up his own act or neglect to the prejudice of the latter (*f*), yet it is not negligence for the customer merely to sign a cheque in such form that somebody else can tamper with it (*g*). The protection against forgery is not the vigilance of parties excluding the possibility of committing it, but the law of the land (*h*).

Negligence must be in the transaction, and proximate cause of misleading.

564. A second essential condition of estoppel by negligence is that the negligence must be in the transaction itself, and a third, which is so closely connected with the second that it is impossible to treat them separately, is that the negligence must not only be calculated to have the misleading effect attributed to it, but must be the proximate or real cause of that result (*i*).

(*d*) *Scholfield v. Londesborough (Earl)*, [1896] A. C. 514.

(*e*) E.g., by advising forged bills as coming forward for payment (*Bank of England v. Vagliano Brothers*, [1891] A. C. 107).

(*f*) *Scholfield v. Londesborough (Earl)*, *supra*, per Lord HALSBURY, L. C., at pp. 523, 524, per Lord WATSON, at p. 537; and see *Bank of England v. Vagliano Brothers*, *supra*, per Lord SELBORNE, at pp. 123, 124.

(*g*) *Colonial Bank of Australasia, Ltd. v. Marshall*, [1906] A. C. 559, P. C.; and see *Scholfield v. Londesborough (Earl)*, *supra*, at p. 532. The judgments in *Young v. Grote* (1827), 4 Bing. 253, and *Halifax Union v. Wheelwright* (1875), L. R. 10 Exch. 183, so far as they affirmed the contrary of the proposition stated in the text, must now be considered as overruled; see *Smith v. Prosser*, [1907] 2 K. B. 735, 746, per VAUGHAN WILLIAMS, L.J. *Young v. Grote*, *supra*, can only be supported on the ground stated by Lord HALSBURY in *Scholfield v. Londesborough (Earl)*, *supra*, at p. 523; *Imperial Bank of Canada v. Bank of Hamilton*, [1903] A. C. 49, P. C. The same principle has been applied to a delivery order addressed to a warehouseman (*Union Credit Bank v. Mersey Docks and Harbour Board*, [1899] 2 Q. B. 205 (a very instructive case, illustrating both aspects of *Young v. Grote*, *supra*, and showing where it may be relied on as authority, and where it fails)). The judgment in *Colonial Bank of Australasia, Ltd. v. Marshall*, *supra*, and some of the dicta on which it is founded, have, however, been severely criticised; see *Law Quarterly Review* (1907), Vol. XXIII., p. 390.

(*h*) *Colonial Bank of Australasia, Ltd. v. Marshall*, *supra*, at p. 568, quoting *BOVILL, C.J., Société Générale v. Metropolitan Bank* (1873), 27 L. T. 849, 856; compare *Keptigalla Rubber Estates, Ltd. v. National Bank of India, Ltd.*, [1909] 2 K. B. 1010, 1023.

(*i*) *Bank of Ireland (Governor & Co.) v. Evans' Charities in Ireland (Trustees)* (1855), 5 H. L. Cas. 389, per PARKE, B., at p. 410, in delivering the opinions of the judges; *Swan v. North British Australasian Co.* (1862), 7 H. & N. 603, 633 (proposition of WILDE, B., as qualified by BLACKBURN, J., S. C. (1863), 2 H. & C. 175, at p. 182, Ex. Ch.); *Carr v. London and North Western Rail. Co.* (1875), L. R. 10 Q. B. 307, 318; *Keptigalla Rubber Estates, Ltd. v. National Bank of India, Ltd.*, *supra*. The expression "proximate cause" used in the 4th proposition in that case was explained in *Selon v. Lafone* (1887), 19 Q. B. D. 68, C. A., by BRETT, M.R., at p. 71, with the approval of the other members of the C. A., to mean "real cause." See also note (*t*), p. 398, *ante*, and succeeding notes; *Swan v. North British Australasian Co.*, *supra*; see the effect stated, p. 412, *post*, following *Bank of Ireland (Governor & Co.) v. Evans' Charities in Ireland (Trustees)*, *supra*; and *Taylor v. Great Indian Peninsular*

On this principle, as well as on the grounds mentioned in the preceding paragraph, a bank having certified (as drawn against sufficient assets) a cheque with blank spaces in it which enabled the drawer afterwards to increase the amount for which it was drawn, was not estopped from denying to a *bona fide* holder that it was certified only for the original sum (*k*). And the appointment by a company of a secretary known to have once committed forgery, and trusting him with the company's books, who takes advantage of his position to forge a cheque on the company's bankers, is not sufficiently in the transaction; nor is it the proximate cause of the bank's parting with its money, so as to give rise to an estoppel (*l*).

SECT. 2.
Estoppel by Representation.

565. The principles under consideration have been frequently applied in cases where there has been want of care, or of precaution, which in the result turned out to have been necessary, in the custody of negotiable instruments. The conduct of a person who leaves a cheque signed in blank in an unlocked drawer, from which it is stolen by a thief who fills it up (*m*), or who when preparing a draft for post omits to forward a separate letter of advice, which would enable the intended receiver of the draft to stop payment in the event of its being abstracted and an indorsement being forged (*n*), is not the proximate cause of the loss which ensues, and does not estop him from setting up the facts. So giving a blank note for safe custody pending instructions, and with no present authority to issue it, to an agent who issues it without having received such instructions, does not render the maker liable by estoppel (*o*). On *à fortiori* grounds a person whose signature is, by fraudulent statements that he is signing for some different purpose, obtained to a document which is in fact a promissory note, so that he has no idea of actually or potentially binding himself by contract, is not estopped as against a holder in due course, either

Neglect in preparation or custody of negotiable instruments.

Rail. Co. (1859), 4 De G. & J. 559, C. A. (transfer signed with blanks is not, when filled up, the transferor's deed, and he is not estopped from saying so against persons who take it with any of the blanks remaining, for they must be taken to know of the invalidity), disapproving, at p. 182, *Coles v. Bank of England* (1839), 10 Ad. & El. 437; and followed in *Hall v. West-End Advance Co.* (1883), Cab. & El. 161 (mortgagee of life policy handed it to mortgagor for verbal alterations, and forgot to get it back again); *Longman v. Bath Electric Tramways, Ltd.*, [1905] 1 Ch. 646, C. A. (company permitting transferor of shares to obtain possession of certificates, whereby he was enabled to make a second and fraudulent transfer of them).

(*k*) *Imperial Bank of Canada v. Bank of Hamilton*, [1903] A. C. 49, P. C., following *Scholfield v. Londesborough (Earl)*, [1896] A. C. 514; see *Kepitigalla Rubber Estates, Ltd. v. National Bank of India, Ltd.*, [1909] 2 K. B. 1010; and p. 399, *ante*.

(*l*) *Lewes Sanitary Steam Laundry Co. v. Barclay & Co.* (1906), 95 L. T. 444, citing from Lord HALSBURY'S judgment in *Bank of England v. Vagliano Brothers*, [1891] A. C. 107, at p. 115, "The carelessness of the customer, or his neglect to take precautions, unconnected with the act itself, cannot be put forward by the banker as justifying his own default."

(*m*) *Bacendale v. Bennett* (1878), 3 Q. B. D. 525, C. A. It seems that it would be otherwise if the instrument had been completed before it was stolen; see *Ingham v. Primrose* (1859), 7 C. B. (N. S.) 82, 85.

(*n*) *Arnold v. Cheque Bank* (1876), 1 C. P. D. 578.

(*o*) *Smith v. Prosser*, [1907] 2 K. B. 735, C. A. As already pointed out, where there is authority to issue for any amount, the estoppel arises (*Lloyd's Bank, Ltd. v. Cooke*, [1907] 1 K. B. 794, C. A.; see p. 392, *ante*).

SECT. 2.
Estoppel by
Representation.

by the Bills of Exchange Act or at common law, from proving the true circumstances (p).

Different considerations apply where the document relied on as a negotiable instrument has been completed (q) by the defendant, or handed to an agent with authority to fill it up and issue it. In these cases an estoppel, as has been seen, arises most usually from the authority which may be presumed to have been given (r). It may, however, arise from negligence. A person who pays what is due on a negotiable instrument, not apparently overdue, owes a duty to the public to obtain it from the holder, or to see that it is cancelled; and if after payment he leaves it in the hands of the holder, he will be estopped, as against a subsequent *bonâ fide* holder for value, from showing that it has been paid (s).

SECT. 3.—Estoppel between Particular Persons.

SUB-SECT. 1.—Landlord and Tenant.

Estoppel
binds lessor
and lessee.

566. Generally, a tenant is estopped from disputing the title at the time of the demise of the landlord by whom he has been let into possession (a). This estoppel is not confined to leases by deed (b), and applies to tenancies from year to year, at will, or on sufferance, as well as to leases for years (c); and anyone holding under a

(p) *Lewis v. Clay* (1897), 67 L. J. (Q. B.) 224 (defendant informed that he was witnessing something which he was not allowed to see), following *Foster v. Muckinnon* (1867), L. R. 4 C. P. 704.

(q) Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), s. 21 (2); *Ingham v. Primrose* (1859), 7 C. B. (N. S.) 82, 85, but the decision in this case was dissented from by BRETT, L.J., in *Baxendale v. Bennett* (1878), 3 Q. B. D. 525, C. A.

(r) See p. 392, *ante*.

(s) *Nash v. de Freville*, [1900] 2 Q. B. 72, C. A.; "Estoppel is the foundation of the rights arising upon the unauthorised transfer of negotiable instruments" (*ibid.*, *per* COLLINS, L.J., at p. 89, citing *Russel v. Langstaffe* (1780), 2 Doug. (K. B.) 514; *Schultz v. Astley* (1836), 2 Bing. (N. C.) 544); *Ingham v. Primrose*, *supra* (acceptor, on bill being returned to him after issue, having torn it in two, intending to cancel it, but in such manner that it might have been done for safe transmission by post, held liable to a *bonâ fide* holder; *aliter*, where the bill was torn in four pieces (*Scholey v. Ramsbottom* (1810), 2 Camp. 485). But this was not the view of the Court of Exchequer in *Marston v. Allen* (1841), 8 M. & W. 494, 504).

(a) *Rawlin's Case* (1587), Jenk. 254; *Sullivan v. Stradling* (1764), 2 Wils. 208; *Friend v. Eastabrook* (1777), 2 Wm. Bl. 1152; notes to *Veale v. Warner* (1669), 1 Wms. Saund. 323, 327 (1871 ed., pp. 575, 580); *Croke v. Luxley* (1792), 5 Term Rep. 4; *Barwick d. Richmond Corporation v. Thompson* (1798), 7 Term Rep. 488; *Doe d. Knight v. Smythe (Lady)* (1815), 4 M. & S. 347; *Parry v. House* (1817), Holt (N. P.), 489; *Alchorne v. Gomme* (1824), 2 Bing. 54; *A.-G. v. Hotham (Lord)* (1823), Turn. & R. 209, 219; *Fleming v. Gooding* (1834), 10 Bing. 549; *Cooper v. Blundy* (1834), 1 Bing. (N. C.) 45; *Doe d. Manvers (Earl) v. Mizem* (1837), 2 Mood. & R. 56; *Doe d. Tresidder v. Tresidder* (1841), 10 L. J. (Q. B.) 160; *Deumey v. Fox* (1857), 2 C. B. (N. S.) 768, 774; *Cuthbertson v. Irving* (1859), 4 H. & N. 742 (affirmed (1860), 6 H. & N. 135, Ex. Ch.), *per* MARTIN, B., at p. 757; *Duke v. Ashby* (1862), 7 H. & N. 600; *Serjeant v. Nash, Field & Co.*, [1903] 2 K. B. 304, C. A.

(b) *Phipps v. Sculthorpe* (1817), 1 B. & Ald. 50; *Doe d. Jackson v. Wilkinson* (1824), 3 B. & C. 413; *Cook v. Whellock* (1890), 24 Q. B. D. 658, C. A.

(c) *Doe d. Bailey v. Foster* (1846), 3 Q. B. 215, *per* CRESSWELL, J., at p. 229, following *Doe d. Johnson v. Baytop* (1835), 3 Ad. & El. 188. R., who had possession but no title, let by parol to defendant for two years. Within that

tenant, or defending as landlord in an action of ejectment, is bound by it (*d*).

Similarly the lessor is estopped from repudiating a lease under which possession has been given or a tenancy which he has acknowledged, and the assignee of the lessor's interest is estopped from denying anything which the lessor is estopped from denying (*e*).

But when a lease is void by statute a person entering under such a lease enters without any title whatever, and there is nothing by way of estoppel to prevent the full operation of the Statute of Limitations (*f*) in his favour (*g*).

A tenant is not estopped either before or after the expiration of the term from showing that his lessor's title has determined (*h*).

SECT. 3.
Estoppel
between
Particular
Persons.

Except in the
case of leases
void by
statute.

period R. assigned by deed to plaintiff. After the period plaintiff brought ejectment against defendant. It was held that the defendant was estopped from denying title of R. (*Ward v. Ryan* (1875), 10 L. R. O. L. 17, Ex. Ch.; see *Doe d. Buddle v. Abrahams* (1816), 1 Stark. 305).

(*d*) *Pulmer v. Ekins* (1728), 2 Ld. Raym. 1550; *Taylor v. Nerdham* (1810), 2 Taunt. 278, 282; *Doe d. Knight v. Smythe (Lady)* (1815), 4 M. & S. 347; *Doe d. Manton v. Austin* (1832), 9 Bing. 41; *Doe d. Bullen v. Mills* (1834), 2 Ad. & El. 17; *Doe d. Manvers (Earl) v. Mizem* (1837), 2 Mood. & R. 56; *Doe d. Willis v. Birchmore* (1839), 3 Ad. & El. 662; *Doe d. Spencer (Earl) v. Beckett* (1843), 4 Q. B. 601; *Doe v. Challis* (1851), 17 Q. B. 166, per COLERIDGE, J., at p. 168; *London and North Western Rail. Co. v. West* (1867), L. R. 2 C. P. 553; compare *Williams v. Heales* (1874), L. R. 9 C. P. 177.

(*e*) This is an example of the dictum that estoppels must be mutual and reciprocal (Co. Litt. 47 b, 352 a, and see Bac. Abr., tit. Leases and Terms for Years, O, ed. 1832, p. 852, as to whether a lease by estoppel can be created by deed poll); *Webb v. Austin* (1844), 7 Man. & G. 701, 724; *Cuthbertson v. Irving* (1859), 4 H. & N. 742; *Weller v. Spiers* (1872), 26 L. T. 866, per COCKBURN, C.J., at p. 867; and compare *Darlington v. Pritchard* (1842), 4 Man. & G. 783, per TINDAL, C.J., at p. 793; *Green v. James* (1840), 6 M. & W. 656, per ALDERSON, B. (in argument), at p. 660 and (judgment) p. 662. Compare, too, *Doe d. Doune (Viscount) v. Thompson* (1847), 9 Q. B. 1037, in which it was held that where a lease was granted by a mortgagor in such a way as to be good only by estoppel, the assignee of the mortgagee, though he received rent from the tenant, was not bound by the estoppel, "as he derived his estate from persons who were not privies to nor in any way estopped by the lease"; and *Doe d. Prior v. Ongley* (1850), 10 C. B. 25; see also note (*e*), p. 388, ante, and title LANDLORD AND TENANT.

(*f*) Real Property Limitation Act, 1833 (3 & 4 Will. 4, c. 27), s. 2; this section, on which *Magdalen Hospital (President and Governors) v. Knotts*, cited in next note, was decided, was repealed by Real Property Limitation Act, 1874 (37 & 38 Vict. c. 59), s. 9, but was re-enacted by s. 1 of that Act with the substitution of twelve years for twenty as the statutory limit.

(*g*) *Magdalen Hospital (President and Governors) v. Knotts* (1879), 4 App. Cas. 324, and according to Bac. Abr., tit. Leases and Terms for Years, O, ed. 1832, p. 852, the doctrine of estoppel does not apply to Crown leases "because the King cannot be estopped, for it cannot be presumed the King would do wrong to any person, and therefore being deceived in his grant makes it absolutely void," but there seem to be no cases on the point.

(*h*) Co. Litt. 47 b; *England d. Syburn v. Slade* (1792), 4 Term Rep. 682; *Doe d. Lowden v. Watson* (1817), 2 Stark. 230; *Fenner v. Duplock* (1824), 2 Bing. 10; *Hill v. Saunders* (1825), 4 B. & C. 529; *Doe d. Jackson v. Ramsbotham* (1815), 3 M. & S. 516; *Doe d. Higginbotham v. Barton* (1840), 11 Ad. & El. 307; *Downs v. Cooper* (1841), 2 Q. B. 256, where Lord DENMAN, C.J., further held that the landlord must also be estopped from treating as his tenant a person whom he has required to enter into that relation with another instead of himself; *Langford v. Selmes* (1857), 3 K. & J. 220, 229; *Gibbins v. Buckland* (1863), 1 H. & C. 736; *Clark v. Adie* (No. 2) (1877), 2 App. Cas. 423, per Lord BLACKBURN, at p. 435; *Wogan v. Doyle* (1883), 12 L. R. Ir. 69; *Serjeant v. Nash, Field & Co.*, [1903]

SECT. 3.

**Estoppel
between
Particular
Persons.**

Lessee may
show that
lessor's title
has deter-
mined.

But if the tenant came into possession under the lessor, the better opinion would seem to be that he must surrender possession before he disputes the lessor's title (*i*); it has, however, been held that it is not necessary that he should actually go out of possession (*k*) unless he claims to be entitled to the premises in his own right (*l*), and that it is sufficient that he should come to a new arrangement with the person who really has the title to hold under him (*m*), or that he should be evicted by a person having title paramount (*n*).

Estoppel
binds licensor
and licensee.

567. There is no distinction, so far as concerns the law of estoppel, between a licensee and a tenant, and a licensee who has obtained possession by aid of the licence, before he can show that his licensor's title has determined, must first surrender possession of the premises (*o*). But the mere fact of a person bringing goods on to demised premises by the tenant's licence does not estop him from disputing the validity of the instrument of demise under which the tenant holds (*p*).

Tenant may
dispute title
of assignee of
the lessor.

568. Where the person claiming as landlord is not the person by whom the tenant was let into possession, evidence may be received to show that the relation of landlord and tenant does not in fact exist (*q*). Thus in the case of an assignee of the

2 K. B. 304, 312, C. A.; and, as to the nature of leases by estoppel, see p. 373, *ante*.

(*i*) *Doe d. Knight v. Smythe (Lady)* (1815), 4 M. & S. 317; *Bayley v. Bradley* (1818), 5 C. B. 396, *per* WILDE, C.J. (in argument), at p. 400, commenting on Co. Litt. 47 b; compare *Doe d. Johnson v. Baytop* (1835), 3 Ad. & El. 188; *Gibbins v. Buckland* (1863), 1 H. & C. 736. To the contrary, see *England d. Syburn v. Slade* (1792), 4 Term Rep. 682. In *Bulls v. Westwood* (1809), 2 Camp. 11, Lord ELLENBOROUGH, C.J., held that a person cannot show that his landlord's title has expired without solemnly renouncing possession. but subsequently in *Doe d. Lowden v. Watson* (1817), 2 Stark. 230, he held that the defendant in an action of ejectment might show an alteration in his landlord's title. See also *Claridge v. Mackenzie* (1842), 4 Man. & G. 143, 152, and *Anon.* (1505), Keil. 65; *Knight v. Clarke* (1885), 15 Q. B. D. 294, C. A., where it was held that a writ of possession will be granted to a landlord against a tenant in an action of ejectment, even though the landlord's title has expired before the trial of the action, unless the defendant can show affirmatively that it will be unjust and futile to issue the writ (following *Gibbins v. Buckland, supra*); and compare *Doe d. Olun (Bailiff etc.) v. Clarke* (1809), Peake, Add. Cas. 239.

(*k*) *Mountney v. Collier* (1853), 1 E. & B. 630, *per* COLERIDGE, J., at p. 636.

(*l*) *Bayley v. Bradley, supra*.

(*m*) *Mountney v. Collier, supra*; compare *Gibbins v. Buckland, supra*.

(*n*) *Doe d. Hugginbotham v. Barton* (1840), 11 Ad. & El. 307; *Cuthbertson v. Irving* (1859), 4 H. & N. 742 (affirmed (1860), 6 H. & N. 135, Ex. Ch.), *per* MARTIN, B., at p. 757. It has been held that a constructive eviction is sufficient for this purpose (*Poole Corporation v. Whitt* (1846), 15 M. & W. 571, *per* POLLOCK, C.B., at p. 577); but doubt has been thrown on this owing to the risk of collusion between a tenant and a third party with the object of depriving the lessor of his rights (*Delaney v. Fox* (1875), 2 C. B. (N. S.) 768, *per* COCKBURN, C.J., at p. 775, distinguishing *Watson v. Lane* (1856), 11 Exch. 769, and discussing *Poole Corporation v. Whitt, supra*).

(*o*) *Doe d. Johnson v. Baytop* (1835), 3 Ad. & El. 188.

(*p*) *Tadman v. Henman*, [1893] 2 Q. B. 168.

(*q*) *Cornish v. Searell* (1828), 8 B. & C. 471; *Claridge v. Mackenzie* (1842), 4 Man. & G. 143; compare *Ford v. Ager* (1863), 2 H. & C. 279. In *Fenner v. Duplock* (1824), 2 Bing. 10, it was held that a tenant who on the expiration of

lessor, though he is to all intents and purposes in the same situation as the lessor, and takes the benefit of and is bound by a lease by estoppel, the lessee is not estopped from showing that the lessor had no such title as he could pass to the assignee, or that the person claiming to be the assignee is not in fact the true assignee (*r*).

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Again, payment of rent to a person by whom the tenant was not let into possession is only *prima facie* evidence of a tenancy, and a tenant is not estopped by such payment from disputing the title of the person to whom such payment has been made (*s*); he may show that rent was paid *de bene esse* (*a*), or through a mistake (*b*), or in consequence of a misrepresentation by the person receiving the rent (*c*), but in any case he must show a better title in someone else, and he is not allowed simply to impeach the title of the person to whom he has paid rent (*d*).

Payment of
rent not
conclusive
admission
of title.

his term entered into a new tenancy with the original lessor, being ignorant of the fact that in the meantime the lessor's title had determined, was not estopped from subsequently disputing the lessor's title at the time of the fresh demise. But it is not easy to understand the principle upon which this decision was based.

(*r*) *Barwick d. Richmond Corporation v. Thompson* (1798), 7 Term Rep. 488; *Parker v. Manning* (1798), 7 Term Rep. 537; *Rennie v. Robinson* (1823), 1 Bing. 147; *Curvick v. Blagrove* (1820), 4 Moore (C. P.), 303; *Doe d. Colomere v. Whitroe* (1822), Dow. & Ry. (N. P.) 1; *Seymour v. Franco* (1823), 7 L. J. (O. S.) (K. B.) 18; *Jew v. Wood* (1811), Cr. & Ph. 185; *Gouldsworth v. Knights* (1843), 11 M. & W. 337, 313; *Doe d. Marlow v. Wiggins* (1843), 4 Q. B. 367, 375; *Sturgeon v. Wingfield* (1846), 15 M. & W. 224; *Cuthbertson v. Irving* (1859), 4 H. & N. 742 (affirmed) (1860), 6 H. & N. 135, Ex. Ch.), *per* MARTIN, B., at p. 757, a case of an assignment of a lease by a mortgagor in possession. After death of lessor who purported to demise as tenant in fee, held lessee not estopped from showing that he was only tenant for life (*Weld v. Barter* (1856), 1 H. & N. 568, Ex. Ch.).

(*s*) *Williams v. Bartholomew* (1798), 1 Bos. & P. 326, *per* BUTLER, J., at p. 328; *Doe d. Clun (Bailiff etc.) v. Clarke* (1809), Peako, Add. Cas. 239; *Rogers v. Pitcher* (1815), 6 Taunt. 202; *Gravenor v. Woodhouse* (1822), 1 Bing. 38, 43; *Fenner v. Duplock* (1824), 2 Bing. 10, where a new lease was taken from the original lessor, but the tenant was not estopped; *Gregory v. Doidge* (1826), 3 Bing. 474; *Cooper v. Blandy* (1834), 1 Bing. (N. C.) 45; *Waddilove v. Barnet* (1836), 2 Bing. (N. C.) 538; *Brook v. Biggs* (1836), 2 Bing. (N. C.) 572; *Doe d. Harvey v. Francis* (1837), 2 Mood. & R. 57; *Doe d. Plevin v. Brown* (1837), 7 Ad. & El. 447; *Hall v. Butler* (1839), 10 Ad. & El. 204; *Doe d. Higginbotham v. Barton* (1840), 11 Ad. & El. 307, *per* Lord DENMAN, C.J., at p. 313; *Jew v. Wood* (1811), Cr. & Ph. 185, *per* Lord COTTENHAM, L.C., at p. 194; *Doe d. Marlow v. Wiggins* (1813), 4 Q. B. 367; *Hitchings v. Thompson* (1850), 5 Exch. 50, as explained by Lord CRANWORTH in *A.-G. v. Stephens* (1855), 6 De G. M. & G. 111, 141; and see also *ibid.* at p. 136; *Knight v. Cox* (1856), 18 C. B. 645; *Carlton v. Bowcock* (1884), 51 L. T. 659; *Serjeant v. Nash, Field & Co.*, [1903] 2 K. B. 304, C. A.

(*a*) *Serjeant v. Nash, Field & Co.*, *supra*.

(*b*) *Rogers v. Pitcher*, *supra*; *Fenner v. Duplock*, *supra*; *Doe d. Plevin v. Brown*, *supra*; *Gravenor v. Woodhouse*, *supra*; *Hall v. Butler*, *supra*; *Cooper v. Blandy*, *supra*; *Doe d. Higginbotham v. Barton*, *supra*; *Hitchings v. Thompson*, *supra*.

(*c*) *Hall v. Butler*, *supra*; *Carlton v. Bowcock*, *supra*.

(*d*) *Carlton v. Bowcock*, *supra*; compare *Cooper v. Blandy*, *supra*. In *replevin* "receipt of rent is title" (*Johnson v. Mason* (1794), 1 Esp. 89, *per* Lord KENYON, at p. 91). But *quære* whether the *dictum* as reported goes beyond the facts of that case.

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Submission to a distress an admission of title.

569. On the other hand, submission to a distress constitutes an acknowledgment of a tenancy. The landlord after distraining cannot bring an ejectment for a cause accruing before the distress, and the occupier, if he does not replevy, is precluded from denying the title of the landlord (e). But payment of rent under threat of a distress is not a conclusive admission of title in the distrainor (f). Further, where a demise operates as an assignment of the lessor's term, so as to leave no reversion in the lessor, and consequently no right to distrain, the estoppel by which the lessee is precluded from denying his lessor's title does not prevent him denying the lessor's right to distrain (g).

But where in a deed, by which the relation of landlord and tenant is created, the want of legal estate in the lessor is apparent, the lessee is bound by the ordinary rule of estoppel between lessee and lessor, and cannot say that a distress is invalid on account of the want of the legal estate (h).

SUB-SECT. 2.—*Bailor and Bailee.*

Bailee estopped from denying bailor's title.

570. An estoppel somewhat similar to that between landlord and tenant arises from the relation of bailor and bailee. A bailee, as a general rule, is estopped from denying the title of the bailor (i) from whom he received the goods, and he is equally estopped from denying the title of one to whom he has attorned as his bailee, undertaking to hold the goods for him (k). But, as in the case of a tenant, the estoppel ceases if the bailee is evicted by title paramount (l), for if the true owner demands the goods, and the bailee refuses to deliver them to him, he is guilty of conversion (m). And, on the same principle, a bailee who has not actually had the goods taken out of his possession can set up the title of a third party against a claim by his bailor (n), but only if he defends upon the right and

(e) *Panton v. Jones* (1813), 3 Camp. 372; *Cooper v. Blandy* (1834), 1 Bing. (n. c.) 45.

(f) *Knight v. Cox* (1856), 18 C. B. 645.

(g) *Preece v. Corrie* (1828), 5 Bing. 24; *Lewis v. Baker*, [1905] 1 Ch. 46, 51.

(h) *Morton v. Woods* (1869), L. R. 4 Q. B. 293, Ex. Ch.

(i) *Biddle v. Bond* (1865), 6 B. & S. 225, per BLACKBURN, J., at p. 231, applying *MARTIN, B.*, in *Cheesman v. Exall* (1851), 6 Exch. 341, 346. As to estoppel of a bailee, see title BAILMENT, Vol. I., p. 562; and as to estoppel between principal and agent, title AGENCY, Vol. I., p. 192.

(k) *Holl v. Griffin* (1833), 10 Bing. 246; *Henderson & Co. v. Williams*, [1895] 1 Q. B. 521, C. A., per LINDLEY and SMITH, L.JJ.

(l) *Biddle v. Bond* (1865), 6 B. & S. 225, 232; citing *Shelbury v. Scotsford* (1602), Yelv. 22; *Hardman v. Willcock* (1832), 9 Bing. 382, n., where, as BLACKBURN, J., points out, the finding of fraud in the bailor was not necessary to the decision; approved in *Rogers, Sons & Co. v. Lambert & Co.*, [1891] 1 Q. B. 318, C. A., per LOPES, L.J., at p. 328, and *Ross v. Edwards & Co.* (1895), 73 L. T. 100, P. C.; *Sheridan v. New Quay Co.* (1858), 4 C. B. (n. s.) 618 (common carriers who had been employed by the purchaser from one who had no title, delivered the goods to the true owner on his request, and were allowed to set up his title); see *ibid.*, at p. 650, where the statement of the law in Story, ss. 266, 282, is commented on.

(m) *Wilson v. Anderton* (1830), 1 B. & Ad. 450, 456 (bailee of shipmaster, holding for supposed lien for freight, liable to owner of goods).

(n) *Biddle v. Bond*, *supra* (auctioneer intrusted with goods improperly seized under a distress, having been served with notice of claim by the true owner, but too late to stop their sale, was allowed to set up his title

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title and by the authority of the third party (o). The act of the third party in forbidding the bailee to part with the goods and requiring them to be retained for him is sufficient evidence of authority for this purpose (p). But it is not enough that the bailee has become aware of a third person's title; he cannot set up the title of a person who has made no claim, or has abandoned it, for that would enable him to retain the goods for himself (q). Nor is it enough that an adverse claim is made, so that he may be entitled to interplead (r).

against the bailor in an action for the proceeds), approved in *Rogers, Sons & Co. v. Lambert & Co.*, cited in next note; compare *Dixon v. Yates* (1833), 5 B. & Ad. 313, 310; see also *Oyle v. Atkinson* (1814), 5 Taunt. 759, 761; *Cheesman v. Erall* (1851), 6 Exch. 311; *Thorne v. Tilbury* (1858), 3 H. & N. 534; *European and Australian Royal Mail Co. v. Royal Mail Steam Packet Co.* (1861), 30 L. J. (C. P.) 247.

(o) *Biddle v. Bond* (1865), 6 B. & S. 225, at p. 234, approving the judgment of POLLOCK, C.B., in *Thorne v. Tilbury*, *supra*, at p. 537, qualifying the head-note in *Oyle v. Atkinson*, *supra* (in which case the judgment of GIBBS, C.J., at p. 761, is quite in accordance with the statement in the text), and followed in *Rogers, Sons & Co. v. Lambert & Co.*, [1891] 1 Q. B. 318, C. A., where the bailee was admittedly defending in his own interest only, compare *Warren v. Daring Brothers & Co., Ltd.* (1910), 51 Sol. Jo. 720.

(p) This proposition is involved in the decisions in *Biddle v. Bond*, *supra*; *Thorne v. Tilbury*, *supra* (appointment of administrator who, thereby becoming entitled to the goods, claimed them); *European and Australian Royal Mail Co. v. Royal Mail Steam Packet Co.*, *supra* (bailment of ship, subsequent mortgage by bailor, and demand of possession by mortgagee). The two last-mentioned cases illustrate the proposition of LORES, J. J., that the bailee may, like a tenant, show that the bailor's title has expired since the bailment; but *quære* whether he could do so if the person who acquired the title made no claim. See next note.

(q) *Biddle v. Bond*, *supra*, at p. 231; *Betteley v. Reel* (1843), 4 Q. B. 511, 517; *Roberts v. Ogilby* (1821), 9 Price, 269 (insurance agent cannot deny his principal's title to moneys received for him on the ground that other persons are interested). The decision and the language of the judges in *Cheesman v. Erall* (1851), 6 Exch. 311, indicate that in case of a pledge a greater latitude may be allowed to the pledgee. They founded their decision on the proposition that "a pledgor impliedly undertakes that the property pledged is his own, and may safely be returned to him," see *per* POLLOCK, C.B., and PARKE, B., at pp. 343, 344; POLLOCK, C.B., added, "and if it turns out not to be so, the pledgee may restore it to its lawful owner." In that case the pledgee of property, pledged with him for the purpose of avoiding an execution, was allowed to set up the title of third parties, although, so far as appears in the report, no claim had been made by them. This aspect of the case does not appear to have been referred to in any subsequent case; but in view of the cases cited in note (o), *supra*, it must be regarded with caution. A mortgagor of real property is never allowed to set up the title of a third person against his mortgagee, *per* Lord MANSFIELD in *Doc d. Bristow v. Pegge* (1785), 1 Term Rep. 758, n., 760, n. As to estoppel against principal by admission of agency, see title AGENCY, Vol. I., p. 192.

(r) *Biddle v. Bond*, *supra*, at p. 234. An expectation of being sued by a third party is now sufficient to entitle the bailee to interplead, see R. S. C., Ord. 57, r. 1 (a). But the interpleader will only determine as between the rival claimants which of them is entitled to the goods; and where there is an estoppel, the interpleader order will preserve the right of the party in whose favour it exists, if the goods turn out not to be his, to recover damages for conversion in an action in which the bailee will be estopped from denying the bailor's title to the goods (*Ex parte Mersey Docks and Harbour Board*, [1899] 1 Q. B. 546, C. A., following *Attenborough v. St. Katharine's Dock Co.* (1878), 3 C. P. D. 450, 455, 459, C. A.; *Rogers, Sons & Co. v. Lambert & Co.*, [1891] 1 Q. B. 318, C. A., *per* JINDLEY, L.J., at p. 327); and see *Robinson v. Jenkins* (1890), 24 Q. B. D. 275, 278, C. A.; and title INTERPLEADER.

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Circum-
 stances
 preventing
 bailor from
 setting up
ius tertii.

571. But if a warehouseman in possession of goods attorns to the buyer of them, acknowledging that he holds them for him (*s*), and upon the faith of that the buyer pays the price or the warehouseman's charges, the ordinary principles of estoppel by representation apply, and the warehouseman cannot afterwards turn round and say "The goods are not yours," setting up the *ius tertii* (*a*). And though it has been ruled that the mere acceptance by a warehouseman of an order for the delivery to a buyer of unappropriated goods out of bulk does not supply the want of an appropriation by the seller, so as to pass the property (*b*), a warehouseman who accepts without qualification from a buyer a delivery order for "twenty sacks" (apparently specific) of flour may be estopped from afterwards saying that he had not got so many sacks (or so many sacks unappropriated to other sales) belonging to the seller, and from denying that the property in twenty sacks in his possession has passed to the buyer (*c*). So a seller of unappropriated goods who accepts a delivery order from a pledgee, and assures him it is in order, whereupon he advances money to the buyer, is estopped as against him from saying that the property has not passed (*d*).

SUB-SECT. 3.—*Companies and Holders of Certificates.*

To what
 extent a
 company is
 estopped by
 its certificate.

572. A company, which issues a certificate certifying that an individual shareholder named therein is a registered shareholder of the particular shares specified, is estopped as against transferees for value who have acted to their detriment on the faith of such certificates from denying the truth of what is thus represented (*e*). But

(*a*) The mere issue of dock warrants is not such an attornment (*Attenborough v. St. Katharine's Dock Co.* (1878), 3 C. P. D. 450, C. A., as explained by SMITH, L. J., in *Henderson & Co. v. Williams*, [1895] 1 Q. B. 521, C. A., at p. 534).

(*b*) *Bibb v. Bond* (1865), 6 B. & S. 225, at pp. 231, 232 (citing *Stonard v. Dunkin* (1810), 2 Camp. 315; followed in *Gosling v. Birnie* (1831), 7 Bing. 339; applying *Flaves v. Watson* (1824), 2 B. & C. 340); followed, *Henderson & Co. v. Williams*, [1895] 1 Q. B. 521, C. A. But mere attornment, where the purchaser or pledgee knows the facts, of which the bailor is ignorant, and does not advance his money on the faith of the attornment, does not in case of eviction by title paramount prevent the bailor setting up the *ius tertii* (*Loss v. Edwards & Co.* (1895), 73 L. T. 100, P. C.).

(*b*) *Unwin v. Adams* (1858), 1 F. & F. 312: the question of estoppel was not discussed, nor was *Gillett v. Hill* (1834), 2 Cr. & M. 530, cited.

(*c*) *Gillett v. Hill*, *supra* (on presentation of the order the defendant's foreman said that "they had not more than five sacks to spare, but the order was filed in the usual manner, and a subsequent order to deliver "5 sacks *ex 20*," was accepted and acted on). A seller who carries on a separate business as a wharfinger is not estopped by giving a delivery order, addressed to himself as wharfinger, but which has not been accepted or assented to by him in that capacity, from denying the title of the holder of the order (*Gillman, Spencer & Co. v. Carbutt & Co.* (1889), 61 L. T. 281, C. A.).

(*d*) *Woodley v. Coventry* (1863), 2 H. & C. 164; compare *Seton v. Lafone* (1887), 19 Q. B. D. 68, C. A.; *Coventry v. Great Eastern Rail. Co.* (1883), 11 Q. B. D. 776, C. A. As to estoppel against an auctioneer, see title AUCTION AND AUCTIONEERS, Vol. I., p. 515.

(*e*) *Re Bahia and San Francisco Rail. Co.* (1868), L. R. 3 Q. B. 584; approved in *Société Générale de Paris v. Walker* (1885), 11 App. Cas. 20, per Lord BLACKBURN, at p. 36; *Coates v. London and South Western Rail. Co.* (1880), 41 L. T. 533; *Hart v. Frontino &c. Gold Mining Co.* (1870), L. R. 5 Exch. 111; *Re Ottos Kopje Diamond Mines, Ltd.*, [1893] 1 Ch. 618, C. A. It is submitted

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this estoppel gives no title to that which is the subject-matter of estoppel; nor does the certificate amount to an implied warranty upon which a transferee can sue (*f*). The court must look for the cause of action elsewhere upon the assumption that the company cannot dispute the facts stated in the certificate; thus, on an application by the transferee to be registered, the company, if they are estopped from denying the title of the transferor, may owe a duty to the transferee to place his name on the register of shareholders, and would therefore be liable in damages for refusing to do so (*g*). But if the transferee gave value for the transfer without seeing the certificate or relying upon its contents, the mere subsequent possession of the certificate would not give him a title to the shares or impose upon the company the duty of entering his name on the register, if at the time of the presentation of the transfer for registration the transferor had ceased to be a shareholder (*h*). It is, however, still uncertain whether and to what extent a company is bound to the transferee of shares by a statement on the certificate that no transfer will be registered without the production of the certificate (*i*), and in consequence the duty of the company to get in expired certificates also remains undefined.

that the *obiter dictum* of ROMER, L.J., in *Rainford v. James Keith and Blackman Co., Ltd.*, [1905] 2 Ch. 147, C. A., quoted at p. 151, "The only representation [contained in a certificate] is that at the date of the certificate the person named therein was the owner of the shares," is not in accordance with the above mentioned decisions, which clearly indicate that the representation is continuous; see also title COMPANIES, Vol. V., pp. 182, 183, 691.

(*f*) *Summ v. Anglo-American Telegraph Co.* (1879), 5 Q. B. D. 188, C. A., *per* BRETT, L.J., at pp. 206, 207. In this case certificates were issued on the presentation of a forged transfer. The transferee himself had no claim against the company by estoppel (see p. 410, *post*), but the certificates were pledged as security for a loan, whereby the pledgees acquired a right of action by estoppel. The loan was subsequently paid off and the certificate surrendered to the pledgor. It was held in the Court of Appeal that as the pledgees had acquired no title to the shares by estoppel (overruling LINDLEY, J.), this right of action ceased when the loan was paid off, and that consequently no right of action was transmitted to the pledgor by the surrender to him of the certificates; see title COMPANIES, Vol. V., p. 698.

(*g*) *Re Otlos Koppie Diamond Mines, Ltd.*, [1893] 1 Ch. 618, C. A., *per* BOWEN, L.J., at p. 628; *Balkis Consolidated Co. v. Tomkinson*, [1893] A. C. 396.

(*h*) *Rainford v. James Keith and Blackman Co., Ltd.*, [1905] 1 Ch. 296. *per* FARWELL, J., at p. 302. His decision was subsequently reversed, but on other grounds, [1905] 2 Ch. 147, C. A.

(*i*) *Shropshire Union Railways and Canal Co. v. R.* (1875), L. R. 7 H. L. 496, *per* Lord CAIRNS, L.C., at p. 509, approved in *Société Générale de Paris v. Walker* (1885), 11 App. Cas. 20, *per* Lord SELBORNE, at p. 29, seems to imply that the company are not so bound, but *Colonial Bank v. Whinney* (1886), 11 App. Cas. 426, *per* Lord BLACKBURN, at p. 437, quoted by FARWELL, J., in *Rainford v. James Keith and Blackman Co., Ltd.*, *supra*, is to the contrary effect. The question was specifically left undecided in the Court of Appeal (*Rainford v. James Keith and Blackman Co., Ltd.*, [1905] 2 Ch. 147, 160, C. A.), but CHANNELL, J., in *Guy v. Waterlow Brothers and Layton, Ltd.* (1909), 25 T. L. R. 515, followed FARWELL, J. The matter is one of contract, but the consequential duty (if any) might raise an estoppel; compare the *dictum* of ROMER, L.J., note (*c*), p. 408, *ante*. A person is not estopped by failing to answer a letter from the company informing him of the proposed transference of his shares (*Barton v. London and North Western Rail. Co.* (1889), 24 Q. B. D. 77, C. A.).

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No estoppel
on account of
a forged
transfer.

573. A person who produces a forged transfer to the company, and by so doing gets himself registered and a certificate issued to him, but does not further alter his position in reliance on those facts, cannot on discovery of the fraud make the company liable to him by estoppel, both because he has not acted to his prejudice on the faith of any representation by the company, and because in producing the forged transfer he himself induced the company to do the things he complains of (*k*). A further reason is that, though it is usual for companies to make inquiry of persons purporting to transfer their shares, such inquiry is for their own protection against liability to the real stockholder, and is not a duty which they owe to the transferee (*l*). The duty of a company to one who presents a transfer for registration does not seem to extend beyond a reference to its own register (*m*), though even when such a reference would have shown that an alleged transferor was not in fact on the register the company is not liable by estoppel to the transferee unless he has changed his position in reliance on the certificate (*n*).

Vendor's
shares.

574. In the case of shares stated on the certificate to be fully paid up, an estoppel is created against the company in favour of a transferee for value without notice, so that he is not liable to be placed on the list of contributories when less than the full amount has been paid on such shares (*o*).

(*k*) *Simm v. Anglo-American Telegraph Co.* (1879), 5 Q. B. D. 188, C. A., distinguishing *Re Bohia and San Francisco Rail. Co.* (1868), L. R. 3 Q. B. 584; *Hurt v. Frontino etc. Gold Mining Co.* (1870), L. R. 5 Exch. 111, as explained in *Balkis Consolidated Co. v. Tomkinson*, [1893] A. C. 396, by Lord HERSCHELL, L.C., at p. 404; compare *Starkey v. Bank of England*, [1903] A. C. 114; *Sheffield Corporation v. Barclay*, [1905] A. C. 392; *A.-G. v. Odell*, [1906] 2 Ch. 47, C. A.; *Platt v. Rowe* (1909), 26 T. L. R. 49, where the first reason given in the text was applied to a case where a supposed transferee obtained a certificate for shares to which the transferor had no title and of which third persons were the registered owners.

(*l*) *Simm v. Anglo-American Telegraph Co. supra*, at pp. 203, 209, 214. This proposition appears to be good law notwithstanding the observations of FARWELL, J., in *Dixon v. Kennaway & Co.*, [1900] 1 Ch. 833, at p. 841; see *Sheffield Corporation v. Barclay*, [1905] A. C. 392, *per* Lord DAVEY, at p. 403.

(*m*) *Balkis Consolidated Co. v. Tomkinson*, [1893] A. C. 396, *per* Lord FIELD, at pp. 412, 413; *Dixon v. Kennaway & Co. supra*; compare *Foster v. Tyne Pontoon and Dry Docks Co.* (1893), 63 L. J. (q. b.) 50, where it was held that the fact that the fraudulent person had been insolvent from the first precluded the plaintiff in any event from getting damages from the company.

(*n*) *Balkis Consolidated Co. v. Tomkinson supra*; *Dixon v. Kennaway & Co. supra*, following *Knights v. Wiffen* (1870), L. R. 5 Q. B. 660, discussed by BRETT, L.J., in *Simm v. Anglo-American Telegraph Co. supra*, at p. 212; *Platt v. Rowe supra*.

(*o*) *Bloomenthal v. Ford*, [1897] A. C. 156. S. 25 of the Companies Act, 1867 (30 & 31 Vict. c. 131), by which vendor's shares could be issued as fully paid up on registration of the contract, has been repealed by s. 33 of the Companies Act, 1900 (63 & 64 Vict. c. 48), and remains repealed under the Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69). As disputes may arise on certificates issued before the later Acts, it may be well to quote the principal cases where the company has been estopped, as against transferees for value without notice, from denying that the shares were fully paid up, though no contract was registered: *Burkinshaw v. Nicolls* (1878), 3 App. Cas. 1004; *Barrow's Case* (1880), 14 Ch. D. 432, C. A., where it was held that a holder for value without notice could give a good title to a transferee who had notice that the shares were not fully paid; *Re*

575. The register of members of a company is only *primâ facie* evidence of matters inserted therein (*p*), but in the case of Government stock, the holders of which are registered in the books of the Bank of England, the bank is estopped from denying that the persons whose names are registered are the holders of stock, even if the original transfer of such stock was a forgery (*q*). A person whose name is on the register of a company, and who exercises acts of ownership over the shares standing in his name, is estopped in an action for the amount of unpaid calls from denying that the register is correct (*r*).

SECT. 8.
Estoppel
between
Particular
Persons.

The com-
pany's
register.

576. A certification given in the ordinary way of business by a proper officer of the company amounts to no more than a representation that the transferor has produced to him such documents as on the face of them show a *primâ facie* title in the transferor to transfer the shares mentioned in the transfer (*s*). The ostensible authority of a secretary of a company in this respect does not extend beyond giving a receipt or an acknowledgment for certificates and documents of title which have been actually lodged with him, and the company is not, at least when the secretary acts fraudulently for his own purposes, estopped by his certification acknowledging the receipt of certificates which have not been lodged (*a*). In any

To what
extent a
company is
estopped by a
certification.

Hall (A. IV.) & Co. (1887), 37 Ch. D. 712; *Christchurch Gas Co. v. Kelly* (1887), 51 J. P. 374 (directors' shares); *Parbury's Case*, [1896] 1 Ch. 100. But where persons taking such shares were fully aware that they were vendor's shares, and in fact did not rely on the certificate, they were precluded from raising an estoppel (*Markham and Darter's Case*, [1899] 1 Ch. 414; *Bloomenthal v. Ford*, [1897] A. C. 156, *per* Lord HERSCHHELL, at p. 167; *Re London Celluloid Co.* (1888), 39 Ch. D. 190, C. A.; as to when third parties are taken to be allottees, see *Carling, Hespeler, and Walsli's Cases* (1875), 1 Ch. D. 115, C. A.; *Re Newport and South Wales Shipowner's Co.*, *Rowland's Case*, [1880] W. N. 80, C. A.; *Re Vulcan Ironworks Co.*, [1885] W. N. 120.

(*p*) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 33.

(*q*) *Davis v. Bank of England* (1824), 2 Bing. 393, 407; *Bank of England v. Cutler*, [1908] 2 K. B. 208, 234, C. A.; compare *Hare v. London and North Western Rail. Co.* (1860), John. 722, as an instance of the case of an ordinary company where registration made on account of a forged transfer was held to be of no effect.

(*r*) *Crawley's Case* (1869), 4 Ch. App. 322; *Re Railway Time Tables Publishing Co., Ex parte Sandys* (1889), 42 Ch. D. 98, C. A.; compare *Hull Flax Co. v. Wellesley* (1860), 6 H. & N. 38. But a company is not estopped by sending a dividend warrant from denying the payee's title to the shares (*Poster v. Tyne Pontoon and Dry Docks Co.* (1893), 63 L. J. (Q. B.) 50).

(*s*) *Bishop v. Balkis Consolidated Co.* (1890), 25 Q. B. D. 512, 519, C. A.; compare *Longman v. Bath Electric Tramways, Ltd.*, [1905] 1 Ch. 648, C. A.

(*a*) *Whitechurch (George), Ltd. v. Cavanagh*, [1902] A. C. 117, 125, 126, 134. In *Bishop v. Balkis Consolidated Co.*, *supra*, a certificate including the shares purporting to have been transferred had been lodged with the company in respect, not of the transfer in question, but of an earlier transfer of the same shares, and it was said that the company was estopped from denying the truth of the facts certified. This decision may perhaps be supported on the ground of the absence of fraud (see *per* Lord BRAMPTON in *Whitechurch (George), Ltd. v. Cavanagh*, *supra*, at p. 139), but in view of the judgment of Lord MACNAGHTEN in the case last cited it would seem that this part of the judgment cannot now be regarded as correct; and see *Platt v. Rowe* (1909), 26 T. L. R. 49; see also the comments in *McKay's Case*, [1896] 2 Ch. 767, *per* VAUGHAN WILLIAMS, J., at p. 761, where he professed himself bound by, but unable to understand, the decision. The remarks of Lord MACNAGHTEN in *Whitechurch (George)*,

SECT. 3.
**Estoppel
 between
 Particular
 Persons.**

Blank
 transfers.

case, certification is not a document or warranty of title, and the company is not estopped by it from showing that the transferor had no title or a defective title to the shares mentioned in the certificate stated to have been lodged (*b*).

577. A person who signs a blank transfer in order to enable his broker to fill it up with particular shares is estopped from asserting that he signed the transfer in blank, so as to show that it is void in law (*c*), provided that the broker carried out his instructions; but where a broker has so acted as to make the whole transaction a forgery, filling up the transfer with a description of shares other than those specified, and has stolen the certificate of such shares in order to enable him to effect his purpose, the conduct of the transferor in executing the deed in blank is not the real or proximate cause of the loss occasioned, and he is not estopped from asserting the true facts in an action against the company for wrongfully removing his name from the register (*d*).

So in the absence of any mercantile usage creating an element of negotiability there is no estoppel in favour of a person who takes a transfer in blank and fills up the blanks in his own favour without the consent or knowledge of the original transferor (*e*).

In cases where the certificate contains on the back a blank form of transfer, and the practice is for such documents to pass from hand to hand, then, when the transfers are duly signed by the registered holders of the shares, each prior holder confers upon the *bonâ fide* holder for value of the certificates for the time being an authority to fill in the name of the transferee, and is estopped from denying such authority; but a title by unregistered transfer is not equivalent to what has been termed the legal estate in the shares or to the complete dominion over them (*f*).

Ltd. v. Cavanagh, [1902] A. C. 117, at p. 124, approved by Lord BRAMPTON at p. 139, indicate that the secretary of a company would not now be held to have ostensible authority to represent as fully paid up shares which were not so, in which case the decision in *McKay's Case*, [1896] 2 Ch. 757, even upon the assumption that the certificate had been lodged, can only be supported upon the ground suggested by Lord BRAMPTON.

(*b*) *Bishop v. Balkis Consolidated Co.* (1890), 25 Q. B. D. 512, C. A., approved by Lord BRAMPTON in *Whitechurch (George), Ltd. v. Cavanagh*, *supra*, at p. 138.

(*c*) As in *Hibblewhite v. M'Morine* (1840), 6 M. & W. 200; *France v. Clark* (1884), 26 Ch. D. 257, 263, C. A. As to the duty of one who signs a blank transfer not to hinder registration, see *Hooper v. Herts*, [1906] 1 Ch. 549, C. A.

(*d*) *Swan v. North British Australasian Co.* (1863), 2 H. & C. 175, Ex. Ch., disapproving, at p. 182, *Coles v. Bank of England* (1839), 10 Ad. & El. 437; explained by Sir G. MELLISH, L.J., in *Hunter v. Walters* (1871), 7 Ch. App. 75, 87; compare *Sheffield and Manchester Rail. Co. v. Woodcock* (1841), 7 M. & W. 574, 583; *Taylor v. Great Indian Peninsula Rail. Co.* (1859), 4 De G. & J. 559, C. A.; and as to negligence being the proximate cause of loss, *Merchants of Staple of England (Mayor etc.) v. Bank of England (Governor & Co.)* (1887), 21 Q. B. D. 160, C. A., following *Bank of Ireland (Governor & Co.) v. Evans' Charities in Ireland (Trustees)* (1855), 5 H. L. Cas. 389; and p. 400, *ante*. As to signature of blank transfers by executors, see title COMPANIES, Vol. V., p. 192.

(*e*) *France v. Clark* (1884), 26 Ch. D. 257, 262, C. A.; followed in *Fox v. Martin*, [1895] W. N. 36; *Montagu (Samuel) & Co. v. Weston, Clevedon and Portishead Light Railways Co.* (1903), 19 T. L. R. 272; compare *Taylor v. Great Indian Peninsula Rail. Co.*, *supra*.

(*f*) *Colonial Bank v. Hepworth* (1887), 36 Ch. D. 36, *per* CHITTY, J., at p. 53.

SUB-SECT. 4.—*Patentee and Licensee.*

SECT. 3.

**Estoppel
between
Particular
Persons.**

Licensee
estopped from
denying
validity.

578. An estoppel which is very closely analogous to that between landlord and tenant exists between a patentee and his licensee. In some of the cases, as in the case of a lease, the estoppel has been by deed (*g*); but apart from this, as a tenant is estopped from disputing his landlord's title, so the licensee of a patent under agreement with the patentee, so long as he continues to act under the licence (*h*), or during the continuance of the agreement, is not at liberty to dispute the validity of the patent (*i*). The analogy between a licensee and a tenant is very exact: "So long as the lease remains in force, and the tenant has not been evicted from the land, he is estopped from denying the lessor's title to that land; but he is entitled to show that a particular parcel was never comprised in the lease. So a licensee may show that the particular thing he has done was not included in the patent, and that he has done it as one of the public, and is therefore not bound to pay royalty for it. If he has used that which is in the patent, and which his licence authorises him to use, then like a tenant under a lease he is estopped from denying the patentee's right, and must pay royalty. Though a stranger can show that the patent was bad (*k*), the licensee must not do so" (*l*).

On a somewhat different principle, a patentee after assignment of the patent is, as between himself and the assignee, and those claiming under him, estopped from disputing the validity of the patent (*m*).

But a bank taking such securities from a professional money-lender is not such a *bond fide* holder for value as to be protected by estoppel (*Sheffield (Earl) v. London Joint Stock Bank* (1888), 13 App. Cas. 333).

(*g*) *Smith v. Scott* (1859), 6 C. B. (n. s.) 771 (defendant estopped by his deed from denying (*a*) that it gave an exclusive licence, and (*b*) that the plaintiff was the true and first inventor), following *Bowman v. Taylor* (1834), 2 Ad. & El. 278, and followed in *Hills v. Laming* (1853), 9 Exch. 256, and distinguishing *Hayne v. Maltby* (1789), 3 Term Rep. 438, which was decided by all the judges on the ground that the licensee was in the position of a tenant who has been ejected by title paramount, and by Lord KENYON, C.J., and ASHURST, J., also on the ground of fraud.

(*h*) The estoppel does not continue after the expiration of the licence (*Goucher v. Clayton* (1865), 34 L. J. (O.N.) 239; compare *Dangerfield v. Jones* (1865), 13 L. T. 142), nor does it bind an equitable assignee of the licence who is not acting under it (*Pidling v. Franks* (1849), 1 Mac. & G. 56; followed, *Baxter v. Combe* (1850), 1 L. Ch. R. 284, 289), nor does it bind a purchaser from the licensee (*Villette Safety Razor Co. v. Gamage (J. W.), Ltd.* (1909), 25 T. L. R. 808).

(*i*) *Crossley v. Dixon* (1863), 10 H. L. Cas. 293; compare *Cutler v. Bower* (1848), 11 Q. B. 973; *Laves v. Purser* (1856), 6 E. & B. 930; and *Noton v. Brooks* (1861), 7 H. & N. 499, where the question turned rather on consideration than estoppel.

(*k*) As actually occurred in *Grover and Baker Sewing Machine Co. v. Millard* (1862), 8 Jur. (N. S.) 713.

(*l*) *Clark v. Adie* (No. 2) (1877), 2 App. Cas. 423, per Lord BLACKBURN, at p. 433.

(*m*) *Walton v. Lavater* (1860), 8 C. B. (n. s.) 162, 180, 186. This seems to rest on the ordinary principle of estoppel by conduct, and on the rule that a man cannot derogate from his own grant. It does not apply as between a patentee after bankruptcy and the assignee of his trustee in bankruptcy (*Smith v. Cropper* (1885), 10 App. Cas. 249); nor does it bind a person who, after the assignment, becomes a partner of the assignor (*Heugh v. Chamberlain* (1877), 25 W. R. 742); and see title PATENTS AND DESIGNS.

ESTOYERS.

See COMMONS.

ESTRAYS.

See ANIMALS ; CONSTITUTIONAL LAW.

ESTREAT.

See CRIMINAL LAW AND PROCEDURE.

EVICITION.

See COUNTY COURTS ; LANDLORD AND TENANT

EVIDENCE.

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Part I.—Introductory.

SECT. 1.—*Functions of the Law of Evidence.*

579. In every system of jurisprudence it is recognised that, before a fact is accepted and acted upon, it must be proved. Evidence is the foundation of proof, with which it must not be confounded. Proof is that which leads to a conclusion as to the truth or falsity of alleged facts which are the subject of inquiry. Evidence, if accepted and believed, results in proof, but it is not necessarily proof of itself. The amount of evidence necessary to establish proof, the quality of the evidence which will be accepted, and the manner in which it may be given vary according to the usages of each country, but all systems recognise that, at least in theory, facts require to be proved. Proof.

The rules which regulate the admission or rejection of evidence are many and complex. They belong to the realm of procedure, and have been formulated in a few Acts of Parliament and an enormous number of judicial decisions spreading over the last hundred and fifty years.

580. The necessity of applying the law of evidence presupposes two things— Foundations of evidence.

- (a) The existence of a court, or of some tribunal in the nature of a court, whose duty it is to ascertain facts;
- (b) An issue to be determined.

581. Given the forum and given the issue to be determined, the next question which arises is by what evidence is the court to be guided. The rules which govern the procedure of the court with reference to the admission or rejection of evidence constitute what is known as the law of evidence (*a*). Law of evidence.

(*a*) Under the Judicature Acts the Rulo Committee may make rules for regulating in the High Court of Justice the means by which particular facts may be proved, and the mode in which evidence thereof may be given: (*a*) on any application in any matter or proceeding relating to the distribution of any fund or property, whether in court or not; and (*b*) on any application upon summons for directions pursuant to such rules (Judicature (Procedure) Act, 1894 (57 & 58 Vict. c. 16), s. 3). The power to dispense with the technical rules of evidence depends entirely upon that Act (*Baerlein v. Chartered Mercantile Bank*, [1895] 2 Ch. 488, C. A.). Even when justices are sitting in an administrative capacity they may refuse to hear statements not made on oath (*R. v. Sharman, Ex parte Denton*, [1898] 1 Q. B. 578). Arbitrators are bound by the same rules

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of Evidence.The *lex fori*.

582. The *lex fori* must determine all questions relating to the admission or rejection of evidence. The questions are to be determined "by the law of the country where the question arises, where the remedy is sought to be enforced, and where the court sits to enforce it" (b). It follows that if it is desired in an English court to prove a foreign document, then, although such document may be provable in its country of origin by the production of a copy, it cannot be so proved in the English court unless the circumstances are such as to render the copy admissible by English law (c).

The cardinal
rules.

583. There are two cardinal rules of evidence to be remembered—

(a) The facts of which evidence is tendered must be relevant to the issue to be tried;

(b) The *best evidence* procurable—in other words, *primary evidence*—must be given of the facts sought to be proved (d).

Facts
relevant to
the issue.

584. Facts relevant to the issue are those facts which, either directly or inferentially, lead to one of the conclusions necessary to proof or disproof of that which is affirmed. The facts which directly lead to such a conclusion are those essential to the issue. The facts which inferentially lead to such a conclusion are those which raise a presumption as to the existence of the facts essential to the issue.

The "*res
gestæ*."

585. The facts necessarily involved in the determination of the issue are sometimes defined as the *res gestæ*, and the rule as to what facts form part of the *res gestæ*, and are consequently provable as facts relevant to the issue, has been well stated as including "acts, declarations, and incidents which constitute, accompany, and explain the facts or transaction in issue" (e). Facts inferentially relevant are usually those which are either the cause or the effect of those directly relevant, and which consequently go, by inference, to prove them, but, as just stated, the inference may be wider and may be drawn from facts which either accompany or explain the transaction in issue (f). Care must of course be taken that the facts sought to be proved as part of the "*res gestæ*" are not in reality what is known as "*res inter alios actæ*" (g). Any fact forming part of the transaction being inquired into is sufficiently connected therewith to be provable, although it may not itself be in issue (h).

of evidence as counts of law (*Re Enoch and Zaretsky, Bock & Co.'s Arbitration*, [1910] 1 K. B. 327, C. A.; and see p. 433, *post*).

(b) *Bain v. Whitehaven and Furness Junction Rail. Co.* (1850), 3 H. L. Cas. 1; *Hamlyn & Co. v. Talisker Distillery*, [1894] A. C. 203.

(c) *Brown v. Thornton* (1837), 6 Ad. & El. 185; *Clark v. Mullick* (1840), 5 Moo. P. C. C. 252. For the circumstances under which a copy of an original document is admissible according to English law, see pp. 518 *et seq.*, *post*.

(d) As to this rule in relation to criminal cases, see title CRIMINAL LAW AND PROCEDURE, Vol. IX., pp. 390–393.

(e) The explanations must be themselves relevant to the issue. As to evidence of similar acts, see p. 450, *post*.

(f) *Rouch v. Great Western Rail. Co.* (1841), 1 Q. B. 51.

(g) *Hyde v. Palmer* (1863), 32 L. J. (Q. B.) 126; *Wright v. Tatham* (1838), 5 Cl. & Fin. 670, H. L.; *Agassiz v. London Tramway Co.* (1872), 21 W. R. 199.

(h) *R. v. Ellis* (1826), 6 B. & C. 145; *Carmarthen and Cardigan Rail. Co. v. Manchester and Milford Rail. Co.* (1873), L. R. 8 C. P. 685.

It is the function of the judge to determine what is and what is not relevant to the issue, and consequently to ascertain what the issue is. At one time the issue—i.e., the point to be determined—was to be discovered in the pleadings, and those documents were framed with much care in order that the litigants should define in and the court should ascertain from the pleadings the nature of the issue. In modern times some causes are tried without pleadings, and even in those where pleadings have survived they are subject to frequent and immediate amendment at the hearing “so as to raise the real issue to be tried”⁽ⁱ⁾. The credibility of testimony is a question of fact to be determined by the jury, if the case is being tried before one, or by the judge, as a jury, if it is not; but the admissibility of evidence must be decided, as a preliminary question, by the judge as such when it is tendered, and it is consequently for him to discover what the issue is: this he must do, in the absence of pleadings, from the opening of the case, from such documents as are before him, and from such evidence as has been given without objection before any question of admissibility arises.

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586. Having once admitted evidence, the duty of the judge is confined to directing the jury (if there be one and the necessity for such direction arises) as to the rules of law regarding corroboration^(j), or the value to be attached to certain classes of testimony^(k), and to commenting in his summing up, if he thinks the case requires it, on the volume and the value of the evidence given^(l).

Function of
the judge.

587. It having been settled that the fact of which proof is tendered is one relevant to the inquiry, the question then arises, How may it be proved? And this leads to the second cardinal rule above stated, namely, that the best evidence must always be given; in other words, the evidence which affords the greatest certainty of the fact in question. The reasons for this rule are sufficiently obvious. Why should a litigant tender evidence less direct and consequently less convincing than other existing and attainable evidence unless for some reason which would make it improper for the court to receive it^(m)? Thus, if a fact is to be proved by oral evidence, it is obvious that the evidence must be that of a person who has directly perceived the fact to which he testifies. Equally, if something is alleged to have been seen, the evidence must be that of the person who says he saw it; if heard, that of the person who says he heard it; otherwise it would be impossible to test by cross-examination the truth of the testimony, and the

Best evidence

(i) See title PLEADING.

(j) Corroboration is essential in cases of breach of promise and of bastardy, and is in practice generally required where a claim is made against the estate of a dead person. See p. 603, *post*.

(k) As in cases where evidence has been given by an accomplice, or by an unsworn child.

(l) See *Heslop v. Chapman* (1853), 2 C. L. R. 139, Ex. Ch.

(m) *Twoyman v. Knowles* (1853), 22 L. J. (Q. B.) 143; *Drewster v. Sewell* (1820), 3 B. & Ald. 296; *Strother v. Barr* (1828), 5 Bing. 136.

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law rejects evidence which cannot be adequately tested (*n*). Similarly, where the transaction sought to be proved is primarily evidenced by a writing, as in the case of a written contract, the writing, if it exists and is obtainable, must be produced (*o*). It is again obvious that it would be improper for the court to rely upon a possibly imperfect copy of an original when the original itself can be produced, or to accept the recollection of witnesses which may be faulty, as to the contents of a document, when the document can itself be referred to. For the same reasons it follows that when a preliminary written agreement has been followed by a deed, the deed, having superseded the written agreement, must be itself produced (*p*); also that in cases where oral testimony should be given, but the court has allowed such testimony to be embodied in depositions, the depositions can only be given in evidence on proof that the witnesses themselves are unable to attend the court (*q*).

The rule as to the production of the best evidence is inflexible, and the mind of the court is invariably alert to discover, when evidence of an alleged fact is tendered, whether it is not within the power of the persons tendering it to produce better evidence of the same fact, and if the court is satisfied that better evidence can be produced it will insist—although possibly an adjournment of the case be involved—upon the production thereof.

Secondary
evidence.

588. In the unavoidable absence of the best or primary evidence the court will accept what is known as secondary evidence. Secondary evidence is evidence which suggests, on the face of it, that other and better evidence exists. It follows that it will never be received until the party tendering it proves that it is out of his power to obtain the best evidence. The fact that secondary evidence is receivable is sometimes stated as forming an exception to the rule which provides that the best evidence alone can be given. This is an error. So far from forming an exception to the rule, it is the logical outcome of it, for, as secondary evidence may only be given when the party tendering it has proved that primary evidence is not obtainable, the secondary evidence becomes the best which the court can procure and consequently satisfies the rule (*r*).

How second-
ary evidence
of a document
may be given.

589. When once it has been proved that a document exists, but that, for reasons which admit the giving of secondary evidence, it cannot be produced, then the contents may be proved by other means, *e.g.*, by the production of a certified copy (*s*), an office copy, any copy which it can be proved has been made from the original and is

(*n*) *A.-G. v. Davison* (1825), 1 M'Cle. & Yo. 160, Ex. Ch.; *Fitzgerald v. Fitzgerald* (1863), 3 Sw. & Tr. 397; *Steinkeller v. Newton* (1838), 9 C. & P. 313; *Allen v. Allen*, [1894] P. 248, O. A.

(*o*) See p. 517, *post*.

(*p*) *Williams v. Morgan* (1850), 15 Q. B. 782.

(*q*) R. S. C., Ord. 37, r. 18.

(*r*) For the occasions on which secondary evidence of a document may be given, see p. 518, *post*.

(*s*) Many public documents, certificates, certified copies of documents, and of entries in registers etc. are by statute made evidence in courts of law, provided they are authenticated as the statute requires. For a detailed list of such documents and of the statutes under which they are made evidence, see pp. 525 *et seq.*, *post*.

correct (a), a counterpart, or by oral evidence as to the contents of the document given by a person who has seen it and is able to swear that he recollects the contents. The statements of deceased persons as to the contents of a lost document, if made under such circumstances as make the statements receivable in evidence, can also be given as secondary evidence (b).

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590. An important example of the rule which provides that the best evidence must always be given is found in the fact that, subject to exceptions presently stated, hearsay is not admitted. A witness cannot be called, in proof of a fact, to state that he heard someone else state it to be one. The reason lies, first, in the fallibility of human nature and human memory, which is found habitually to affect the accuracy of a narrative that passes through several persons; secondly, in the impossibility of testing the truthfulness of a statement not made by the witness who is repeating it, but by a person not called; and, thirdly, in the opportunities which any other rule would offer to fraudulent persons wishful to put into the mouths of others statements which they had never made (c).

Hearsay.

Care must be taken to distinguish between evidence which is tendered to prove that someone else has spoken certain words when the fact of which proof is required is merely the speaking, and evidence which is tendered to prove that someone else has spoken certain words as leading to a conclusion that the words spoken were true. The former is admissible (as in cases where the uttering of a slander has to be proved); the latter is not.

591. Salutary as is the rule regarding the rejection of hearsay, it is manifest that certain statements by the parties must have an important bearing upon the determination of the issue, although, strictly speaking, such statements, when not proved out of the mouth of the person who made them, amount to nothing more nor less than hearsay. The various statements of which it has been found necessary to admit proof, although the proof be not given by the person responsible for the statement, may be either written or verbal. They are termed exceptions to the rule regarding the rejection of hearsay.

Exceptions
to the rule
regarding
hearsay.

592. The first exception, and the one most usually met with in practice, is that which allows admissions made by one of the parties to be proved. The admission is evidence against the party making it, but not in his favour. What a person admits against himself may reasonably be supposed to be true, although it is more than possible that he might fabricate statements in his favour or even make them, when untrue, in the belief that they were true. Consequently the former statements are admissible; the

Admissions of
one of the
parties.

(a) A copy which has merely been examined with a draft, the draft itself not having been examined with the original, will be rejected (*Re Halifax Commercial Banking Co. and Wood* (1898), 79 L. T. 183).

(b) See p. 518, *post*.

(c) As to the antiquity of the rule as to hearsay, see 2 Hawk. P. C., c. 46, s. 14 (8th ed., p. 596); *Wright v. Doe d. Tatham* (1837), 7 Ad. & El. 313, Ex. Ch.

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latter are not (*d*). An admission may be written or verbal. Thus, an entry in a book kept by a party or by his firm cannot, strictly speaking, be evidence in his favour, although it may be evidence against him (*e*). In practice witnesses are frequently allowed to look at their books while giving evidence (*f*), but this is justified only by the rule which allows a witness to refresh his memory by looking at any note which he has made at the time. The fact that a witness is allowed to look at a document when in the box—whether it be a book of account or any other document—does not make the document evidence against his opponent unless his opponent calls for it, asks questions upon it, and thus does what is called “puts it in,” *i.e.*, makes it evidence in the cause.

Besides verbal or written admissions, a party may admit by conduct; that is to say, he may so acquiesce in certain conditions, or in certain statements made by others, that it would be unjust to allow him afterwards to deny the propriety of the one or the truth of the other (*g*). Admissions may also be made not only by the parties, but by any person who is, by his relation to the party, in a position to bind him by the admission (*h*), *e.g.*, by a person jointly interested with the party against whom the evidence is tendered, or by the latter's predecessor in title (*i*).

Declarations
of deceased
persons—
when
admissible.

593. The next exception to the rule that hearsay will be rejected is afforded by the fact that in certain circumstances the statements—or declarations, as they are more usually called—of deceased persons are admissible in evidence (*k*).

Declarations of deceased persons to be so admissible must have been made—

- (a) Against the pecuniary or proprietary interest of the deceased when he made it (*l*);
- (b) In the course of business, or of duty in the nature of business (*m*);
- (c) As to public rights (*n*);
- (d) As to pedigree and ancient possession (*o*);

(*d*) *Darby v. Ouseley* (1836), 1 H. & N. 1; *R. v. Erdheim*, [1896] 2 Q. B. 260, C. C. R.; *Heane v. Rogers* (1829), 9 B. & C. 577, 586.

(*e*) *Smyth v. Anderson* (1819), 7 C. B. 21.

(*f*) *R. v. Worth (Inhabitants)* (1843), 4 Q. B. 132, 139.

(*g*) *La Banque Jacques-Cartier v. La Banque d'Epargne de la Cité et du District Montreal* (1887), 13 App. Cas. 118; *Moriarty v. London, Chatham and Dover Rail. Co.* (1870), L. R. 5 Q. B. 314; and see title ESTOPPEL, p. 388, *ante*.

(*h*) Confessions are a common form of admission. See p. 456, *post*; *Petch v. Lyon* (1816), 9 Q. B. 147; and title CRIMINAL LAW AND PROCEDURE, Vol. IX., pp. 384—400.

(*i*) *Great Western Rail. Co. v. Willis* (1865), 18 C. B. (N. S.) 748; and see title AGENCY, Vol. I., p. 215. As to evidence of acts done by an agent or servant being evidence against the principal or employer, see *ibid* pp 217, 218, and title MASTER AND SERVANT.

(*k*) See p. 463, *post*.

(*l*) See p. 463, *post*.

(*m*) See p. 461, *post*.

(*n*) See p. 467, *post*.

(*o*) See p. 469, *post*.

(e) When dying, as to the cause of death (*p*); or

(f) With reference to the deceased's testamentary intentions in the contents of his will (*q*).

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594. The two cardinal rules with reference to the giving of evidence and the exceptions to that which provides that the best evidence must always be given having been set out, it remains to consider—

When facts must be proved in a specific way.

(a) Circumstances in which facts must be proved in a certain way;

(b) Circumstances in which facts do not require to be proved;

(c) Circumstances in which alleged facts may not be proved at all.

595. The circumstances in which facts have to be proved in a certain way are those in which the statute or the common law has provided that no action shall succeed unless founded on a written document. They are:—

Cases in which a writing is necessary.

(a) Actions brought on the promise of an executor to be personally liable. This is statutory and is provided for by s. 4 of the Statute of Frauds (*r*). The promise, or some memorandum thereof, must be in writing and signed by the party to be charged or some person thereunto by him lawfully authorised. The agreement must embody the consideration (*s*).

(b) Actions brought on the promise of one to be answerable for the present or future debt of another (*t*). The agreement need not disclose a consideration on the face of it (*u*), but a consideration must be proved (*x*).

(c) Actions brought on a promise in consideration of marriage (*y*).

(d) Actions on contracts not to be performed within a year from the making thereof (*z*). This is also provided for by s. 4 of the Statute of Frauds and is subject to the same provision regarding the necessity for a written agreement or some memorandum thereof. When the contract sued on is capable of being performed within a year from the date when made the statute has no

(*p*) See p. 471, *post*, and title CRIMINAL LAW AND PROCEDURE, Vol. IX., pp. 393, 589.

(*q*) See p. 471, *post*.

(*r*) 29 Car. 2, c. 3, s. 4.

(*s*) *Runn v. Hughes* (1778), 4 Bro. Parl. Cas. 27; and see title EXECUTORS AND ADMINISTRATORS.

(*t*) Statute of Frauds (29 Car. 2, c. 3), s. 4.

(*u*) Mercantile Law Amendment Act, 1856 (19 & 20 Vict. c. 97), s. 3.

(*x*) *Semple v. Pink* (1847), 1 Exch. 74; *Holmes v. Mitchell* (1859), 7 C. B. (N. S.) 361. See titles CONTRACT, Vol. VII., p. 362; GUARANTEE.

(*y*) Statute of Frauds (29 Car. 2, c. 3), s. 4. The section does not, it is to be observed, deal with promises to marry, but with contracts to do something—as, for example, to pay money—in consideration of marriage; and see title CONTRACT, Vol. VII., p. 364.

(*z*) *Ibid.* This provision applies to an agreement for the sale of goods which is not to be performed within a year, notwithstanding the repeal of s. 16 by the Sale of Goods Act, 1893 (56 & 57 Vict. c. 71); *Prested Miners Co., Ltd. v. Garner, Ltd.*, [1910] 2 K. B. 776.

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application (a), but on the other hand, if the contract on the face of it is for longer, but may be determined by a contingency arising within the year, the statute applies (b).

(e) Actions on contracts to let or sell land. Sects. 1 and 2 of the Statute of Frauds (c) provide that "leases, estates, interests of freehold, or terms of years" in land are to be in writing, except in the case of leases not exceeding the term of three years from the making thereof, "whereupon the rent reserved to the landlord during such term shall amount unto two third parts at the least of the full improved value of the thing demised" which may be created by parol. By s. 4 of the statute no action is to be brought on any contract to sell lands "or any interest in or concerning them" except the contract or some note or memorandum thereof be in writing. The terms of the contract, the parties to it, and the subject-matter of it must appear with reasonable clearness in the agreement (d).

(f) Actions on contracts for the sale of goods of the value of £10 and upwards. This is provided for by the Sale of Goods Act, 1893 (e). The rule is, however, only operative in cases where the buyer has neither accepted and received part of the goods, nor given anything in earnest to bind the contract or in part payment (f). The buyer's acceptance may be implied from his conduct in dealing with the goods (g). Both acceptance (h) and receipt (i) may be constructive, not actual. When a written contract is relied upon it need not be contained in one writing; the statute will be satisfied if it can be deduced from several, but the writings must be sufficiently connected (j). The names of the parties or of their agents must appear in the writing, but if there is doubt as to which party is seller and which buyer, parol evidence on the subject may be given (k).

(g) Actions relating to the sale of a ship or of a share therein. A registered ship or a share therein, when disposed of to a person qualified to own a British ship, is to be transferred by bill of sale (l), and therefore the document must be produced to prove the sale.

(a) *Cherry v. Heming* (1819), 4 Exch. 631; *Smith v. Neale* (1857), 2 C. B. (N. S.) 67; and see title CONTRACT, Vol. VII., p. 363.

(b) *Davey v. Shannon* (1879), 4 Ex. D. 81; *Reeve v. Jennings* (1910), 26 T. L. R. 576.

(c) 29 Car. 2. c. 3. See further, as to these provisions of the statute, titles LANDLORD AND TENANT; SALE OF LAND; SPECIFIC PERFORMANCE.

(d) *Williams v. Lake* (1859), 2 E. & E. 349.

(e) 56 & 57 Vict. c. 71, s. 4 (1). If invalid on this ground, it will not be operative in other respects, e.g., to rescind another contract (*Noble v. Ward* (1867), L. R. 2 Exch. 136, Ex. Ch.). See, further, titles CONTRACT, Vol. VII., p. 361; SALE OF GOODS.

(f) Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 4 (1).

(g) *Ibid.*, s. 4 (3).

(h) *Elmore v. Stone* (1809), 1 Taunt. 458.

(i) *Marshall v. Green* (1875), 1 C. P. D. 35.

(j) *Taylor v. Smith*, [1893] 2 Q. B. 65, C. A.; *Oliver v. Hunting* (1890), 44 Ch. D. 205; *Long v. Millar* (1879), 4 C. P. D. 450.

(k) *Newell v. Radford* (1867), L. R. 3 C. P. 52.

(l) Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), s. 24; and see title SHIPPING AND NAVIGATION.

596. The circumstances in which facts do not require to be proved arise where the facts relied on are those of which the court takes judicial notice without proof. They include the practice of the court itself (*m*), all public Acts of Parliament and every statute passed since 1851 (unless the statute itself provides to the contrary) (*n*), the proceedings and privileges of Parliament, the maritime law of nations (*o*), the *London Gazette*, the rules of practice in the Supreme Court, all customs established by a course of judicial decision (*p*), the existence and title of every State and Sovereign recognised by His Majesty, the existence of a war in which this country is engaged, royal proclamations, the Great Seal, the Privy Seal, all seals which any court is authorised to use by Act of Parliament (*q*), the seals of a notary public in the King's dominions (*r*), and a few other matters of general notoriety or appertaining to the ordinary course of nature (*s*).

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Cases in which facts do not require to be proved.

597. There are certain cases in which persons are not compelled to give evidence of fact, such as communications between husband and wife made during marriage (*t*), communications between counsel, solicitors, and their clerks, made in professional confidence (unless the client expressly authorises the evidence to be given (*u*)), matters which are State secrets (and these include communications between public officials in the discharge of their public duties (*v*)), information given for the detection of crime (unless the disclosure be necessary to show the innocence of an accused (*b*)), judicial disclosures—by which is meant disclosures by judges of the superior courts or by arbitrators as to matters which have arisen before them in their judicial capacity (*c*), statements by parents which would bastardise their offspring (*d*), evidence which involves the unnecessary disclosure of indecent matter (*e*).

Privileged communications.

598. Where a transaction has been reduced into writing, extrinsic evidence is inadmissible to contradict, vary, add to, or subtract from the terms of the document. Verbal evidence, however,

Exclusion of evidence to vary a written document.

(*m*) *Pugh v. Robinson* (1786), 1 Term Rep. 116.

(*n*) Interpretation Act, 1889 (52 & 53 Vict. c. 63), s. 9.

(*o*) *Chandler v. Griers* (1792), 2 Hy. Bl. 606, n.

(*p*) *London Chartered Bank of Australia v. White* (1879), 4 App. Cas. 413, 422, P. C.; *Re Parker, Ex parte Turquand* (1885), 14 Q. B. D. 636, C. A.

(*q*) *Doe d. Duncan v. Edwards* (1839), 9 Ad. & El. 555.

(*r*) *Cole v. Sherard* (1855), 11 Exch. 482.

(*s*) See Stephen, *Digest of the Law of Evidence*, 8th ed., art. 58; Taylor, *Law of Evidence*, 10th ed., ss. 4—21; and p. 494, *post*.

(*t*) By the Evidence Amendment Act, 1853 (16 & 17 Vict. c. 83), s. 3, neither husband nor wife shall be compellable to disclose the communications made by one to the other during marriage.

(*u*) *Wilson v. Rastall* (1792), 4 Term Rep. 753, 759; *Procter v. Smiles* (1886), 55 L. J. (Q. B.) 527, C. A.

(*a*) *Wyatt v. Gore* (1816), Holt (N. P.), 299; *Hennessey v. Wright* (1888), 21 Q. B. D. 509; *Wright & Co. v. Mills* (1890), 62 L. T. 558.

(*b*) *Marks v. Beyfus* (1890), 25 Q. B. D. 494, C. A.

(*c*) *Buccleuch (Duke) v. Metropolitan Board of Works* (1872), L. R. 5 H. L. 418.

(*d*) *The Aylesford Peerage* (1885), 11 App. Cas. 1; *The Poulett Peerage*, [1903] A. C. 395; *Burnaby v. Baillie* (1889), 42 Ch. D. 282.

(*e*) As to privilege, generally, see pp. 570 *et seq.*, *post*.

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may be admitted to impeach the document on the ground of fraud; to explain ambiguities not appearing on the face of the document itself; to show the existence of some condition precedent subject to which the agreement was made; and to prove that there was concluded, at the same time as the written agreement or earlier, another agreement adding to but not inconsistent with the former (f).

SECT. 2.—Functions of Judge and Jury.

Questions of
law for judge,
questions of
fact for jury.

599. In all proceedings tried by judge and jury questions of law are decided by the judge and questions of fact by the jury. It is the duty of the judge to give the jury a proper and complete direction upon the law applicable to the matters in dispute (g), and it is the duty of the jury to accept and follow the direction of the judge upon the law.

Admissibility
of evidence
for judge.

600. Questions relating to the admissibility of evidence are questions of law and must be determined by the judge, and, if such questions depend upon the determination of some preliminary question of fact, it is the duty of the judge to decide that question by himself after hearing the evidence upon it, when evidence is necessary (h), even though the decision of such preliminary question involves the determination by the judge of the same fact which the jury have ultimately to decide (i). Upon this principle it is for the judge to decide whether deeds or documents more than thirty years old are produced from the proper custody (k), whether a witness can claim privilege (l), and whether documents required to be stamped are stamped sufficiently (m). Similarly, where it is sought, in the absence of an original document, to adduce secondary evidence of its contents (n), the judge decides whether reasonable

Examples

(f) *Lindley v. Lacey* (1864), 17 O. B. (N. S.) 578; and see p. 566, *post*.

(g) See Judicature Act, 1875 (38 & 39 Vict. c. 77), s. 22.

(h) *Boyle v. Wisman* (1855), 11 Exch. 360; *Welstead v. Levy* (1831), 1 Mood. & R. 138; *Lewis v. Marshall* (1814), 7 Man. & G. 729; *Beaufort (Duke) v. Crawshaw* (1866), L. R. 1 C. P. 699; *Bartlett v. Smith* (1813), 11 M. & W. 483, 486. In *Froude v. Hobbs* (1859), 1 F. & F. 612, the preliminary question was, by consent, decided by the jury. Where evidence is *prima facie* admissible other evidence cannot be interposed for the purpose of excluding it (*Jones v. Fort* (1828), Mood. & M. 196).

(i) *Doe d. Jenkins v. Davies* (1847), 10 Q. B. 314; see, *contra*, *Stowe v. Querner* (1870), L. R. 5 Exch. 155. In *Hitchins v. Hardley* (1871), L. R. 2 P. & D. 248, as a practical means of meeting the difficulty, Lord PENZANCE decided, when a strong *prima facie* case had been made out, to admit the evidence the admissibility of which was disputed, and leave the whole case to the jury. In criminal cases the rule that where evidence which was not legal evidence had been left to the jury a conviction ought not to stand (*R. v. Gibson* (1887), 18 Q. B. D. 537, C. C. R.; *R. v. Saunders*, [1899] 1 Q. B. 490, C. C. R.) is now subject to the express powers vested in the Court of Criminal Appeal to dismiss an appeal on the ground that there has been no substantial miscarriage of justice, see title CRIMINAL LAW AND PROCEDURE, Vol. IX., p. 435, note (g).

(k) *Rees v. Walters* (1838), 3 M. & W. 527; *Doe d. Shrewsbury (Earl) v. Keeling* (1848), 11 Q. B. 884; *Doe d. Jacobs v. Phillips* (1845), 8 Q. B. 158; and see as to proper custody (*Meath (Bishop) v. Winchester (Marquess)* (1836), 3 Bing. (N. C.) 183, H. L.; and p. 512, *post*).

(l) *Cleave v. Jones* (1852), 7 Exch. 421; *Stace v. Griffith* (1869), L. R. 2 P. C. 420.

(m) *Bartlett v. Smith* (1813), 11 M. & W. 483; *Bennison v. Jewison* (1848), 12 Jur. 485; *Dunsford v. Curlewis* (1859), 1 F. & F. 702.

(n) See p. 518, *post*.

exertion or search has been made to procure the original (*o*), whether the original is in the possession of the party to whom notice has been given to produce it (*p*), whether a witness required to produce documents under a *subpoena duces tecum* has a reasonable excuse for withholding them from production (*q*), and any questions that may be raised as to the existence (*r*) or identity (*s*) of the document alleged to be the original.

SECT. 2.
Functions
of Judge
and Jury.

In cases of disputed ownership of land, where evidence is tendered of acts of ownership done in places not in dispute, it is for the judge to decide whether there is such a unity of character in the land in dispute and the places where the acts of ownership were done as to render the evidence admissible (*t*).

601. Although it is the province of the jury to decide questions of fact, it is for the judge to decide whether there is any evidence upon which they can reasonably find that the party on whom the burden of proof lies has established the fact or facts which it is necessary for him to prove (*a*), and it is for the judge to determine whether it is open to the jury to draw an inference from the facts proved, leaving it to the jury to say whether or not such inference shall be drawn (*b*). If the judge is of opinion that there is no evidence upon which the jury can reasonably decide a question of fact in favour of the party who has to establish it affirmatively, he should withdraw the case from them or direct them to find in favour of the other party (*c*), but whenever there is conflicting evidence upon such a question it is entirely for the jury to say which evidence they accept, and the judge must leave the question to them for their decision (*d*).

Question
whether any
evidence for
judge.

602. The construction, meaning, and effect of all written and printed documents, including statutes (*e*), deeds, wills, agreements and letters, are matters which fall within the peculiar province of the judge, and where the document is or documents are plain and unambiguous there is no question for the jury (*f*), but it may be necessary for the jury to assist the judge by determining as facts

Construction
of documents
for judge.

(*o*) *Quiller v. Joss* (1863), 14 C. B. (N. S.) 747.

(*p*) *Harvey v. Mitchell* (1841), 2 Moo. & R. 366.

(*q*) *Amey v. Long* (1808), 9 East, 473.

(*r*) *Froude v. Hobbs* (1859), 1 F. & F. 612; *Cox v. Couvless* (1860), 2 F. & F. 139.

(*s*) *Boyle v. Wiseman* (1855), 11 Exch. 360.

(*t*) *Doe d. Barrett v. Kemp* (1831), 7 Bing. 332. As to such evidence, see p. 452, *post*; and title BOUNDARIES, FENCES, AND PARTY WALLS, Vol. III., pp. 148, 149.

(*a*) *Ryder v. Wombwell* (1868), L. R. 4 Exch. 32, Ex. Ch.; *Hiddle v. National Fire and Marine Insurance Co. of New Zealand*, [1896] A. C. 372, P. C.

(*b*) *Metropolitan Rail. Co. v. Jackson* (1877), 3 App. Cas. 193; *Toul v. North British Railway*, [1908] A. C. 352.

(*c*) Such other party may, however, require that his evidence shall be heard before a decision is given (*Re Pincoffs, Ex parte Jacobson* (1882), 22 Ch. D. 312, C. A.).

(*d*) *Dublin, Wicklow, and Wexford Rail. Co. v. Slattery* (1878), 3 App. Cas. 1155.

(*e*) *Planché v. Braham* (1837), 8 C. & P. 68; *Elliott v. South Devon Rail. Co.* (1848), 2 Exch. 725.

(*f*) *Hitchin v. Droom* (1848), 5 C. B. 515.

SECT. 2.

Functions
of Judge
and Jury.

any surrounding circumstances which may affect the proper construction or the meaning of any words contained in the document which have peculiar meanings attached to them in particular localities or trades (*g*). When the jury have ascertained upon the evidence the surrounding circumstances, if any, and the meaning to be attached to any such trade or local terms, it is for the judge to say what is the meaning and effect of the document in question (*h*).

Circum-
stances
affecting
construction
of documents
for jury.

Where, therefore, the terms of a contract are contained in, or the legal effect of any transaction is to be ascertained from, a number of documents or a series of letters between the parties, which do not involve the consideration of any technical or mercantile expressions, the matter is entirely for the judge to decide as a question of construction (*i*), but where, in addition to written documents, it is necessary, in order to ascertain the rights of the parties, to take into consideration their conduct, course of business, and oral evidence of communications made at interviews between them, it is for the jury to judge of the truth or falsehood of the oral evidence and, under the direction of the judge, to decide, upon the whole of the evidence before them, what was the real intention and meaning of the parties (*k*).

Documents
in foreign
language.

Similarly, in the case of a document in a foreign language, the meaning of the words must first be determined as a question of fact, upon the evidence of persons competent to translate them, and to explain any technical, legal, or scientific expressions which it may contain. The construction of the document so translated then becomes a question of law (*l*).

Inspection of
record.

The inspection of a record is peculiarly within the province of the court (*m*), and if there is any dispute as to what are the actual words written in a document, it is for the judge on inspection of the document to decide, and not for the jury (*n*).

Lost docu-
ments.

The rule that the construction of documents is for the judge applies when the contents of a document which is lost are proved by secondary evidence. It is for the judge to say what is its proper meaning and effect, as it would have been if he had had the actual document before him (*o*).

(*g*) *Neilson v. Harford* (1811), 8 M. & W. 806; *Bowes v. Shand* (1877), 2 App. Cas. 455; *Ashforth v. Redford* (1873), L. R. 9 C. P. 20; *Alexander v. Vanderzee* (1872), L. R. 7 C. P. 530, Ex. Ch.

(*h*) *Hutchison v. Bowker* (1839), 5 M. & W. 535.

(*i*) *Marbeath v. Haldimand* (1786), 1 Term Rep. 172; *R. v. Cotesworth* (1852), 7 Exch. 595; *Ashpitel v. Sercombe* (1850), 5 Exch. 147; *Furness v. Meek* (1857), 27 L. J. (EX.) 34.

(*k*) *Smith v. Thompson* (1849), 8 C. B. 44; *Moore v. Garwood* (1849), 4 Exch. 681, Ex. Ch.; *Bolckow v. Seymour* (1864), 17 C. B. (N. S.) 107; *Hordern v. Commercial Union Insurance Co.* (1887), 56 L. T. 240, P. C.; *Maskelyne v. Stallery* (1899), 16 T. L. R. 97, H. L.; *Wilkinson v. Stoney* (1839), 1 Jebb & S. 509; *Brook v. Hook* (1871), L. R. 6 Exch. 89. As to the admissibility of such oral evidence, see pp. 568 *et seq.*, *post*.

(*l*) *De Sora (Duchess) v. Phillippis* (1863), 10 H. L. Cas. 624; *Chatenay v. Brazilian Submarine Telegraph Co.*, [1891] 1 Q. B. 79, C. A.

(*m*) *R. v. Hucks* (1816), 1 Stark. 521.

(*n*) *Remon v. Hayward* (1835), 2 Ad. & El. 666.

(*o*) *Berwick v. Horsfall* (1858), 4 C. B. (N. S.) 450; and see *Read v. Price*, [1909] 2 K. B. 724, C. A.

SECT. 2.
Functions
of Judge
and Jury.

Defamation.

Privilege.

Fair com-
ment.

Malicious
prosecution.

Necessaries.

603. In certain matters the respective functions of judge and jury are more particularly defined. In actions for libel and slander it is the duty of the judge to rule whether the words complained of are, in the circumstances in which they were used, capable of bearing a defamatory meaning, and, if not, to withdraw the case from the jury, but, if the judge holds the words capable of being defamatory, it is for the jury to decide whether they are defamatory or not (*p*). If the defence of privilege is raised in such an action the judge must decide whether the document containing the alleged libel is a privileged communication, whether the words complained of were published or spoken upon a privileged occasion, and, if so, whether there is any evidence of malice (*q*). The facts, however, upon which the judge's decision upon the question of privilege depends, if in dispute, must be found by the jury (*r*). If the judge holds in favour of the privilege claimed and that there is no evidence of malice, it is his duty to enter judgment for the defendant (*s*). If the defence raised is that of fair comment on a matter of public interest, the judge decides whether the matter is one of public interest, the jury whether the comment is fair (*t*).

In actions for malicious prosecution and false imprisonment the question whether, on the facts, the defendant acted without reasonable and probable cause is for the judge, but the facts on which his decision depends must, if disputed, be found by the jury (*u*).

In an action against an infant for goods supplied (*a*), the question whether or not the goods can be necessaries is a question for the judge, and the question whether or not they are necessaries is a

(*p*) As to libel, see *Goldstein v. Foss* (1827), 6 B. & C. 154; *Purmiter v. Coupland* (1840), 6 M. & W. 105; *Baylis v. Lawrence* (1810), 11 Ad. & El. 920; *Hearne v. Stowell* (1840), 12 Ad. & El. 719; *Sturt v. Mugg* (1847), 10 Q. B. 899, 906, Ex. Ch.; *Cox v. Lee* (1869), L. R. 4 Exch. 281; *Hunt v. Goodlake* (1873), 43 L. J. (Q. B.) 51; *Saxby v. Easterbrook* (1878), 3 C. P. D. 339, per Lord COLERIDGE, C.J., at p. 342, and LINDLEY, J., at p. 343; *Capital and Counties Bank v. Henry* (1882), 7 App. Cas. 741; *Nevill v. Fine Art and General Insurance Co.*, [1897] A. C. 68; *Lindtpe Co. v. British Empire Type-setting Machine Co.* (1899), 81 L. T. 331, II. L.; as to slander, see *O'Brien v. Salisbury (Marquis)* (1889), 6 T. L. R. 133; and see title LIBEL AND SLANDER.

(*q*) *Stace v. Griffith* (1869), L. R. 2 P. C. 420; *Stuart v. Bell*, [1891] 2 Q. B. 341, C. A., per LINDLEY, L.J., at p. 315; and see title LIBEL AND SLANDER.

(*r*) *Hebditch v. MacIlwaine*, [1894] 2 Q. B. 51, C. A.; *Hoppe v. P'Anson and Weatherly* (1901), 18 T. L. R. 201, C. A.

(*s*) *Stuart v. Bell*, *supra*; *Turner v. Bowley & Son* (1896), 12 T. L. R. 402, C. A.

(*t*) *Jenner v. A'Beckett* (1871), L. R. 7 Q. B. 11; *Cooney v. Edevean* (1897), 14 T. L. R. 31, C. A.; and see title LIBEL AND SLANDER.

(*u*) As to malicious prosecution, see *Brown v. Hawkes*, [1891] 2 Q. B. 718, C. A.; *Hilliar v. Dade* (1898), 14 T. L. R. 534; *Cox v. English, Scottish, and Australian Bank*, [1905] A. C. 168, P. C.; *Abrath v. North-Eastern Rail. Co.* (1886), 11 App. Cas. 247; and title MALICIOUS PROSECUTION AND PROCEDURE. As to false imprisonment, see *West v. Bazendale* (1850), 9 C. B. 141; *Lister v. Perryman* (1870), L. R. 4 H. L. 521; and title TRESPASS. The similar question whether a pawnbroker reasonably suspects an article offered to him in pawn to have been stolen or otherwise illegally or clandestinely obtained so as to entitle him to detain the article and person offering it to him under the Pawnbrokers Act, 1872 (35 & 36 Vict. c. 93), s. 34, is a question for the judge and not for the jury (*Howard v. Clarke* (1888), 20 Q. B. D. 558); see also title PAWN AND PLEDGES.

(*a*) See title INFANTS AND CHILDREN; and Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 2.

SECT. 2.

Functions
of Judge
and Jury.

"Parcel or no
parcel."

Penalty or
liquidated
damages.

Statutes of
Limitations.

Restraint of
trade.

Custom.

Divorce.

question of fact for the jury, but it is also a question of law whether there is any evidence upon which the jury can find them to be necessaries, and if the judge holds there is no such evidence he should direct the jury to find for the defendant or withdraw the case from them and direct judgment to be so entered (*b*).

In questions relating to boundaries, "parcel or no parcel" is for the jury. Although the construction of title deeds and documents is for the judge, the identification of the land intended to be described with the description contained in the deed or document is always a question for the jury (*c*).

It is in each case a question of law for the judge to decide whether a sum of money stipulated in an agreement to be paid by one party to another, in the event of the agreement being broken, is a penalty or liquidated damages (*d*), whether a document is a sufficient acknowledgment to take a case out of the Statutes of Limitation (*e*), whether an agreement in restraint of trade is void as being unreasonably wide (*f*), and whether a custom is reasonable or unreasonable (*g*).

In undefended petitions for dissolution of marriage, though there are no issues between the parties, the judge must satisfy himself, so far as he reasonably can, as to the truth of the petitioner's allegations (*h*). If such a petition, defended by one party but not by another, is tried with a jury, it is for the jury to decide the matters of fact contested by the party defending, but for the judge to be satisfied as to the facts alleged against the party who does not defend (*i*). Upon a husband's petition for damages against any person on the ground of his having committed adultery with the petitioner's wife, the damages must in all cases be ascertained by the verdict of a jury (*k*).

(*b*) *Maddox v. Miller* (1813), 1 M. & S. 738; *Harrison v. Paine* (1810), 1 Man. & G. 550; *Brooker v. Scott* (1843), 11 M. & W. 67; *Wharton v. Mackenzie, Cripps v. Hills* (1844), 5 Q. B. 606; *Peters v. Fleming* (1840), 6 M. & W. 42; *Barnes v. Toye* (1884), 13 Q. B. D. 410; *Ryder v. Wombwell* (1868), L. R. 4 Exch. 32, Ex. Ch.; *Nash v. Inman*, [1908] 2 K. B. 1, C. A.; and see title INFANTS AND CHILDREN.

(*c*) *Lyle v. Richards* (1866), L. R. 1 H. L. 222; and see title BOUNDARIES, FENCES, AND PARTY WALLS, Vol. III., p. 139.

(*d*) *Wallis v. Smith* (1882), 21 Ch. D. 243, C. A.; *Willson v. Love*, [1896] 1 Q. B. 626, C. A.; *Saintier v. Ferguson* (1849), 7 C. B. 716.

(*e*) *Morrell v. Frith* (1838), 3 M. & W. 402, overruling *Lloyd v. Maund* (1788), 2 Term Rep. 760; *Routledge v. Ramsay* (1838), 8 Ad. & El. 221; *Doe d. Curzon v. Edmunds* (1840), 6 M. & W. 295. *Linsell v. Bonsor* (1835), 2 Bing. (N. C.) 211, appears to have been wrongly decided.

(*f*) *Mallan v. May* (1843), 11 M. & W. 653; *Haynes v. Doman*, [1899] 2 Ch. 13, C. A.; *Dowden and Pook, Ltd. v. Pook*, [1904] 1 K. B. 45, C. A.; *United Shoe Machinery Co. of Canada v. Brunet*, [1909] A. C. 330, P. C., per Lord ATKINSON, at p. 341.

(*g*) Co. Litt. 56 b; *Tyson v. Smith* (1838), 9 Ad. & El. 406, Ex. Ch., per TINDAL, C.J., at p. 421; *Bradburn v. Foley* (1878), 3 C. P. D. 129, per LANDLEY, J., at p. 135; and see title CUSTOM AND USAGES, Vol. X., pp. 253, 254. Similarly the reasonableness of a customary fine on the dropping of lives of tenants of copyholds is for the judge and not the jury (*Wilson v. Hoare* (1839), 10 Ad. & El. 236).

(*h*) Matrimonial Causes Act, 1857 (20 & 21 Vict. c. 85), s. 29; and see title HUSBAND AND WIFE.

(*i*) *Ibid.*, ss. 28, 29.

(*k*) *Ibid.*, s. 33.

SECT. 2.
Functions
of Judge
and Jury.

604. A judge sitting without a jury decides the issues both of law and fact, and when he is sitting with assessors, and differs from them, he is bound to decide in accordance with his own opinion (*a*).

Arbitrators are bound by, and must give effect to, the laws of evidence (*b*), unless a relaxation of those laws is justified by the submission or by the consent, express or implied, of the parties (*c*).

SECT. 3.—*Burden of Proof.*

605. In legal proceedings the general rule is that he who asserts must prove—a proposition sometimes more technically expressed by saying that the burden of proof rests upon the party who substantially asserts the affirmative of the issue.

Burden of
proof.

This rule is derived from the Roman law, and is supportable not only upon the ground of fairness, but also upon that of the greater practical difficulty which is involved in proving a negative than in proving an affirmative.

In applying the rule, however, a distinction is to be observed between the burden of proof as a matter of substantive law or pleading, and the burden of proof as a matter of adducing evidence. The former burden is fixed at the commencement of the trial by the state of the pleadings, or their equivalent, and is one that never changes under any circumstances whatever; and if, after all the evidence has been given by both sides, the party having this burden on him has failed to discharge it, the case should be decided against him (*d*).

Distinction
to be drawn
in applying
rule.

606. In considering upon whom this burden falls, a convenient test is to inquire whether the allegation involved, be it affirmative or negative, is or is not essential to the particular party's case, *i.e.*, whether he would fail if it were struck out of the record. If it be essential, and he would so fail, then the burden of proving it is upon him (*e*). Thus, in an action against a tenant for not repairing

The test.

(*a*) *The Beryl* (1884), 9 P. D. 137, C. A.; *The Owners of SS. Gannet v. Owners of SS. Algoa*, [1900] A. C. 234, 236.

(*b*) *Re Enoch and Zaretsky, Bock & Co.*, [1910] 1 K. B. 327, C. A.; and see *A.-G. v. Davison* (1825), 1 M.Clo. & Yo. 160, and *East and West India Dock Co. v. Kirk and Randall* (1887), 12 App. Cas. 738.

(*c*) Evidence which strictly is inadmissible is admitted in many references where the parties or arbitrators, or both, are not familiar with the law of evidence or no objection is taken, and in cases where an arbitrator admits that which is not evidence even if he knows it to be inadmissible at law (*Hagger v. Baker* (1845), 14 M. & W. 9), the court will, in its discretion, refuse to set his award aside if his decision was not misconduct but mere mistake (*James v. James* (1889), 23 Q. B. D. 12, C. A.), but, strictly, that which is not evidence can only be admitted by consent, express or implied, of the parties, *e.g.*, where an umpire is appointed in accordance with the practice in a particular trade, and it has been customary in the trade for umpires so appointed to apply their own knowledge of the trade to the particular case. The statements to the contrary by the judges of the Court of Appeal in *Re Keighley, Maastel & Co. and Durant & Co.*, [1893] 1 Q. B. 405, C. A., are qualified by the express statement by KAY, L.J., at p. 415, that the court was not satisfied that the evidence referred to in the judgment in that case was inadmissible, and are therefore only *dicta*. See also as to this case, *Re Enoch and Zaretsky, Bock & Co.*, *supra*, per FARWELL, L.J., at p. 335. Generally, as to evidence before arbitrators, see title ARBITRATION, Vol. I., p. 462.

(*d*) *R. v. Stodhart* (1909), 25 T. L. R. 612, C. O. A.; *Pickup v. Thames Insurance Co.* (1878), 3 Q. B. D. 594, 599, 600, C. A.; *Wakelin v. London and South Western Rail. Co.* (1886), 12 App. Cas. 41.

(*e*) *Mills v. Barber* (1836), 1 M. & W. 425, 427; *Abrath v. North Eastern Rail. Co.* (1883), 11 Q. B. D. 440, C. A., per BOWEN, L.J., at p. 457.

SECT. 3.

Burden of Proof.

according to covenant, proof of non-repair, though a negative averment, is upon the plaintiff (*f*), as also, in an action for malicious prosecution, is the burden of proving the absence of reasonable and probable cause (*g*). On the other hand, in an action for false imprisonment, proof of the existence of reasonable cause is upon the defendant, since arrest, unlike prosecution, is *per se* a tort, and thus calls for justification (*h*).

Division of burden.

Where, however, there are several issues in a case the burden is sometimes divided, each party having the burden of proof of one or more of the issues cast upon him, and the above test may consequently have to be applied to each of these in turn. But, in a general way, the incidence of the issues is already pre-determined by law, so that, with regard to this sense of the term "burden of proof," little difficulty will usually arise. Thus, in an action for damage to goods shipped under a charterparty containing the usual exception as to damage by perils of the sea, the burden (where nothing is admitted by either party) is upon the plaintiff to prove the contract and damage or non-delivery, upon the defendant to prove that the damage arose by the perils excepted, and upon the plaintiff, in reply, to prove negligence by the defendant disentitling him to the benefit of the exception (*i*). Similarly, in an action against an innkeeper for loss of his guest's luggage, where the loss is admitted, but the defences are (1) contributory negligence, and (2) statutory exemption beyond £30—the burden is upon the defendant as to the first plea, and upon the plaintiff, in reply, to show wilful act, default, or neglect of the defendant so as to disentitle the latter to the statutory exemption (*k*).

Burden of adducing evidence.

607. The burden of proof, in the sense of adducing evidence, on the other hand, is a burden which may shift continually throughout the trial, according as the evidence in one scale or the other preponderates (*l*). This burden rests upon the party who would fail if no evidence at all, or no more evidence, as the case may be, were adduced by either side. In other words, it rests, before any evidence whatever is given, upon the party who has the burden of proof on the pleadings, *i.e.*, who asserts the affirmative of the issue; and it rests, after evidence is gone into, upon the party against whom, at the time the question arises, judgment would be given if no further evidence were adduced by either side (*m*). The rule, in this sense, applies not only to matters

(*f*) *Soward v. Leggutt* (1836), 7 C. & P. 613.

(*g*) *Abrath v. North Eastern Rail. Co.* (1886), 11 App. Cas. 247.

(*h*) *Hicks v. Faulkner* (1878), 8 Q. B. D. 167, 170.

(*i*) *The Glendarloch*, [1894] P. 226, C. A. Where the negligence alleged is criminal it is not necessary to give such evidence as would suffice to convict (*Vaughton v. London and North Western Rail. Co.* (1874), 1. R. 9 Exch. 93). See title SHIPPING AND NAVIGATION.

(*k*) *Medawar v. Grand Hotel Co.*, [1891] 2 Q. B. 11, C. A. See title INNS AND INNKEEPERS.

(*l*) *Abrath v. North Eastern Rail. Co.*, *supra*; *Pickup v. Thames Insurance Co.* (1878), 3 Q. B. D. 594, 599, 600, C. A.; *Wakelin v. London and South Western Rail. Co.* (1886), 12 App. Cas. 41; *R. v. Stoddart* (1909), 25 T. L. R. 612, C. C. A.

(*m*) *Abrath v. North Eastern Rail. Co.*, *supra*; *Wakelin v. London and South Western Rail. Co.*, *supra*, C. A., as reported at [1896] 1 Q. B. 189, n., 196, n. If in an action for negligent driving of an omnibus, the plaintiff proves that the person driving was the conductor and not the regular driver, the burden is cast

which are the subject of express allegation in the pleadings, but also to those that relate merely to the admissibility of evidence or to the construction of documents. Thus, a party desiring to adduce a hearsay statement (*n*), or secondary evidence of a lost deed (*o*), must first establish the conditions necessary to its reception; and if a document be ambiguous, the party tendering it has the burden of showing that his interpretation thereof is correct (*p*).

SECT. 8.
Burden of
Proof.

608. There are two cases in which the burden of adducing evidence is liable to be shifted from the party on whom it would naturally fall, and which, therefore, may be considered as exceptions to the above general rule:—

Exceptions:

(1) When there exists a rebuttable presumption of law in favour of a party, the burden of rebutting it lies upon his opponent.

(1) Rebuttable presumption of law.

Thus, a party suing upon a bill of exchange need not, in the first instance, give any evidence of consideration, or that he is a holder in due course, the presumption on each of these points being in favour of the plaintiff (*q*). In the same way, the burden of proving the death of any person is upon the party asserting it; but if such party gives evidence that the person concerned has not been heard of for seven years by those most likely to hear of him, the presumption of death will arise, and the burden of disproof be shifted to the party's opponent (*r*). So, on a charge of manslaughter by negligent driving, proof of the killing will throw upon the defendant the burden of showing that he exercised proper care, since the presumption is that the killing was unlawful (*s*).

In many cases, however, the burden of proof has been arbitrarily fixed by statute, so that no single uniform rule will apply.

(2) Where the truth of a party's allegation lies peculiarly within the knowledge of his opponent, the burden of disproving it lies upon the latter.

(2) Facts peculiarly within knowledge of opponent.

The principle of this exception has frequently been recognised, both by the Legislature (*t*) and in decided cases (*a*). On the other

on him to give evidence that the conductor was acting within the scope of his employment (*Beard v. London General Omnibus Co.*, [1900] 2 Q. B. 530, C. A.).

(*n*) *R v. Thompson*, [1893] 2 Q. B. 12, C. C. R.

(*o*) Stephen, *Digest of the Law of Evidence*, 5th ed., art. 97.

(*p*) *Falck v. Williams*, [1900] A. C. 176, 181, P. C.

(*q*) Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), s. 30. As to this presumption and the shifting of the burden of proof, see title *BILLS OF EXCHANGE ETC.*, Vol. II., p. 499.

(*r*) See p. 500, *post*.

(*s*) *R. v. Cavenish* (1873), 8 I. R. C. L. 178, C. C. R.

(*t*) See, e.g., Foreign Enlistment Act, 1870 (33 & 34 Vict. c. 90), ss. 8, 9, where the burden is cast upon the builder of a ship to prove that he did not know she was to be employed in contravention of the Act.

(*u*) *Apothecaries Co. v. Bentley* (1824), Ry. & M. 159 (action for penalties against a person for practising as an apothecary without a certificate, proof of the certificate held to lie on the defendant as being peculiarly within his knowledge); and see *Dickson v. Evans* (1794), 6 Term Rep. 57; *R. v. Turner* (1816), 5 M. & S. 206; *Hibbs v. Ross* (1866), L. R. 1 Q. B. 534, 541, *per* MELLOR, J., and see *ibid.*, p. 543, where the present doctrine is apparently countenanced by BLACKBURN, J.; *Magdalen Hospital (Governors) v. Knotts* (1877), 8 Ch. D. 709, 724, C. A.; *Mahony v. Waterford, Limerick, and Western Rail. Co.*, [1900] 2 I. R. 273; *Powell v. M'Glynn and Bradlaw*, [1902] 2 I. R. 154, where it is accepted by BOYD, J., at p. 175, and apparently by O'BRIEN, L.C.J., at p. 185, but denied by BARTON, J., at p. 169; *General Accident Fire and Life Assurance Corporation v. Robertson (or Hunter)* (1909), 25 T. L. R. 685, 686, H. L.

SECT. 3.
Burden of
Proof.

hand, its validity has been several times challenged by high authorities (*b*), and having regard to this conflict of opinion, the following statement of the point is, perhaps, the one which is the least open to objection:—"In considering the amount of evidence necessary to shift the burden of proof, the court has regard to the opportunities of knowledge with respect to the fact to be proved which may be possessed by the parties respectively" (*c*).

Part II.—Facts which may be Proved.

SECT. 1.—*Facts in Issue.*

Facts which
may be
proved.

609. The facts which, in any particular case, are legally essential to establish the claim or defence of the parties respectively, and which have been alleged on the one side and denied on the other, are technically termed facts in issue (*d*). In the vast majority of cases these facts are all pre-determined by substantive law; they form a class apart, with which logic has nothing necessarily to do, and it is these alone which can be submitted for decision to a tribunal. This is sometimes expressed by saying that an issue is never raised as to a merely relevant or evidential fact (*e*). Having got a fact in issue, it becomes a question how far it may be considered the subject of evidence (*f*). It seems natural enough to say, "Evidence may be given in any proceeding of any fact in issue" (*g*); but in practice this is not literally true. Suppose, for example, that A. is charged with the murder of B. and pleads not guilty, and that the following facts are in issue: (1) The fact that A. killed B.; (2) the fact that A. was at the time prevented by disease from knowing right from wrong; and (3) the fact that A. had received from B. such provocation as would reduce the offence to manslaughter (*h*). If each of these statements was turned

(*b*) "The proof may be difficult where the matter is peculiarly within the defendant's knowledge, but that does not vary the rule of law" (*Doe d. Bridger v. Whitehead* (1838), 8 Ad. & El. 571, *per* Lord DENMAN, C.J., at p. 575); "I doubt whether those expressions are not too strong. They are right as to the weight of the evidence, but there must be some evidence to start it, in order to cast the onus on the other side" (*Elkin v. Janson* (1845), 13 M. & W. 655, *per* ALDERSON, B., at p. 662); and, in a leading and more modern case:—"It has been said that an exception exists in those cases where the facts lie peculiarly within the knowledge of the opposite party. The counsel for the plaintiff has not gone the length of contending that in all those cases the onus shifts. . . . I think that a proposition of that kind cannot be maintained and that the exceptions supposed to be found amongst cases relating to the game laws may be explained on special grounds" (*Abrath v. North Eastern Rail. Co.* (1883), 11 Q. B. D. 440, C. A., *per* BOWEN, L.J., at pp. 457, 458).

(*c*) Stephen, Digest of the Law of Evidence, 6th ed., art. 96.

(*d*) *Ibid.*, art. 1.

(*e*) Wharton, Law of Evidence in Civil Issues, s. 26.

(*f*) A judge has no right to nonsuit the plaintiff without his consent on his counsel's opening statement (*Fletcher v. London and North Western Rail. Co.*, [1892] 1 Q. B. 122, C. A.). Where defendant has admitted all the facts pleaded, the plaintiff will not be allowed to call evidence, except by leave of the court on special grounds (*The Hardwick* (1883), 9 P. D. 32; *The Rothbury* (1893), 10 T. L. R. 60).

(*g*) Stephen, Digest of the Law of Evidence, 6th ed., art. 2.

(*h*) *Ibid.*, illustration to art. 2.

SECT. 1.
Facts in
Issue.

into an interrogatory and put to a witness—*e.g.*, “Did A. kill B.?”—the court would at once disallow it as a leading question (*i*); but even supposing the form to be corrected to the familiar “Tell us what happened,” and the witness were to reply, “A. killed B.; A. did not know right from wrong; A. received such provocation as reduces his offence to manslaughter,” the answers would still be excluded, because they involve inferences of law or fact which it is the province of the court or jury, and not of the witness, to draw (*k*). In simple cases, involving no inference on the part of the witness, this objection does not apply, *e.g.*, in an action of slander, where a fact in issue may be merely whether the defendant spoke the words or not (*l*). Nor does it apply where, as on questions of identity, though an inference or impression is stated, it is not always possible to give the bases thereof. Wherever the inference is doubtful, however, the proper course is for the witness to state the incidents relied on as constituting or amounting to the main fact, and not the latter *per se*.

There are many incidents, however, which, though not strictly constituting a fact in issue, may yet be regarded as forming a part of it, in the sense that they closely accompany and explain that fact. In testifying to the matters in issue, therefore, witnesses must state them not in their barest possible form, but with a reasonable fulness of detail and circumstance (*m*). These constituent or accompanying incidents are in law said to be admissible as forming part of the *res gesta* or main fact (*n*); and, when they consist of declarations accompanying an act, are subject to three important qualifications: (1) They must not be made at such an interval as to allow of fabrication, or to reduce them to the mere narrative of a past event (*o*); (2) they must relate to, and can only be used to explain, the act they accompany, and not independent facts prior

Incidents not
constituting
fact in issue.

(*i*) See p. 594, *post*.

(*k*) *Bonfield v. Smith* (1844), 12 M. & W. 405, where the point in issue was whether A. sold goods to B. solely, or to B. and C. jointly, and it was held that A. could not be asked, “With whom did you deal?” but that he might properly have been asked questions as to any particular acts that were done by the parties; *Rigg v. Manchester, Sheffield, and Lincolnshire Rail. Co.* (1866), 14 W. R. 834, where the question for decision was whether a railway platform was dangerous, and it was held that the opinions of witnesses that it was, or was not so, were inadmissible, though a statement that it was slippery etc. was allowed; *Seel v. Higgins* (1860), 8 H. L. Cas. 550, *per* Lord WENSLEYDALE, at pp. 565, 566 (question of infringement of patent: experts, though they may give their opinions on the points of science involved, may not testify that there has, or has not been, an infringement); *Grove v. Bulwago Estate and Trust Co.* (1898), *Times*, 30th March, C. A. (experts not allowed to be asked whether a certain corporation was a “gold-mining company,” as it depended on the construction of the prospectus etc.).

(*l*) *Clarke v. Main* (1904), *Times*, 24th March.

(*m*) Phipson, Law of Evidence, 4th ed., p. 45.

(*n*) “The principle of admission is that the declarations are *pars rei gestæ*” (*Rouch v. Great Western Rail. Co.* (1841), 1 Q. B. 51, *per* Lord DENMAN, C.J., at p. 60). As to what constitute the *res gesta* in criminal cases, see title CRIMINAL LAW AND PROCEDURE, Vol. IX., pp. 379–381.

(*o*) *Thompson v. Trevanion* (1693), Skin. 402 (action by husband and wife for injuries to latter: statement of wife, “immediate upon the hurt received and before she had time to devise anything to her own advantage,” admitted); *The Schwalbe* (1859), Sw. 521 (collision action: statement by pilot after his ship was cut away and while she was backing, “The damned helm is still a-starboard,” received); *Agassiz v. London Tramway Co.* (1872), 21 W. R. 199 (action

SECT. 1.
Facts in
Issue.

Mental and
physical
conditions.

or subsequent thereto (*p*); and (8) though admissible to explain, or corroborate, they are not in general to be taken as any proof of the truth of the matters stated (*q*): they are consequently not, in any strict sense, to be classed as exceptions to the hearsay rule (*r*).

610. With regard to the proof of mental and physical conditions, certain limitations prevail. Thus, although witnesses may give evidence of their own mental or physical condition at a given time, they may not testify directly as to that of others, but should state the facts from which the condition may be inferred. When, then, the bodily or mental feelings of another person are material to be proved, the usual expressions of such feelings made at the time by such person may be shown (*s*). If

against tramway company for injury to passenger: remark by fellow passenger to conductor, a few minutes after the collision, "The driver ought to be reported," and the conductor's reply, "He has already been reported, for he has been off the line five or six times to-day," rejected, the transaction being over, and the remark referring not to the *res*, but to the past acts, of the driver); *Smith v. Blakey* (1867), L. R. 2 Q. B. 326 (question as to terms on which A.'s country agent bought goods from B.: letter to A. by the agent, immediately after the sale, stating the terms, rejected); *R. v. Bedingsfield* (1879), 14 Cox, C. C. 341 (charge of murder: exclamation of deceased, while rushing with her throat cut out of a house entered by prisoner a minute or two before, of "Oh aunt, see what Bedingsfield has done to me," rejected, the transaction being over); see also *R. v. Goddard* (1882), 15 Cox, C. O. 7; *Gilbey v. Great Western Rail. Co.* (1910), 102 L. T. 202, C. A. In *R. v. Bedingsfield*, *supra*, COCKBURN, C.J., is generally considered to have applied the rule too strictly; on the other hand, the *dictum* of Lord DENMAN, C.J., in *Rouch v. Great Western Rail. Co.* (1841), 1 Q. B. 51, that "concurrence of time, though material, is not essential," seems to err in the opposite direction, the weight of authority favouring a substantial, though not a literal, contemporaneousness. Where, however, the act is of a continuous nature—e.g., prolonged residences in cases of domicile—declarations made at any time during its currency may properly be received (*Doucet v. Geoghegan* (1878), 9 Ch. D. 441, C. A.; *Re Grove, Vaucher v. Treasury Solicitor* (1888), 40 Ch. D. 216, C. A.). For a consideration of the cases decided under the old bankruptcy law, some of which contain very loose *dicta* on this point, see Law Quarterly Review, Vol. XIX., pp. 445–447.

(*p*) *Hyde v. Palmer* (1863), 32 L. J. (q. b.) 126 (question whether an article patented by A. in 1849 had been publicly sold by B. in 1846: evidence that B. in selling the same article in 1850 had then remarked, "This is a new article which I don't want fully known," rejected to show that the sale in 1846 was also a private one); and see *Agassiz v. London Tramway Co.* (1872), 21 W. R. 199, where a statement accompanying an act was rejected because relating to prior acts.

(*q*) *Perkins v. Vaughan* (1842), 4 Man. & G. 988 (statement by acceptor of bill, when refusing to pay, that his signature had been forged by the drawer, admitted to show the good faith of the presenter in taking criminal proceedings against the drawer, but not to prove the forgery); *Milne v. Leisler* (1862), 7 Ll. & N. 786 (question whether A. sold goods to B. personally, or to B. as agent for C.: letter by A. to his own agent, asking him to "enquire as to credit of C., and also of B., who is making large purchases for C.," admitted in A.'s favour, to corroborate other evidence, though not as any proof *per se*, that B.'s purchase was for C.); *The Aylesford Peerage* (1885), 11 App. Cas. 1 (question as to legitimacy of child born in wedlock: letter from mother to friends stating that an adulterer was the father of her child admitted, not as evidence of truth of that statement, but as part of adulterous conduct, leading to the conclusion of illegitimacy).

(*r*) See pp. 455 *et seq.*, *post*.

(*s*) "There is nothing outside a man's mind which is a certain indication of what is going on inside, yet you must look into it if you are going to find fraud against him, and unless you think you see what must have been in his mind you cannot find him guilty of fraud" (*Angus v. Olifford*, [1891] 2 Ch. 449, *per* BOWEN, L.J., at p. 471).

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Facts in
Issue.

these were the natural language of the affection, whether of body or mind, they furnish satisfactory evidence, and often the only proof, of its existence; and the question whether they were real or feigned is for the jury to determine (*t*). Such declarations are sometimes considered to fall within the *res gesta* principle, and sometimes to form a special category of their own: in either view, however, they are admitted merely as manifestations from which the given condition may be inferred, and not as assertions establishing the truth of the facts stated (*a*). So the answers of patients to inquiries by medical men and others, are admissible to prove their state of health, provided the answers be confined to contemporaneous symptoms, and are not in the nature of a narrative as to how or by whom the injuries were caused (*b*). Again, where it is material to prove the terms upon which two persons have lived, their conversations and correspondence with each other, or with third parties, are admissible (*c*); though, in the case of letters, in order to guard against collusion, independent evidence may be required that they were written before any suspicion of collusion could arise (*d*).

SECT. 2.—*Facts relevant to the Issue.*SUB-SECT. 1.—*In General.*

611. Facts relevant to the issue are facts which tend, directly or indirectly, to prove or disprove a fact in issue or to prove directly some relevant fact.

acts relevant
the issue.

Strictly speaking, legal and logical relevancy are not quite conterminous, law in some cases rejecting as the basis of an inference matters which logic would accept, *e.g.*, similar occurrences and character; in others prescribing as legal proof arbitrary requirements which have no logical bearing on the issue, *e.g.*, search and similar incidents necessary to admit secondary evidence of documents. In the main, however, the legal and logical theories coincide, and in the vast majority of cases the law will accept as evidence those matters which are indicated as such by the ordinary course of human experience.

It is not possible to classify all the facts which may be relevant in a judicial inquiry; but experience shows that in courts of law certain important classes of fact tend continually to recur as the bases of proof. These may, for convenience, be roughly grouped under three main divisions: (1) facts probative of the main fact; (2) facts showing the identity or connection of the parties; and (3) facts showing state of mind.

(*t*) Taylor, *Law of Evidence*, 10th ed., s. 580.

(*a*) Phipson, *Law of Evidence*, 4th ed., p. 50; and see *R. v. Gunnell* (1886), 16 Cox, C. C. 154, C. C. R.

(*b*) *Gardner Peerage Claim* (1727), *Le Marchant's Report*, pp. 169—179; *R. v. Blandy* (1752), 18 State Tr. 1117; *Aveson v. Kinnaird (Lord)* (1805), 6 East, 188; *R. v. Guttridge* (1840), 9 C. & P. 471, 473; *R. v. Nicholas* (1846), 2 Car. & Kir. 246, 248; *R. v. Johnson* (1847), 2 Car. & Kir. 354; *R. v. Gloster* (1888), 16 Cox, C. C. 471; *Gilbey v. Great Western Rail. Co.* (1910), 102 L. T. 202, C. A. As to the exceptional case of complaints in charges of rape, see p. 446, *post*.

(*c*) *Trelawney v. Colman* (1817), 2 Stark. 191, 193; *Willis v. Bernard* (1832), 1 L. J. (C. P.) 118; *Winter v. Wroot* (1834), 1 Mood. & R. 404.

(*d*) *Edwards v. Crock* (1801), 4 Esp. 39; *Trelawney v. Colman*, *supra*; *Houlston v. Smyth* (1825), 2 C. & P. 22, 24; *Wilton v. Webster* (1835), 7 C. & P. 198.

SECT. 2.

SUB-SECT. 2.—*Facts Probative of the Main Fact.*

**Facts
relevant to
the Issue.**

**Facts
logically
probative.**

612. Facts which have a natural and logical tendency to prove or disprove the main fact, or which experience ordinarily shows to have that effect, are, in general, also legally admissible. Thus, the question being whether A. is the child of B., the fact that in appearance A. closely resembles B. is relevant and admissible (*e*). So, the question being whether A. survived B. in a shipwreck in which both lost their lives, the fact that A. was stronger, in better health, and a more expert swimmer than B. is relevant (*f*). On the other hand, where the question is whether the pupils at a certain school were badly fed and lodged, evidence that they were badly educated should be rejected as irrelevant to that issue (*g*).

There are other classes of facts, however, of common occurrence in courts of law, but whose probative bearing is much less obvious, and which, to the lay mind, might in many cases seem to have a merely fanciful and remote connection with the issue. The law, nevertheless, allows them to be proved for what they are worth, leaving their weight to be determined by the circumstances of each individual case.

**Continuance
of facts.**

613. In many cases the existence of the main fact may be shown by proving its previous existence at a reasonably proximate date, there being a probability that certain conditions or relations continue. This was formerly regarded as a presumption of law, but the better opinion now is that it is, in most cases, merely a probability, or presumption of fact, which will vary with the particular circumstances (*h*).

**Presumption
of life.**

The most important application of this principle arises in the case of human life, as to which an inference of fact may legitimately be drawn that a person alive and in health at a certain time was alive a short time (*i*), or even several years (*j*), later. Similar inferences have also been drawn in the case of sanity (*k*), insanity (*l*), religious opinions (*m*), partnership (*n*), the tenure of land (*o*) or office (*p*),

(*e*) *Bagot v. Bogot* (1878), 1 L. R. Ir. 308; *Burnaby v. Baillie* (1889), 42 Ch. D. 282, 290.

(*f*) *Sillick v. Booth* (1841), 11 L. J. (CH.) 41; but not the mere fact that A. was a male and B. a female (*Underwood v. Wing* (1855), 4 Do G. M. & G. 633; *Wing v. Angrave* (1860), 8 IL. L. Cas. 183); see also *Durrant v. Freund* (1851), 5 Do G. & Sm. 343, and *R. v. Hay* (1767), 1 Wm. Bl. 640.

(*g*) *Boldron v. Widdows* (1824), 1 C. & P. 65.

(*h*) *E.g.*, the fact that defendant was driving a motor car when stopped is some evidence that he had been driving it at a recent stage of the same journey (*Beresford v. St. Albans Justices* (1903), 22 T. L. R. 1).

(*i*) *Re Phené's Trusts* (1870), 5 Ch. App. 139; *R. v. Lumley* (1869), L. R. 1 C. C. R. 196; *Re Connor* (1892), 29 L. R. Ir. 261; *Re Aldersey, Gibson v. Hall*, [1905] 2 Ch. 181, 185.

(*j*) *R. v. Willshire* (1881), 6 Q. B. D. 366, C. C. R. (eleven years); *R. v. Jones* (1883), 15 Cox, C. C. 284, C. C. R. (seventeen years).

(*k*) *Dyce Sombre v. Troup* (1856), Dea. & Sw. 22, 38; *Sutton v. Sadler* (1857), 26 L. J. (C. P.) 284.

(*l*) *Smith v. Tebbitt* (1867), L. R. 1 P. & D. 398.

(*m*) *A.-G. v. Braulough* (1884), Cab. & El. 467—469; and see title ECCLESIASTICAL LAW, Vol. XI., p. 357, note (*n*).

(*n*) *Clark v. Alexander* (1844), 8 Scott (N. R.), 147, 161; *Brown v. Wren Brothers*, [1895] 1 Q. B. 390.

(*o*) *Pickett v. Packham* (1868), 4 Ch. App. 190.

(*p*) *R. v. Budd* (1805), 5 Esp. 230.

SECT. 2.
Facts
relevant to
the Issue.

and the settlement of paupers (*g*). So, in the absence of evidence to the contrary, a debt once proved to exist is presumed to remain unpaid (*r*). And where adultery has been proved, its continuance will be presumed while the parties live under the same roof (*s*); but if the continuance of a condition is unlawful it will not in general be presumed (*a*).

The presumption of continuance may operate retrospectively, and it has, in fact, been so applied in several instances. Thus, the fact that a ship became unseaworthy, without visible cause, shortly after sailing is evidence that she was unseaworthy at the time of sailing (*b*). And a letter which was proved to be unsealed when received was presumed to have been so when posted (*c*).

614. The doing of an act may, in some cases, be inferred from the existence of a general course of business according to which it would ordinarily be done, there being a probability that the general practice will be followed in the particular case. The most common illustration under this heading arises in the case of letters which, if proved to have been addressed properly and posted, are presumed to have been received in due course (*d*). Under several statutes and orders, indeed, such proof is rendered conclusive where the letter has been registered, and in certain cases even where it has not (*e*). The same presumption has been applied where the question was whether a licence to export certain goods had been obtained, and proof was given that the goods had been entered at the Custom House for exportation, and a licence was presumed from the fact that the course of office did not permit exportation without one (*f*).

Course of
business.

The principle, however, is not by any means confined to public offices, but applies also to private concerns. Thus, where it was necessary to prove that an employer had paid certain wages to his servant, evidence was received that it was the former's practice to pay all his workmen regularly every Saturday, that the servant in question had been seen with the others waiting to be paid, and that he had not afterwards been heard to complain (*g*).

615. As a general rule, title to property may be shown by the exercise of acts of ownership in connection therewith (*h*). Thus, possession is not only *prima facie* evidence of ownership (*i*), but is

Acts of
ownership.

(*g*) *R. v. Tanner* (1795), 1 Esp. 301.

(*r*) *Jackson v. Irvin* (1809), 2 Camp. 48, 50.

(*s*) *Turton v. Turton* (1830), 3 Hag. Ecc. 338, 350.

(*a*) *Price v. Worwood* (1859), 4 Il. & N. 512, 514.

(*b*) *Pickup v. Thames Insurance Co.* (1878), 3 Q. B. D. 594, C. A.; *Ajum Goolam Hossen & Co. v. Union Marine Insurance Co., Hajee Cassim Joosub v. Ajum Goolam Hossen & Co.*, [1901] A. C. 362, P. C.

(*c*) *R. v. Bartlett* (1820), 4 B. & Ald. 95, 124, 125.

(*d*) *Kufh v. Weston* (1799), 3 Esp. 54; *Warren v. Warren* (1834), 1 Cr. M. & R. 250; *Dunlop v. Higgins* (1848), 1 Il. L. Cas. 381; *Household Fire Insurance Co. v. Grant* (1879), 4 Ex. D. 216, C. A.

(*e*) For a list of these statutes and orders, see Taylor, *Law of Evidence*, 10th ed., s. 180, and note (*d*). p. 556, *post*.

(*f*) *Van Omeron v. Dowick* (1809), 2 Camp. 42, 44.

(*g*) *Lucas v. Novosilieski* (1795), 1 Esp. 296.

(*h*) *Barnes v. Mawson* (1813), 1 M. & S. 77; and see title BOUNDARIES, FENCES, AND PARTY WALLS, Vol. III., pp. 148, 149.

(*i*) *Webb v. Fox* (1797), 7 Term Rep. 391, 397. As to this presumption in

SECT. 2.
Facts
relevant to
the Issue.

also evidence of the highest title to the property in question (*k*), and, as against mere wrongdoers, has in cases of trespass to real property even been said to be conclusive (*l*). Moreover, the presumption from the possession of land will, in general, apply not only to the surface, but also to the minerals underneath (*m*), though an exception to this exists in mining districts where the two are frequently held in different rights, and even in other cases the presumption may always be rebutted by proof of separate enjoyment (*n*). In addition to possession, other *indicia* of title are also admissible as evidence of ownership, *e.g.*, receipt of the rents and profits of the property, and the discharge of its burdens and repairs (*o*). On the same principle, granting leases (*p*), planting and felling timber (*q*), cutting grass, and grazing cattle or turning off those of strangers (*r*), have been held evidence of a right to the soil; perambulations by the lord have been held evidence of the boundaries of a manor (*s*); and user has been held evidence of title to an easement, the character of the user determining the extent of the easement (*t*).

In all these cases it is important to remember that acts of ownership are receivable not as admissions, since they operate in favour of the party exercising them, but as evidence of possession, and thus as proof of title (*u*).

Ancient
possession.

When the fact to be proved is the ancient possession of property, and the acts of ownership tendered consist of documents over thirty years old, two important qualifications exist, and these will only be receivable (1) if they purport to constitute (wholly or in part) the transactions which they effect, and are not mere prior directions to do, or subsequent narratives of having done, them (*a*); and (2) if they are produced from proper custody (*b*). To be of

relation to a wife's separate property when in the house of her husband, see *R. v. Murray*, [1906] 2 K. B. 385, C. C. R.; compare *Ramsay v. Margrett*, [1894] 2 Q. B. 18, C. A.

(*k*) *Jayne v. Price* (1814), 5 Taunt. 326; *Doe d. Daniel v. Coulthred* (1837), 7 Ad. & El. 235; *Doe d. Graham v. Penfold* (1838), 8 C. & P. 536, 537; *Daintry v. Brocklehurst* (1848), 3 Exch. 207; *Mellers v. Brown* (1863), 1 Il. & C. 686, 692.

(*l*) *Elliott v. Kemp* (1840), 10 L. J. (ex.) 321.

(*m*) *Rowbolham v. Wilson* (1860), 8 Il. L. Cas. 348.

(*n*) *Rowe v. Grenfel* (1824), Ry. & M. 396; *Rowe v. Brenton* (1828), 8 B. & C. 737.

(*o*) Stephen, Digest of the Law of Evidence, art. 5, n.; *Ferrand v. Milligan* (1845), 7 Q. B. 730. Declarations accompanying acts of ownership may also be proved as indicating the nature of the acts (*Bennison v. Cartwright* (1864), 5 B. & S. 1). Notice to a purchaser that rents are paid by tenants to some person whose receipt is inconsistent with the title of the vendor, is notice of that person's rights (*Hunt v. Luck*, [1902] 1 Ch. 428, C. A.).

(*p*) *Doe d. Eyremont (Earl) v. Fulman* (1842), 3 Q. B. 622, 623—626, where counterparts signed by the lessees were received; *Magdalen Hospital (Governors) v. Knotts* (1878), 8 Ch. D. 709, C. A.; *Haigh v. West*, [1893] 2 Q. B. 19, 30, C. A.

(*q*) *St. Leonards (Lord) v. Ashburner* (1869), 21 L. T. 595; *Doe d. Stansbury v. Arkwright* (1833), 5 C. & P. 575.

(*r*) *Belmore (Countess) v. Kent County Council*, [1901] 1 Ch. 873.

(*s*) *Woolway v. Rowe* (1834), 1 Ad. & El. 114.

(*t*) *Gingell, Son and Foskett, Ltd. v. Stepney Borough Council*, [1906] 2 K. B. 468; *Cowling v. Higginson* (1838), 4 M. & W. 245; *Blackett v. Lowes* (1814), 2 M. & S. 494; and title EASEMENTS AND PROFITS A PRENDRE, Vol. XI., pp. 259, 265.

(*u*) *Jones v. Williams* (1837), 2 M. & W. 326, *per PARKE, B.*, at p. 327.

(*a*) *Malcolmson v. O'Dea* (1862), 10 Il. L. Cas. 593; *Bristow v. Cormican* (1878), 3 App. Cas. 641, 658; *Blandy-Jenkins v. Dunraven (Earl)*, [1899] 2 Ch. 121, C. A.

(*b*) As to proper custody, see p. 512, *post*.

SECT. 2.
Facts
relevant to
the issue.

weight, moreover, these paper dispositions should be corroborated by proof of modern enjoyment thereunder, since it is conceivable that unscrupulous persons might have fabricated the deeds without having any title to the property (c). Strictly speaking, however, the absence of modern enjoyment goes merely to the weight, and not to the admissibility, of the evidence. Documents tendered under this head are sometimes considered to be admissible by way of exception to the hearsay rule; but seeing that they are received not as proving the truth of the matters stated, but merely as acts raising the inference of ownership, they are more properly classed under the present heading.

616. Under the present head may be classed the rule that acting in a public capacity, or relation, is evidence of title so to act, even in favour of the party so acting, and even against third persons who have in no way acquiesced therein. Moreover, acting in a public office is evidence of due appointment, although the appointment is required to be by deed (d), and is directly in issue in the proceedings (e), and although the acting is only shown to have taken place on a single occasion, and the case is a criminal one (f). The appointment of the following officials has been held, at common law, to be provable in this manner: Lords of the Treasury (g); Masters in Chancery, though exercising special powers (h); deputy county court judges (i); commissioners for oaths (k); surrogates (l); sheriffs and under-sheriffs (m); justices of the peace, constables, and watchmen, though the appointments were, in some cases, made under local Acts (n); churchwardens (o); overseers (p); vestry clerks (q); trustees for raising rates under local Acts (r); trustees under a turnpike Act (s); bank directors (t); weigh-masters of market towns (u); and attested soldiers in the recruiting service (v). And this common law rule has, in a few cases, been extended by

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(c) *Port v. Clarke* (1826), 1 Russ. 604.

(d) *Doe d. James v. Brawn* (1821), 5 B. & Ald. 243.

(e) *Dexter v. Hayes* (1860), 11 I. C. L. R. 106; affirmed *sub nom. Hayes v. Dexter* (1861), 13 I. C. L. R. 22, 1 Ex. Ch.; *Faulkner v. Johnson* (1843), 11 M. & W. 581.

(f) *R. v. Roberts* (1878), 14 Cox, C. C. 101, C. C. R.; *R. v. Lawson*, [1905] 1 K. B. 541, C. C. R.

(g) *R. v. Jones* (1809), 2 Camp. 131.

(h) *Marshall v. Lamb* (1843), 5 Q. B. 115.

(i) *R. v. Roberts*, *supra*.

(k) *R. v. Howard* (1832), 1 Mood. & R. 187; *R. v. Newton* (1844), 1 Car. & Kir. 469, 480; and see *R. v. Murphy* (1837), 8 C. & P. 297.

(l) *R. v. Verelst* (1813), 3 Camp. 432.

(m) *Bunbury v. Matthews* (1844), 1 Car. & Kir. 380; *Doe d. James v. Brawn*, *supra*; *Plumer v. Briscoe* (1847), 17 L. J. (Q. B.) 153; *Robinson v. Collingwood* (1864), 17 C. B. (N. S.) 777.

(n) *Berryman v. Wise* (1791), 4 Term Rep. 366; *Butler v. Ford* (1833), 1 Cr. & M. 662.

(o) *R. v. Mitchell* (1818), cited 2 Story on Criminal Evidence, 307, n.

(p) *Doe d. Bowley v. Barnes* (1846), 8 Q. B. 1037.

(q) *M'Gahey v. Alston* (1836), 2 M. & W. 206.

(r) *R. v. Murphy*, *supra*, at p. 310.

(s) *Pritchard v. Walker* (1827), 3 C. & P. 212.

(t) *R. v. Boaler* (1892), 67 L. T. 354; and see *R. v. Lawson*, *supra*.

(u) *M' Mahon v. Lennard* (1858), 6 H. L. Cas. 970; *Dexter v. Hayes*, *supra*.

(v) *Wolton v. Gavin* (1850), 16 Q. B. 48.

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statute, *e.g.*, to the proof of the appointment of officers of excise (*c*) and customs (*d*).

On the other hand, the fact that a person has acted in a private capacity, or relation, is generally, though not always, excluded as evidence of title, since the same safeguards do not exist as in the case of public functionaries. Evidence of the above nature has, accordingly, been rejected to prove the authority of a solicitor to act for his client (*e*); that of a collector of tithes for a private owner (*f*); as well as, it has been said, that of an executor or administrator (*g*); although it has been allowed in order to establish the relations of master and apprentice, landlord and tenant, and co-partners (*h*). But mere cohabitation is *prima facie* evidence of a valid marriage, its weight varying with the circumstances (*i*); and the presumption may prevail although evidence be offered of the invalidity of a ceremony actually gone through by the parties (*k*).

Custom and
usage.

617. Evidence of agricultural, mercantile, and other established usages is admissible to annex unexpressed incidents to contracts (whether oral (*l*) or written (*m*)), grants, wills (*n*), and the like (*o*), there being a presumption that people dealing in a particular market or place intend to adopt its settled practices (*p*).

(*c*) Inland Revenue Regulation Act, 1890 (53 & 54 Vict. c. 21), s. 24.

(*d*) Customs Consolidation Act, 1876 (39 & 40 Vict. c. 36), s. 261.

(*e*) *Bright v. Legerton* (1861), 2 De G. F. & J. 606.

(*f*) *Short v. Lee* (1821), 2 Jac. & W. 464, 168.

(*g*) Best, Law of Evidence, 10th ed., p. 307, n. (1), where it is pointed out that before the Common Law Procedure Act, 1852 (15 & 16 Vict. c. 76), s. 55, executors and administrators were bound, in pleading, to make proof of the probate or letters of administration; see Chitty on Pleading, 6th ed., p. 420.

(*h*) *R. v. Fordingbridge (Inhabitants)* (1858), 27 L. J. (M. C.) 290.

(*i*) *Doe d. Fleming v. Fleming* (1827), 4 Bing. 266; *Collins v. Bishop* (1878), 48 L. J. (Ct.) 31; *Fox v. Bearblock* (1881), 17 Ch. D. 429; *Re Thompson, Langham v. Thompson* (1904), 91 L. T. 680.

(*k*) *Re Shephard, George v. Thyer*, [1904] 1 Ch. 456, applying *Sastry Veluider Aronegary v. Sembucutty Vaigalie* (1881), 6 App. Cas. 364, L. C.

(*l*) *Sewell v. Corp* (1824), 1 C. & P. 392; compare *Loader v. London and India Docks Joint Committee* (1891), 65 L. T. 674.

(*m*) *Pike v. Ongley* (1887), 18 Q. B. D. 708, C. A.; *Univero Insurance Co. of Milan v. Merchants Marine Insurance Co.*, [1897] 2 Q. B. 93, C. A.; *Bechuanaland Exploration Co. v. London Trading Bank*, [1898] 2 Q. B. 658.

(*n*) *Dashwood v. Magniac*, [1891] 3 Ch. 306, C. A.

(*o*) *E.g.*, a custom that horse dealers were intrusted with other people's horses as negating the operation of the reputed ownership clause in bankruptcy (*Re Florence, Ex parte Wingfield* (1879), 10 Ch. D. 591, C. A.), but not a habit of horse dealers not to warrant a horse pronounced sound by a veterinary surgeon as negating the giving of a warranty (*Howard v. Sheppard* (1866), L. L. 2 C. P. 148). As to evidence of custom to explain a trade description, see *Watson v. Jaeger's Sanitary Woollen System Co.* (1897), 13 T. L. R. 150; see also *King v. Spencer* (1904), 20 Cox, C. C. 692 (customary mode of weighing); see also titles CONTRACT, Vol. VII., pp. 511, 516; CUSTOM AND USAGES, Vol. X., pp. 260 *et seq.*; SHIPPING AND NAVIGATION.

(*p*) *Hutton v. Warren* (1836), 1 M. & W. 466; *Pike v. Ongley, supra*; *Parker v. Ibbetson* (1838), 27 L. J. (P. C.) 236 (usage to terminate service by month's notice annexed to written hiring); *R. v. Stoke-upon-Trent (Inhabitants)* (1843), 13 L. J. (M. C.) 41 (usage to have certain holidays and Sundays free, annexed to written hiring); *Wigglesworth v. Dallinson* (1779), 1 Doug. (K. B.) 201; 1 Sm. L. C., 11th ed., 545 (usage for tenant to have away-going crop annexed to lease); *Johnson v. Raylton* (1881), 7 Q. B. D. 438, C. A. (usage that iron plates sold by a manufacturer under written contract were to be of his own make; see now Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), ss. 14, 55); *Murzetti v. Smith & Son*

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The usage must not be inconsistent with the express terms of the contract (*g*); and must be so sufficiently certain, reasonable, and generally acquiesced in, that it may be presumed to have formed an ingredient of the contract (*r*), in which case it will bind the parties even though they may be ignorant of it; otherwise a mere practice (*s*), or a usage that is unreasonable (*t*), will only bind those who know of and assent to it.

A local, or business, usage, as distinguished from a common law custom that is judicially noticed (*a*), may be proved by the direct evidence of witnesses (*b*), or by a series of particular instances in which it has been acted on (*c*), or sometimes by showing that the alleged usage exists in the same (*l*), or even in similar (*e*), trades or localities elsewhere.

618. The fact that a person has treated a certain state of things as existing is not usually receivable as evidence of its existence, Treatment.

(1883), 49 L. T. 580, C. A. (usage of port that general cargoes of steamships should be discharged on the quay, annexed to, and held not inconsistent with, bill of lading providing that cargoes were to be discharged from the ship's tackles). See, further, as to cases relating to the custom of the port, title SHIPPING AND NAVIGATION. For examples of customs rejected because inconsistent with written contracts, see *Barrow v. Dyster* (1884), 13 Q. B. D. 635 (custom which made broker a principal, in a certain event, inconsistent with written clause appointing him an arbitrator); *The Nifa*, [1892] P. 411 (custom of port throwing expense of taking cargo from ship's rail to quay on shipowner, inconsistent with contract that it was to be taken from alongside at merchant's expense). A less obvious application of this objection is shown in *Joynton v. Hunt & Son* (1905), 93 L. T. 470, C. A., where a glove manufacturer, after agreeing to pay a traveller commission on all business introduced by the latter and accepted by the former, terminated the agreement without notice. In an action by the traveller, the latter tendered evidence of a custom in the glove trade to give six months' notice on terminating an agency. The court, however, rejected this on the ground that, as the agreement excluded the idea of employment, and the custom could only apply thereto, it was inconsistent and inadmissible. See, further, as to parol evidence of local or mercantile customs in reference to written contracts, titles CONTRACT, Vol. VII., pp. 511, 516; CUSTOM AND USAGES, Vol. X., p. 217.

(*g*) *Robinson v. Mollett* (1875), L. R. 7 H. L. 802; *Brown v. Byrne* (1854), 3 B. & B. 703; *Barrow v. Dyster* (1884), 13 Q. B. D. 635; *Joynton v. Hunt & Son*, *supra*; *Hayton v. Irwin* (1879), 5 C. P. D. 130.

(*r*) *Plaice v. Allcock* (1866), 4 F. & F. 1074; *Ghose v. Munichund* (1859), 7 Moo. Ind. App. 282; *Devonald v. Rosser*, [1906] 2 K. B. 741—743.

(*s*) *Womersley v. Dally* (1857), 26 L. J. (Ex.) 219; *Sweeting v. Pearce* (1861), 9 C. B. (N. s.) 534.

(*t*) *Blackburn v. Mason* (1893), 68 L. T. 510; *Perry v. Barnett* (1885), 15 Q. B. D. 388.

(*a*) See p. 484, *post*.

(*b*) *Lewis v. Marshall* (1844), 7 Mun. & G. 744 (the evidence must be positive, and not the mere opinion of the witnesses).

(*c*) *Johnstone v. Spencer* (1885), 30 Ch. D. 581 (particular instances of manorial custom admitted, though they did not appear on any of the manor records); *Tucker v. Linger* (1882), 21 Ch. D. 34, 38 (an agricultural custom proved, not by what the tenants thought it was, but by acts publicly done throughout the district).

(*d*) *Noble v. Kenneway* (1780), 2 Doug. (K. B.) 510 (evidence of a custom in the cod fisheries of Labrador received to show what was the custom in those of Newfoundland); *Plaice v. Allcock*, *supra* (a custom of the bleaching trade at Nottingham received to show what was the custom in the same trade at Loughborough); *Re Leigh's Estate* (1877), 6 Ch. D. 256 (practice of other horse dealers admitted to show that agreement in question was reasonable).

(*e*) *Fleet v. Murtom* (1871), L. R. 7 Q. B. 126 (a custom in the colonial trade in London admitted to show what was the custom in the fruit trade there).

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unless it can be regarded as an admission by conduct made by a party to the suit, in which case it will operate as evidence against, but not for, him (*f*). Thus, on a question as to the sanity of a testator, the fact that his physician permitted him to make a will, or that he was elected, in his absence, to a high and responsible office, would be rejected; as also, on a question of seaworthiness, the fact that the captain showed his belief in the vessel by embarking in it with his family (*g*).

In certain cases, however, this rule is relaxed, and acts of treatment by a party are received, even in his own favour, as well as those done by strangers to the suit. Thus, acts of ownership by a party are admissible for him to establish title to property (*h*); and, on questions of pedigree, family conduct and treatment are receivable, even from non-parties, to show relationship (*i*). So a marriage may be inferred, not only from the cohabitation of the parties, but also from the fact that they were treated as married by their friends and neighbours (*k*); although where strict proof of this fact is required, *e.g.*, in bigamy proceedings, such evidence, while admissible, will not be sufficient (*l*).

Admissions
by conduct.

619. A party's admissions by conduct of any material fact may always be proved against him; and evidence to explain or disprove such admissions is receivable in his favour. Thus, payment of tithe by A. to B. would be an admission by conduct on the part of A. that he owed B. the tithe; though its receipt would not be an admission by B. of A.'s liability (*m*). So, in an action by A. and her husband, where the question was whether A. had suffered injury by a railway accident, evidence that A.'s husband and her solicitor's clerk had conspired to suborn false witnesses at the trial to support their case was held an admission by conduct that A.'s claim was not genuine (*n*). In such a case the fact that A. had attributed her injuries to a fall, and not to the accident, would be receivable under the same head; while, in rebuttal, A. might show that she had had no such fall as suggested (*o*).

Complaints.

620. On charges of rape, indecent assault, and similar offences upon females (but on no others), the fact and particulars of any complaint made by the prosecutrix shortly after the outrage are admissible as evidence for the prosecution, not to prove the truth of the matters stated, but as confirming her testimony, and, where consent is a defence, to disprove consent (*p*). The complaint must have been

(*f*) *Pilot v. Craze* (1888), 52 J. P. 311; *Wright v. Doe d. Tatham* (1837), 7 Ad. & M. 313, 387, Ex. Ch., *per* PARKE, B., at p. 388; *Re Anglesey (Marquis)*, *Willmott v. Gardner*, [1901] 2 Ch. 548, C. A.

(*g*) *Wright v. Doe d. Tatham*, *supra*.

(*h*) See p. 442, *ante*.

(*i*) *Greaves v. Greenwood* (1877), 2 Ex. D. 289, C. A.

(*k*) *Doe d. Fleming v. Fleming* (1827), 4 Bing. 266; *Re Thompson, Langham v. Thompson* (1904), 91 L. T. 680.

(*l*) *R. v. Simpson* (1883), 15 Cox, C. C. 323; *R. v. Althausen* (1893), 17 Cox, C. C. 630.

(*m*) *James v. Bion, Owen v. Flack* (1826), 2 Sim. & St. 600, 606.

(*n*) *Moriarty v. London, Chatham, and Dover Rail. Co.* (1870), L. R. 5 Q. B. 314; *R. v. Watt* (1905), 70 J. P. 29.

(*o*) *Melhuish v. Collier* (1850), 15 Q. B. 878.

(*p*) *R. v. Lillyman*, [1896] 2 Q. B. 167, C. C. R.; *R. v. Osborne*, [1905] 1 K. B. 551, C. C. R.; *Beatty v. Cullingworth* (1896), 60 J. P. 740; affirmed (1897),

made at the first reasonable opportunity that offered; thus complaints made on the following day (*q*), or three days after the outrage (*r*), have been rejected. The complaint must have been voluntary, and not induced by leading or intimidating questions. Answers to such inquiries as "Did A. assault you? Did he say this and that to you?" will be excluded; while answers to such questions as "What is the matter? Why are you crying?" will be admissible (*s*).

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SUB-SECT. 3.—*Facts showing the Identity or Connection of the Parties.*

621. Where the question of personal identity arises, without reference to the doing of any particular act, it may be proved or disproved, not only by direct testimony, but also presumptively by evidence of similarity or dissimilarity of personal characteristics. Thus, if A. claims property on the ground that he is B., it is relevant to show that A. possesses all, or any, of the known attributes or peculiarities of B. In practice, however, the question of identity usually occurs with respect to the doing of some specific act forming the subject-matter of the proceedings, the point being whether A. is or is not the author of such act. In civil cases this act is most commonly the signing of some contract or instrument, and in the absence of direct evidence of the identity of the alleged and the actual author, similarity of name and handwriting, and sometimes also of residence and occupation, may have to be proved.

Questions of
identity.

But by far the most important development of this principle occurs in criminal cases. Here, though the evidence tendered to prove the act may, in some cases, also prove the authorship, yet generally the proof of the two is separable (*a*), and consequently a much wider field may have to be explored. When, then, a criminal act has been proved, and it is desired to connect the accused therewith, it is relevant, whether there is direct evidence or not of identification, to show that he had or had not a motive for the act, or means and opportunity of doing it, or that he had made preparations with that end in view, or had threatened to do the act (*b*). Moreover, if the act itself, or the mode of doing it, revealed any special knowledge, skill, or peculiarity, the possession, or non-possession, by the accused of this special qualification may also be shown (*c*). The subsequent conduct of the accused often furnishes still more cogent evidence of guilt, *e.g.*, possession of recently stolen property, which, if unexplained, is evidence that

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cases.

Times, 14th January; see also title CRIMINAL LAW AND PROCEDURE, Vol. IX., p. 394.

(*q*) *R. v. Rush* (1896), 60 J. P. 777.

(*r*) *R. v. Ingrey* (1900), 64 J. P. 106.

(*s*) *R. v. Osborne*, [1905] 1 K. B. 551, C. C. R.

(*a*) Wills, *Circumstantial Evidence*, 5th ed., pp. 318, 319.

(*b*) Stephen, *Digest of the Law of Evidence*, art. 7; Best, *Law of Evidence*, 10th ed., ss. 453–458; *R. v. Clewes* (1830), 4 C. & P. 221 (fear of discovery proved as motive for murder of confederate); *R. v. Buckley* (1873), 13 Cox, C. C. 293 (depositions showing that deceased had given evidence against the accused in former proceedings admitted to show motive).

(*c*) *R. v. Patch* (1806), cited Wills, *Circumstantial Evidence*, 5th ed., p. 165, n., pp. 390–395, and *R. v. Richardson* (1787), *ibid.*, pp. 384–389, in which cases the evidence showed that the crime must have been committed by, and that the accused was, a left-handed man.

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the possessor is the thief, or the receiver, according to the circumstances, and throws on him the burden of explanation (*d*); flight; or the fabrication or suppression of evidence. On the other hand, a defence frequently raised by the accused is that of *alibi*; though very little weight will be attached to this unless it be supported by the prisoner's own evidence (*e*).

SUB-SECT. 4.—Facts showing State of Mind.

State of mind.

622. When the mental condition of a party is in question, it may be proved either directly by the party himself, or indirectly by other witnesses speaking to the outward expression of the given condition by the party at the time (*f*).

In addition to these sources, however, a third has frequently to be invoked, namely, that supplied by purely circumstantial evidence.

Inference of knowledge.

623. A party's knowledge of a fact may be inferred circumstantially in a variety of cases (*g*). Thus, it may be shown that he had prior knowledge of the fact, in which case there will be a presumption that such knowledge continued for a more or less lengthened period (*h*). In judicial proceedings, however, knowledge is more generally shown by documentary evidence. In ordinary cases, the mere fact that letters, with their seals broken, were found in the possession of a party will imply a knowledge by him of their contents (*i*). So, the execution (*k*), though not the mere attestation (*l*), of a written instrument will have the same effect. And access to documents sometimes affords presumptive evidence of knowledge, *e.g.*, in the case of the rules of a club, or of books kept between partners, or banker and customer (*m*). Knowledge of the

(*d*) *R. v. Partridge* (1836), 7 C. & P. 551; *R. v. Crouchurst* (1841), 1 Car. & Kir. 370; *R. v. Poolman* (1909), 3 Cr. App. Rep. 36; and see title CRIMINAL LAW AND PROCEDURE, Vol. IX., p. 619.

(*e*) *R. v. Kirkham* (1909), 73 J. P. 406, C. O. A.

(*f*) See p. 438, *ante*.

(*g*) As to the knowledge of an agent being imputed or not to his principal, see title AGENCY, Vol. I., pp. 215, 216; as to actual and constructive notice of facts affecting the title to land, see title EQUIT, pp. 84—88, *ante*; as to *scienter* in the case of damage done by an animal, see title ANIMALS, Vol. I., p. 372. The nature of the malady of a lunatic may be proved to show that defendant must have known of the lunacy (*Beavan v. M'Donnell* (1854), 10 Exch. 184).

(*h*) See p. 440, *ante*.

(*i*) *Wright v. Doe d. Tatham* (1837), 7 Ad. & El. 313, 369, 376, Ex. Ch.; and see S. C. (1838), 4 Bing. (N. C.) 531, 11. 11. This presumption, however, does not arise where the sanity of the recipient is in issue (*ibid.*).

(*k*) *Re Cooper, Cooper v. Vesey* (1882), 20 Ch. D. 611, C. A.

(*l*) *Harding v. Crethorn* (1793), 1 Esp. 57, 58.

(*m*) As to the imputation of knowledge of special terms printed on a ticket, invoice, bill of lading, or deposit note to the person receiving it, see *Henderson v. Stevenson* (1875), 11 R. 2 Sc. & Div. 470; *Harris v. Great Western Rail. Co.* (1876), 1 Q. B. D. 515; *Parker v. South Eastern Rail. Co.*, *Gabell v. Same* (1877), 2 C. P. D. 416, C. A.; *Malpas v. London and South Western Rail. Co.* (1866), 11 R. 1 C. P. 336; *Richardson, Spence & Co. and "Lord Gough" Steamship Co. v. Rowntree*, [1891] A. C. 217; *Watkins v. Rydmill* (1883), 10 Q. B. D. 178; *Burke v. South Eastern Rail. Co.* (1879), 5 C. P. D. 1; and titles CARRIERS, Vol. IV., p. 17; NEGLIGENCE; SHIPPING AND NAVIGATION. As to the effect of a condition printed on a sold note, see *Wallis, Son, and Wells v. Pratt and Haines* (1910), 26 T. L. R. 572, C. A.; and title SALE OF GOODS. As to the rule that a lessee or purchaser of land has constructive notice of that which he would

books of a company, however, will not be imputed either to a director or shareholder (*n*), though it will generally be implied where there is a duty to know (*o*), as distinguished from a mere right to inspect (*p*). Again, the notoriety of a fact in a party's calling, or neighbourhood, is some evidence that it reached his ears (*q*), while the mere existence of a rumour of the fact is none (*r*).

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624. In cases of intention, the line of demarcation between substantive law and evidence is not always very clearly observed (*s*). The intention with which a person did an act which he had a right to do cannot in general be inquired into (*t*), while in some cases, as where a defendant is charged with obtaining money without disclosing the fact of his bankruptcy, the intent, however innocent, with which he did so is, under statute, wholly immaterial, and any evidence on the point is consequently excluded, not by a rule of evidence, but by one of substantive law (*u*); so with a party's intent in infringing a patent (*a*); or inflicting cruelty to animals (*b*). When, however, intent can be, and is, properly put in issue, its proof becomes cognisable by the law of evidence, it being recognised that the state of a man's mind is as much a matter of fact, and so as much the subject of evidence, as the state of his digestion (*c*). It may be harder to prove than an external fact, but whenever it is material, litigants may prove it if they can (*d*). Intention, therefore, may be proved by the direct testimony of the party whose intention is in question; as well as by proof of his declarations made out of court at the time that such intention was material (*e*). But it may also, and much more often, be established circumstantially by the

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have discovered by a reasonable inquiry into the title, see titles EQUITY, pp. 86, 87, *ante*; LANDLORD AND TENANT; MORTGAGE; SALE OF LAND.

(*n*) *Hallmark's Case* (1878), 9 Ch. D. 329, C. A.; *Re Denham & Co.* (1883), 25 Ch. D. 752; *Re Printing, Telegraph, and Construction Co. of the Agence Havas, Ex parte Cammell*, [1891] 1 Ch. 528; *Dorey v. Cory*, [1901] A. C. 477, 492, 493.

(*o*) *Hallmark's Case*, *supra*.

(*p*) *Hill v. Manchester and Salford Water Works Co.* (1833), 5 B. & Ad. 866.

(*q*) *Re Matthews, Ex parte Powell* (1875), 1 Ch. D. 501, C. A.

(*r*) *Greenslade v. Dare* (1855), 20 Beav. 284.

(*s*) As to the distinction between representations of intention and of fact, see *Citizens' Bank of Louisiana v. First National Bank of New Orleans* (1873), L. R. 6 II. L. 352, and title MISREPRESENTATION AND FRAUD.

(*t*) *Bradford Corporation v. Pickles*, [1895] A. C. 587; *Allen v. Flood*, [1898] A. C. 1; *Quinn v. Leatham*, [1901] A. C. 495; *Fitzroy v. Carr*, [1905] 2 K. B. 361, C. A.; *Salt Union, Ltd. v. Brunner, Mond & Co.*, [1906] 2 K. B. 822.

(*u*) *R. v. Dyson*, [1894] 2 Q. B. 176, C. C. R.

(*a*) *Oxford and Cambridge Universities v. Gill & Sons* (1899), *Times*, 14th June.

(*b*) *Duncan v. Pope* (1899), 80 L. T. 120. For a statement of the cases in which *mens rea* is or is not required to be proved, see title CRIMINAL LAW AND PROCEDURE, Vol. IX., pp. 233–238. In the case of *Hobbs v. Winchester Corporation* [1910] 2 K. B. 471, C. A., the Court of Appeal, following *Mullinson v. Carr*, [1891] 1 Q. B. 48, *Blaker v. Tillstone*, [1894] 1 Q. B. 345, and *Firth v. McPhail*, [1905] 2 K. B. 300, and questioning *Walshaw v. Brighouse Corporation*, [1899] 2 Q. B. 286, held that *mens rea* was not essential to justify a conviction for being possessed of diseased meat. See also title FOOD AND DRUGS.

(*c*) *Edgington v. Fitzmaurice* (1885), 29 Ch. D. 459, C. A., *per* BOWEN, L.J., at p. 483.

(*d*) Pollock, *Law of Fraud in British India*, p. 61. As to evidence of intent to deceive in passing off cases, see *Saxlehner v. Apollokuris Co.*, [1897] 1 Ch. 893; and title TRADE MARKS.

(*e*) *Brodie v. Brodie* (1861), 4 L. T. 307.

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party's previous or subsequent conduct. Thus, the question being with what intention as to domicile A., a Frenchman, resided in England, the facts that he lived here for twenty-seven years, married successively two English wives, was during the greater part of his stay a partner in an English business house, and made his will in an English and not a French form, were received as showing an English domicile; while the facts that he frequently visited France, and refused to be naturalised in England, or to take a house there for more than three years, were admitted, though allowed less weight, in favour of an opposite contention (*f*).

Distinction
between law
and evidence.

The opposition, or distinction, between law and evidence in this connection, is well illustrated in cases where drunkenness is sought to be proved by an accused person. Since, by the substantive law, inebriety is no excuse for crime, its proof is ordinarily irrelevant. Nevertheless, where intent is material, the accused is entitled to show that he was in such a condition through drink, at the time of the act, that he could not appreciate its probable effects (*g*). In judging, however, of a party's state of mind, it is often important to consider not only his acts, but the declarations both of himself and of others. Declarations tendered for this purpose are, of course, not to be used as evidence of the truth of the matters stated, but merely as throwing light upon his state of mind at the time (*h*).

SUB-SECT. 5—Similar Facts.

Similar facts.

625. Evidence of similar facts may be tendered for three main purposes: (1) To prove the occurrence of the main fact; (2) to prove that a given party was its author; (3) to prove the state of mind of that party with reference to such fact. Of these objects, the first and second have given rise to a general rule of exclusion, qualified by certain exceptions; and the third to a general rule of admission, qualified by certain exclusions. It is useful to bear in mind the precise purpose and limits of each rule, since the second might be, and indeed sometimes is, supposed to constitute merely an additional exception to the first, instead of forming an independent rule, which stands wholly outside it. The rule of exclusion may be stated as follows:—Facts similar to, but not part of, the same transaction as the main fact are not, in general, admissible to prove either the occurrence of the main fact or the identity of its author.

Origin of
rule.

This rule is based, not on the logical irrelevancy of such evidence, nor, as is sometimes said, on the fact that it may be *res inter alios acta*, for it would be equally inadmissible if it were *inter partes*, but merely

(*f*) *Doucet v. Geoghegan* (1878), 9 Ch. D. 441, C. A.; *Platt v. A.-G. of New South Wales* (1878), 3 App. Cas. 336, P. C.; *Re Grove, Vaucher v. Treasury Solicitor* (1888), 40 Ch. D. 216, 229, 237, 239.

(*g*) *R. v. Haden* (1909), 2 Cr. App. Rep. 148; and see title CRIMINAL LAW AND PROCEDURE, Vol. IX., pp. 242, 243.

(*h*) Thus, in an action for malicious prosecution, the question being whether the defendant acted in good faith in giving the plaintiff into custody, the fact that he had obtained the opinion of counsel justifying such a course, together with the contents of the opinion, were received in his favour, though they would not have been evidence of any facts therein asserted (*Ravenga v. Mackintosh* (1824), 2 B. & C. 693).

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on the inconvenience and delay its admission might occasion, since it would tend to confuse the jury by raising collateral issues, and prejudice the parties by permitting attacks to be made without notice. The law assumes that litigants come into court ready to meet the specific case launched against them, but no man can be prepared to repel charges which may extend over the whole of his lifetime (*i*).

In illustration of the first branch of the rule, *i.e.*, that similar facts are inadmissible to prove the occurrence of the main fact, may be cited a case in which the question was whether a certain brewer supplied good beer to a publican. The brewer sought to establish this by proving, *inter alia*, that during the period in question he supplied good beer to other publicans. The evidence was rejected, the court remarking that a man might deal well with one and not with others (*j*). So, where the question was whether a surgeon had performed a certain operation negligently, evidence that he had been negligent or skilful in performing similar operations on other patients was rejected (*k*); but where a practice to do or omit a particular act is in issue, evidence of the act or omission on several occasions is admissible (*l*).

Inadmissible
to prove
occurrence of
main fact.

In neither of the above cases, it may be observed, was the identity of the party doing the act in any sense in question. In criminal cases, however, it is mainly on the latter point that the evidence is important, and has, in practice, been tendered and ruled upon. The criminal act itself, the *corpus delicti*, is, *prima facie* at least, assumed to have been established; and the question then arises, Was the prisoner the doer thereof? In order to establish this, evidence is offered that acts of a similar class were done by him which show a disposition, habit, or propensity on his part to do such acts, and a consequent probability that he did the act in question. It is to this proposition that the second branch of the rule applies; and although in everyday life inferences of the above kind are constantly drawn and acted upon, the law, nevertheless, regards them as unsafe, and will, in general, exclude the facts which give rise to them (*m*). Thus, if A. was charged with forging B.'s signature to a bill of exchange, and in order to connect A. with the crime it was proposed to show that he had forged B.'s signature in other instances, the evidence would be rejected (*n*), and, as here

Criminal
cases.

Proof of
similar acts
inadmissible.

(*i*) Where the charge is one of being an habitual criminal, the grounds of the charge must be stated in the notice of intention to raise it in a general way, and where evidence of previous bad conduct is admissible will depend on the circumstances of the case (*R. v. Turner*, [1910] 1 K. B. 316).

(*j*) *Holcombe v. Hewson* (1810), 2 Camp. 391; *Manchester Brewery Co. v. Coombs* (1900), 82 L. T. 347; but compare *Holden v. Bostock & Co., Ltd.* (1902), 50 W. R. 323, C. A., and *Bostock & Co., Ltd. v. Nicholson & Co., Ltd.*, [1901] 1 K. B. 725.

(*k*) *R. v. Whitehead* (1848), 3 Car. & Kir. 202; and see *Brown v. Eastern and Midlands Rail. Co.* (1889), 22 Q. B. D. 391, 393, C. A.; *Hales v. Kerr*, [1908] 2 K. B. 601, where, in an action against a barber by a customer who had contracted a contagious disease, evidence of witnesses who had also contracted the disease after being shaved at the defendant's shop was admitted; *McAllum v. Reid* (1869), L. R. 3 A. & E. 57, n.

(*l*) *Hales v. Kerr*, *supra*.

(*m*) See title CRIMINAL LAW AND PROCEDURE, Vol. IX., pp. 380, 381.

(*n*) *Griffiths v. Payne* (1839), 11 Ad. & El. 131, 133, per Lord DENMAN, C.J.; *Viney v. Barrs* (1795), 1 Esp. 293; *Balcetti v. Serani* (1792), Peake, 192, 193 [142, 143].

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the Issue.

Exceptions.

the parties would be the same in both cases, namely, the Crown and the prisoner, the objection of *res inter alios acta* could have no application, and the true ground of exclusion must be sought elsewhere.

626. Upon the above rule, however, certain exceptions have from time to time become engrafted, and in several instances similar facts may be received either to show the existence of the main fact (*o*), or to identify its causative agency. Thus, in divorce cases, both ante-nuptial incontinence and post-nuptial acts, prior or subsequent to those charged in the petition, may be received to prove a wife's adultery with the co-respondent (*p*). To prove agency, repeated acts thereof are admissible (*q*), although no multiplication of acts by a special agent can be received to establish a general agency (*r*), nor is evidence of this kind allowable in proof of partnership (*s*). Evidence of similar facts may, however, sometimes be resorted to on questions of title. Thus, not only are repeated acts of ownership with respect to the same property admissible in proof of this issue, but in certain cases even acts done with respect to other places, provided the latter are connected with the *locus in quo* by "such a common character of locality as to give rise to the inference that the owner of one is likely to be the owner of the other" (*t*). This principle has been applied to the waste lands of a manor (*u*), to roads (*x*), rivers (*a*), inland lakes (*b*), woods, hedges (*c*), and the like. Manorial and trade customs are also similarly provable (*d*). When the behaviour of animals is in question, it is admissible to prove not only the doings of the same animal on different occasions, but even those of other animals of the same species (*e*). And the operation of physical agencies may be shown in the same way, *e.g.*, of poisons (*f*), explosives (*g*), noxious discharges from works (*h*), sparks from a railway engine (*i*), or infection from a hospital (*ii*).

(*o*) *E.g.*, to show that defendant had given orders for work on a house; evidence that he had given similar orders for other work on the same house may be admitted (*Woodward v. Buchanan* (1879), 1 L. R. 5 Q. B. 285).

(*p*) *Wales v. Wales*, [1900] P. 63; *Cantello v. Cantello* (1896), *Times*, 1st February; *Howard v. Howard* (1904), *Times*, 14th July.

(*q*) *Blake v. Albion Life Assurance Society* (1878), 4 C. P. D. 91.

(*r*) *Burrell v. Irvine*, [1907] 2 L. L. 462, C. A.

(*s*) *Kennedy v. Dodson*, [1895] 1 Ch. 334, C. A.

(*t*) *Jones v. Williams* (1837), 2 M. & W. 326, *per* PARKE, B., at p. 331; *Lord Advocate v. Blantyre (Lord)* (1879), 4 App. Cas. 770, 791, 792.

(*u*) *Doe d. Barrett v. Kemp* (1835), 2 Bing. (N. C.) 102.

(*x*) *R. v. Brightside Bierlow (Inhabitants)* (1849), 13 Q. B. 933.

(*a*) *Neill v. Devonshire (Duke)* (1882), 8 App. Cas. 135; compare *Frost v. Richardson* (1910), 103 L. T. 22 (mill tail of mill built across navigable river not part of river).

(*b*) *Bristow v. Cormican* (1878), 3 App. Cas. 641, 670.

(*c*) *Jones v. Williams*, *supra*.

(*d*) *Anglesey (Marquis) v. Hatherton (Lord)* (1842), 10 M. & W. 218; as to trade customs, see p. 444, *ante*.

(*e*) *Brown v. Eastern and Midlands Rail. Co.* (1889), 22 Q. B. D. 391, C. A.

(*f*) *R. v. Geering* (1819), 18 L. J. (M. C.) 215; *R. v. Flannagan and Higgins* (1884), 15 Cox, C. C. 403.

(*g*) *R. v. Bernard* (1858), 1 F. & F. 210; *R. v. McGrath and McKevitt* (1881), 14 Cox, C. C. 598.

(*h*) *Tennant v. Hamilton* (1839), 7 Cl. & Fin. 122.

(*i*) *Aldridge v. Great Western Rail. Co.* (1841), 3 Man. & G. 515; *Piggot v. Eastern Counties Rail. Co.* (1846), 3 C. B. 229.

(*ii*) *Metropolitan Asylum District (Managers) v. Hill* (1882), 47 L. T. 29, H. L.

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the Issue.

Admissible to
prove state of
mind.

627. Evidence of similar facts, although in general inadmissible to prove the main fact or the connection of the parties therewith, is receivable, after evidence *aliunde* on these points has been given, to show the state of mind of the parties with regard to such fact. This rule, it will be observed, is not an exception to the preceding one, which forbids the proof of a criminal act by such evidence, but operates independently of it, and has a wholly different aim and scope, for it is always supposed that the doing of the act, as a fact capable of external observation, is first confessed, or that there is sufficient independent testimony on the subject to be laid before a jury. Were the law otherwise, it is obvious that under the pretence of proving the prisoner's state of mind the external act itself could be proved, and that the common law principle would thus be wholly set aside (*j*). Under the present rule, then, after the above foundation has been laid, evidence of similar facts may be legitimately received to prove a party's knowledge of the nature of the main fact or transaction, or his intent with respect thereto (*k*). The same principle is applicable to proof of fraud or malice (*l*). Thus, where A. was charged with fraudulently obtaining credit for board and lodging from B., evidence that shortly before he had left his previous landlord without paying his rent, and still owed this money when he went to lodge with B., was received to show his fraudulent intent with regard to the latter (*m*). And in libel cases, to establish malice, the publication by the defendant of other libels concerning the plaintiff, both prior and subsequent to that in issue, may be shown, together with all the circumstances attending their publication (*n*). And, in general, wherever it is necessary to rebut (even by anticipation) the defence of accident, mistake, or other innocent condition of mind, evidence that the defendant has been concerned in a systematic course of conduct of the same specific kind as that in question may be given (*o*). To admit evidence under this head, however, the other acts tendered must be of the same specific kind as that in question, and not of a

Evidence relating to collateral facts is only admissible when such facts will, if established, afford a reasonable presumption as to the matter in dispute, and when such evidence is reasonably conclusive (*ibid.*, per Lord Watson, at p. 35).

(*j*) *R. v. Hall* (1887), 5 New Zealand Law Reports, C. A., 93.

(*k*) Thus, where the question was whether A. had attempted to obtain money from B. by falsely pretending that a certain article was a diamond ring, the fact that A. had previously attempted to obtain money from other persons by false representations as to the genuineness of jewellery was admitted to show his knowledge that the ring in question was not genuine (*R. v. Francis* (1874), 1. R. 2 C. C. R. 128; *R. v. Ollis*, [1900] 2 Q. B. 758, C. C. R.). Knowledge that money was counterfeit (*R. v. Foster* (1855), 24 L. J. (M. C.) 134, C. C. R.), or that an agency was dangerous (*R. v. Cooper* (1849), 3 Cox, C. C. 547, 549, 550), may be similarly shown; and see title CRIMINAL LAW AND PROCEDURE, Vol. IX., pp. 381, 683.

(*l*) *Blake v. Albion Life Assurance Society* (1878), 4 C. P. D. 94; *Barnes v. Merritt & Co.* (1899), 15 T. L. R. 419, C. A.

(*m*) *R. v. Wyatt*, [1904] 1 K. B. 188, C. C. R.; *R. v. Walford* (1907), 71 J. P. 215, C. C. R.; *R. v. Smith* (1905), 92 L. T. 208, C. C. R.; *R. v. Rhodes*, [1899] 1 Q. B. 77, C. C. R.; and see *R. v. Ollis*, [1900] 2 Q. B. 758, C. C. R.

(*n*) *Barrett v. Long* (1851), 3 H. L. Cas. 395; *Pearson v. Lemaitre* (1843), 5 Man. & G. 700

(*o*) *R. v. Geering* (1849), 18 L. J. (M. C.) 215; *R. v. Garner* (1863), 3 F. & F. 681; *R. v. Cotton* (1873), 12 Cox, C. C. 400, following *R. v. Geering*, *supra*.

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different character (*p*). And the acts tendered must also have been proximate in point of time to that in question (*q*). If, however, these conditions concur, it is no objection that the similar facts are the subject of prior indictments on which the defendant has already been acquitted (*r*), or of separate indictments still to be tried (*s*).

SUB-SECT. 6.—Character.

Character.

628. When a party's character is not directly in issue in the proceedings, but is merely tendered in proof of some other fact, it is, as a general rule, excluded—not because it may not in strictness be logically relevant, but for reasons of policy and fairness, since no litigant can be prepared to protect himself against imputations made without previous notice, and which may range over the whole of his career (*a*). Accordingly, it is not primarily permissible in a criminal case to adduce evidence that the accused either bears a bad general reputation in the community, or has a natural disposition to commit crimes of the class charged (*b*). And the converse of the rule has also sometimes been applied—*e.g.*, in a divorce case, to disprove a particular act of cruelty, the respondent has not been allowed to call evidence that he was of a generally humane disposition (*c*). The above rule, however, is not invariable, and in criminal cases it has been relaxed to a certain extent *in favorem libertatis* (*d*).

Evidence of
character in
civil cases.

629. In civil cases, evidence as to character, though character is not directly in issue, is admissible in two classes of cases: (1) To impeach the credit of witnesses (*e*); and (2) in reduction of damages. Under the latter head, the bad character of the plaintiff in the case of actions for libel (*f*) or breach of

(*p*) Thus, on a charge of obtaining a pony and trap by false pretences, evidence that the accused had afterwards obtained a quantity of oats and fodder from another party was rejected, as the two acts were dissimilar (*R. v. Fisher*, [1910] 1 K. B. 149, C. C. A., followed and approved in *R. v. Ellis*, [1919] 2 K. B. 716, C. C. A.; *Makin v. A.-G. for New South Wales*, [1891] A. C. 57, P. C.; and see title CRIMINAL LAW AND PROCEDURE, Vol. IX., p. 380.

(*q*) *R. v. Wyatt*, [1901] 1 K. B. 188, C. C. R.; *R. v. Smith* (1905), 92 L. T. 208, 209, C. C. R.; *R. v. Walford* (1907), 71 J. P. 215, C. C. R.

(*r*) *R. v. Ollis*, [1900] 2 Q. B. 758, C. C. R.

(*s*) *R. v. Jones and Hayes* (1877), 14 Cox, C. C. 3.

(*a*) *R. v. Rowton* (1865), 34 L. J. (M. C.) 57, C. C. R., but see dissenting judgments of FRIE, C.J., and WILLES, J.

(*b*) *R. v. Rowton*, *supra*; *R. v. Cole* (1810), cited 1 Phillpotts and Arnold, Law of Evidence, 10th ed., 508, C. C. R.

(*c*) *Narracott v. Narracott* (1864), 33 L. J. (P. M. & A.) 61.

(*d*) As to evidence of character in criminal cases, see title CRIMINAL LAW AND PROCEDURE, Vol. IX., pp. 282 *et seq.*

(*e*) See p. 600, *post*.

(*f*) *Scott v. Sampson* (1882), 8 Q. B. D. 491. The evidence must be confined to the bad general reputation of the plaintiff, or, in cases where the plaintiff is libelled in respect of his calling, to his general reputation in that capacity, *e.g.*, his general reputation as a jockey when he is libelled as a jockey (*Wood v. Cox* (1888), 4 T. L. R. 550, 652, 655; and compare *Wood v. Durham (Earl)* (1888), 21 Q. B. D. 501). Rumours or suspicions to the same effect as the libel, and particular facts showing bad character or disposition, are inadmissible (*Scott v. Sampson*, *supra*). Moreover, where the truth of the libel has not been pleaded, the defendant cannot give evidence in chief of the circumstances under which the

promise (g), and the bad character of the woman betrayed in the case of actions for seduction (h) or petitions for damages for adultery (i), may be proved in chief in reduction of damages, irrespective of the right to cross-examine such person should he or she testify as a witness.

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SECT. 3.—Hearsay.

SUB-SECT. 1.—General Rule and Exceptions.

630. As a general rule, statements made by persons not called as witnesses are inadmissible to prove the truth of the facts stated. The term "hearsay," in the present connection, imports a purpose, and not a quality. A statement is hearsay if tendered to prove the truth of the facts asserted; it is original, or circumstantial, evidence if its materiality depends on the fact that it was made, and not on the fact that it was true. This main test, or distinction, if carefully borne in mind, will suffice to obviate many of the difficulties occurring in the law of evidence; but it is not always easy to apply. Thus, A. gives B. into custody for forging C.'s acceptance to a bill of exchange. The charge is dismissed, and B. sues A. for malicious prosecution. A. testifies that on presenting the bill to C., the latter said: "It is a forgery; B. has forged it." C.'s statement is hearsay and inadmissible if tendered to prove the forgery, but is relevant and admissible on the question of A.'s *bona fides*, in order to show the information on which he acted (a). If A. had taken counsel's opinion before acting, the contents of the opinion would be admissible for the same purpose (b).

Hearsay :
general rule.

631. The reasons usually advanced for the rejection of hearsay evidence are numerous, chief among them being—the irresponsibility of the original declarant, the depreciation of truth in the process of repetition, the opportunities for fraud its admission would open, and the waste of time involved in listening to idle rumour. In strictness, however, only two objections appear to

Reasons for
rejection.

libel was published, or of the character of the plaintiff, in mitigation of damages, without the leave of the judge, unless, seven days at least before the trial, he furnishes particulars to the plaintiff of the matters of which he intends to give evidence (11. S. C., Ord. 36, r. 37; and see title LIBEL AND SLANDER).

(g) *Foulkes v. Sellway* (1800), 3 Esp. 236. The evidence here may embrace the plaintiff's general character for, as well as specific acts of, immorality (*ibid.*).

(h) *Bamfield v. Massey* (1808), 1 Camp. 460; *Dodd v. Norris* (1814), 3 Camp. 519 (evidence of general immoral character, as well as prior, but not subsequent acts of immorality).

(i) *Smith v. Allison* (1765), Buller, Nisi Prius, 27. The wife's general immoral character, and previous but not subsequent acts of adultery (*Winter v. Henn* (1831), 4 C. & P. 494); as well as the husband's general character for infidelity, and particular acts thereof (*Bromley v. Wallace* (1803), 4 Esp. 237).

(a) *Perkins v. Vaughan* (1842), 6 Jur. 1114.

(b) *Ravenga v. Mackintosh* (1824), 2 B. & C. 693. Declarations which are a part of the *res gesta*, or which amount to acts of ownership, as leases, licences, and grants, or which constitute motive, convey notice or show good faith, fraud, negligence, or other states of mind, are all relevant, or the reverse, irrespective of the truth or falsity of the particular statement.

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be essential and decisive, namely, the absence of an oath and the deprivation of cross-examination (*c*). It is true that the presence of the witness is generally required as an additional safeguard to testimony, but this seems to be exacted primarily to ensure cross-examination, and only secondarily to observe demeanour (*d*); and, provided that the requirements as to oath and cross-examination have been fulfilled, the physical absence of the witness will not necessarily entail the exclusion of his evidence.

Exceptions.

632. The general rule against hearsay evidence is subject to three important classes of exceptions: (1) Admissions and confessions; (2) statements by deceased persons; and (3) statements contained in public documents (*e*).

In interlocutory proceedings (*f*), and in taking accounts (*g*), similar evidence may also, within certain limits, be received; and on the hearing of a summons for directions the judge may order any particular fact to be proved by statement on oath of information and belief (*h*).

Hearsay, when falling within any of the above exceptions, is receivable notwithstanding that direct evidence of the facts involved may also be available.

SUB-SECT. 2.—Admissions and Confessions.

Admissions.

633. In civil cases, statements made out of court by a party to the proceedings are evidence of the truth of the facts asserted against, but not in favour of, such party (*i*).

Although what a party has said on some former occasion may, without injustice, be presumed to be true as against himself, yet no presumption of truth arises when such statements are tendered as evidence in his own favour; otherwise, every man, if he were in a difficulty, or in view of one, might make declarations to suit his own case (*k*). This objection does not apply when his own statements are tendered for some other purpose than to prove their truth, and they may accordingly always be proved by him when offered merely as original or circumstantial evidence (*l*).

(*c*) Wigmore, *System of Evidence*, s. 1363.

(*d*) *Ibid.*, s. 1365.

(*e*) For instances of the exceptions in criminal cases, see also title CRIMINAL LAW AND PROCEDURE. Vol. IX., p. 393, note (*1*).

(*f*) R. S. C., Ord. 38, r. 3; *Re Young (J. L.) Manufacturing Co., Ltd.*, *Young v. Young (J. L.) Manufacturing Co., Ltd.*, [1900] 2 Ch. 753, O. A.; *Lumley v. Osborne*, [1901] 1 K. B. 532.

(*g*) R. S. C., Ord. 33, r. 3.

(*h*) R. S. C., Ord. 30, r. 7.

(*i*) Even though such party is only trustee for another (*Bauerman v. Radenius* (1798), 7 Term Rep. 603; and see note (*p*), p. 460, *post*), but the acts of one who is sued as a mere nominal defendant are not admissible in favour of the plaintiff against the real defendant who has been substituted for him (*Armstrong v. Normandy* (1850), 5 Exch. 409).

(*k*) *R. v. Hardy* (1794), 24 State Tr. 199, 1093—1094; *R. v. Petcherini* (1855), 7 Cox, C. C. 79, 82, 83; *R. v. Haines* (1858), 1 F. & F. 86. On a similar principle, a married woman cannot by any admission she can make get rid of a restraint on anticipation (*Bateman (Lady) v. Faber*, [1898] 1 Ch. 144, O. A.).

(*l*) See pp. 436 *et seq.*, *ante*.

634. As the value of an admission depends on the circumstances in which it was made, these are always receivable to affect its weight. Thus, the party against whom it is tendered may show that it was made in ignorance of the facts, or when his mind was in an abnormal condition. Moreover, the law has always been peculiarly tender in its treatment of efforts made by the parties to compromise their disputes, and accordingly it will altogether exclude proof of negotiations entered into for that purpose either expressly or impliedly "without prejudice." In order, however, to entitle communications to protection on this ground, it must appear that there was a dispute or negotiation impending between them, and that the letters were written, or interviews held, *bonâ fide* with a view to its settlement (*m*). Thus, a letter marked "Without prejudice," but containing a threat against the recipient should the offer not be accepted, is admissible to prove the threat (*n*); so, where the alternative to acceptance was that the writer would commit an act of bankruptcy (*o*). Letters marked "Without prejudice" protect subsequent correspondence on the same subject (*p*); and generally such letters cannot be used even on a question of costs (*q*). It has also been held, with perhaps more questionable propriety, that independent facts admitted during negotiations for a settlement are not protected. Thus, in an action by A. against B. on a bill of exchange, A. tendered evidence of certain proposals for payment made by B. to him at a confidential interview, as well as the fact that B. had, at the same interview, admitted the signature of the bill. The court rejected the proposals, but allowed B.'s admission to be proved (*a*).

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Hearsay.

When circumstances receivable.

Letters "without prejudice."

When a party sues, or is sued, personally, any admission which he has previously made, even in a representative capacity, is evidence against him (*b*). But the converse does not hold, and when sued or suing as a representative, admissions made by him before sustaining that character, or after it has ceased, are not binding on his principal (*c*).

635. A party against whom an admission has been proved may call upon his adversary, as a part of the latter's case, to prove so much of the entire statement, document, or correspondence containing or referred to in the admission, as is necessary to explain it, even though such additional part may be unfavourable to the adversary proving the admission (*d*). And the same rule applies

Whole statement receivable.

(*m*) *Re Daintrey, Ex parte Holt*, [1893] 2 Q. B. 116.

(*n*) *Kurtz & Co. v. Spence & Sons* (1887), 57 L. J. (CH.) 238. See, further, as to letters written without prejudice, p. 557, *post*.

(*o*) *Re Daintrey, Ex parte Holt, supra*.

(*p*) *Paddock v. Forrester* (1841), 3 Scott (N. R.), 734; *Peacock v. Harper* (1877), 26 W. R. 109; *Oliver v. Nautilus Steam Shipping Co.*, [1903] 2 K. B. 639, C. A.

(*q*) *Walker v. Wilsher* (1889), 23 Q. B. D. 335, C. A.

(*a*) *Waldrige v. Kennison* (1794), 1 Esp. 143.

(*b*) *Stanton v. Percival* (1855), 5 H. L. Cas. 257.

(*c*) *New, Prance, and Garrard's Trustee v. Hunting*, [1897] 1 Q. B. 607, 611; *Jegge v. Edmonds* (1855), 25 L. J. (CH.) 125, 141.

(*d*) *Thomson v. Austen* (1823), 2 Dow. & Ry. (K. B.) 358, 361; *Fletcher v. Froggatt* (1827), 2 C. & P. 569; *Cobbett v. Grey* (1850), 19 L. J. (EX.) 137; but the fact that such additional part contradicts the admission does not preclude

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to interrogatories (e). The jury may, however, attach different degrees of credit to the different parts (f). Distinct portions of the communication, not forming part of or essential to explain the admission, cannot, however, be proved under this head, however material to the case (g).

**Form of
admission
immaterial.**

636. The particular form in which an admission was made is, so far as its admissibility goes, generally immaterial. Thus, not only are solemn admissions on oath, such as those contained in affidavits and answers to interrogatories in the same or former proceedings (h), receivable against a party, but also declarations in wills (i), recitals or descriptions in deeds (k), receipts (l), bankers' pass-books (m), cases for the opinion of counsel (n), maps and surveys (o), probate stamps and executors' inventories (p), debtors' statements in bankruptcy proceedings (q), and even statements contained in cancelled or invalid instruments (r), though not (in civil cases) in unstamped ones (s). On the other hand, neither pleadings, unless upon oath (t), nor statements or depositions of witnesses called by a litigant are evidence against him in other proceedings under this head, unless expressly caused to be made or knowingly used as true by him for the purpose of proving some particular fact (a). Generally, however, any document which a party has signed or otherwise recognised, adopted, or acted upon, may be tendered against him as an admission, and so as evidence of the truth of its contents (b), though mere failure to answer a letter or object to an account will not necessarily have this effect (c).

the statement being regarded as some evidence of the admission (*Brown v. Wren Brothers*, [1895] 1 Q. B. 390).

(c) R. S. C., Ord. 31, r. 24; *Lytell v. Kennedy* (1884), 27 Ch. D. 1, 15, 29, C. A. (f) *Bernon v. Woodbridge* (1781), 2 Doug. (K. B.) 781, 788; *Smith v. Blandy* (1825), Ry. & M. 257.

(g) *Prince v. Samo* (1838), 7 Ad. & El. 627.

(h) R. S. C., Ord. 31, r. 24; *Fleet v. Perrins* (1868), L. R. 3 Q. B. 536.

(i) *Re Hoyle, Hoyle v. Hoyle*, [1893] 1 Ch. 84, C. A.

(k) *Carpenter v. Buller* (1841), 8 M. & W. 209.

(l) *Lee v. Lancashire and Yorkshire Rail. Co.* (1871), 6 Ch. App. 527. See also title CONTRACT, Vol. VII., p. 446, note (g).

(m) *Gaden v. Newfoundland Savings Bank*, [1899] A. C. 281, 236, P. C.; *Holland v. Manchester and Liverpool District Banking Co., Ltd.* (1909), 25 T. L. R. 386; *Kepitigalla Rubber Estates, Ltd. v. National Bank of India*, [1909] 2 K. B. 1010; and see title BANKERS AND BANKING, Vol. I., p. 619.

(n) *Meath (Bishop) v. Winchester (Marquis)* (1836), 3 Bing. (N. C.) 183, II. L.

(o) *Craven (Earl) v. Pridmore* (1902), 18 T. L. R. 282, C. A.

(p) Taylor, Law of Evidence, 10th ed., s. 860.

(q) *Hart v. Newman* (1811), 3 Camp. 13.

(r) *Breton v. Cope* (1791), Peake, 43.

(s) Stamp Act, 1891 (54 & 55 Vict. c. 39), s. 14.

(t) *Boileau v. Rutlin* (1848), 2 Exch. 665.

(a) *Ibid.*; *Brickell v. Hulse* (1837), 7 Ad. & El. 454; *Gardner v. Moulst* (1839), 10 Ad. & El. 464; *Richards v. Morgan* (1863), 4 B. & S. 641; *Simmons v. London Joint Stock Bank* (1890), 62 L. T. 427; *Evans v. Merthyr Tydfil Urban Council*, [1899] 1 Ch. 241, C. A.

(b) *Evans v. Merthyr Tydfil Urban Council*, *supra*; *Freeman v. Cox* (1878), 8 Ch. D. 148 (failure to dispute affidavit that money was in defendant's hands as executor treated as an admission by him); *Hampden v. Wallis* (1884), 27 Ch. D. 251 (admission in recital of settlement).

(c) *Fairlie v. Denton* (1828), 3 C. & P. 103; *Doe d. Frankis v. Frankis* (1840), 11 Ad. & El. 792; *Wiedemann v. Walpole*, [1891] 2 Q. B. 534, C. A., where, in

637. Statements made in the presence and hearing of a party are also evidence against him under the present head, to the extent that his answers or conduct show that he accepts the assertions made (*d*). And his mere silence, where he is reasonably called on to reply, will have the same effect (*e*). Where, however, a reply cannot reasonably be expected, silence will afford no inference of assent, *e.g.*, where the party was deaf, ignorant of the language, intoxicated, asleep (*f*), or in *extremis* (*g*). So, as to statements made in a party's presence in the course of judicial inquiries, for here the regularity of the proceedings prevents free interposition (*h*).

SECT. 3.
Hearsay.

Statements in
a party's
presence.

638. Not only may a party's own statements be thus given in evidence against him, but those also of other persons who were at the time in privity with him. The term "privity" implies mutual or successive relationship to the same interests, and the admissions of privies are receivable because they are identified in interest with the party against whom they are tendered (*i*). Privies are of three classes: (1) Privies in blood, as heir and ancestor; (2) privies in law or representation, as executor and testator; and (3) privies in estate or interest, as vendor and purchaser, grantor and grantee, lessor and lessee.

Admissions
by privies.

Admissions made by persons so connected with a party are, however, only *prima facie* evidence against him, and may be contradicted or explained in the same manner as if made by himself.

The following are the chief relationships of this class:—

Statements made by a predecessor in title, when in possession of property, and affecting his rights thereto, are evidence against, but not in favour of, a party claiming through him by title subsequent to the admission (*j*). But the rule is only co-extensive with the identity

Predecessors
in title.

an action for breach of promise by A. against B., copies of letters written both by A. and by the rector of her parish to B., in which they alleged that B. had promised to marry A., but to which B. had returned no answer, were rejected both as proof and as corroboration of the promise. Compare *Gaskill v. Shene* (1850), 14 Q. B. 661.

(*d*) *R. v. Norton*, [1910] 2 K. B. 496; *Child v. Grace* (1825), 2 C. & P. 193; *Jones v. Morrell* (1844), 1 Car. & Kir. 266. In *R. v. Smith* (1897), 18 Cox, C. C. 470, HAWKINS, J., held that a party's denial of a statement made in his presence excluded it; but in *R. v. Bromhead* (1906), 71 J. P. 103, C. C. R., this proposition was considered too wide, and the court, while declining to lay down any general rule, said that each case must be decided on its own circumstances.

(*e*) *R. v. Norton*, *supra*; *Wiedemann v. Walpole*, [1891] 2 Q. B. 534, 539, C. A.; *Richards v. Gallatly* (1872), 1. R. 7 C. P. 127, 131; *R. v. Tate*, [1908] 2 K. B. 680, 683, C. A. Thus, in a breach of promise case, evidence that the plaintiff had said to the defendant, in circumstances which made it reasonable to expect an answer, "You know you have always promised to marry me, and now you don't keep your word," to which the defendant made no reply, was received as some evidence of corroboration of the promise (*Bessela v. Stern* (1877), 2 O. P. D. 265, C. A.).

(*f*) *Wright v. Tatham* (1838), 5 Cl. & Fin. 670, 701, 722, II. L.

(*g*) *R. v. Mitchell* (1892), 17 Cox, C. C. 503, 508.

(*h*) *R. v. Turner* (1832), 1 Mood. C. C. 317; *R. v. Mitchell* (1892), 17 Cox, C. C. 503.

(*i*) The answers of a bankrupt, however, are, on special grounds, not admissible against other parties even in the same proceedings (*Re Brunner* (1887), 19 Q. B. D. 572).

(*j*) *Melbourne Banking Corporation v. Brougham* (1882), 7 App. Cas. 307, P. C. Where A. sued B., as administrator of C., an intestate, to recover a watch, a declaration by C. that he had given the watch to A. is evidence against B. (*Smith v. Smith* (1836), 3 Bing. (N. C.) 29). And where A. sued B. for trespass

SECT. 3.
Hearsay.

of the interest, and, accordingly, admissions by a subordinate will not affect the estate of a superior in title. Thus, a tenant cannot by his admissions restrict his landlord's rights (*k*); nor can a tenant for life the title of the remainderman (*l*). In this connection, however, a distinction exists between the case of an assignee of land and that of an assignee of a negotiable instrument, the former having, in general, no title unless his assignor had, while the latter may have a good title though his assignor had none. Consequently, unless the plaintiff suing on a bill or note stands on the title of the former owner, as by taking the bill with notice, or without consideration, or when overdue, the declarations of the former holder are not receivable against him (*m*).

**Nominal and
real parties.**

The admissions of a real party who, though not named on the record, has a substantial interest in the event are evidence against a nominal party to the proceedings. The admissions must, however, have been made during the subsistence of the interest of the real party, and are only receivable so far as the rights of the two are identical. Thus, the admissions of a *cestui que trust* are evidence against his trustee (*n*), as 'also are those of a shipowner against the master, where the latter sues for freight (*o*). And, conversely, the principal may be affected by the admissions of his representative, if made while the latter filled that capacity (*p*). So, also, the admissions of an executor are receivable against a legatee (*q*), though not against the heir or devisee, since here the two interests are distinct (*r*). This rule, however, does not apply to the case of a guardian or next friend of an infant, these being merely officers appointed for the latter's protection, and, accordingly, admissions made by either are not evidence against the infant (*s*).

**Partners,
co-contractors.**

Admissions or representations made by a partner concerning the partnership business, and in its ordinary course, are evidence against the firm (*t*). And an admission by one of several joint

to land, and B. tendered evidence that C., a former proprietor of A.'s estate, had, while in possession thereof, stated that he (C.) had only a right of common over the land, but no right to enclose it, this was admitted against A., although A. was alive and might have been called as a witness (*Woolway v. Rowe* (1834), 1 Ad. & El. 114). On the other hand, a statement made by a mortgagor, after he had assigned the equity of redemption, that he had paid interest on the mortgage up to a certain date would be inadmissible (*Dysart Peerage Case* (1881), 6 App. Cas. 489, 500). See also *Fenwick v. Thornton* (1827), Mood. & M. 51.

(*k*) *Papendick v. Bridgwater* (1855), 5 E. & B. 166; *Blandy-Jenkins v. Dunraven (Earl)*, [1899] 2 Ch. 121, C. A.

(*l*) *Howe v. Malkin* (1878), 27 W. R. 340; unless the admission is accompanied by some act (*ibid.*).

(*m*) *Barough v. White* (1825), 4 B. & C. 325; *Beauchamp v. Parry* (1830), 1 B. & Ad. 89; Byles on Bills, 16th ed., p. 432.

(*n*) *Harrison v. Vallance* (1822), 1 Bing. 45; *May v. Taylor* (1843), 6 Man. & G. 261.

(*o*) *Smith v. Lyon* (1813), 3 Camp. 465.

(*p*) *Legge v. Edmonds* (1855), 25 L. J. (CH.) 125, 141; *New, Prance, and Garrard's Trustee v. Hunting*, [1897] 1 Q. B. 607, 611.

(*q*) *Concha v. Concha* (1886), 11 App. Cas. 541, 553.

(*r*) *Lordham v. Wallis* (1853), 10 Hare, 217.

(*s*) *Ingram v. Little* (1883), 11 Q. B. D. 251; though as to interrogatories and inspection or production of documents, see now R. S. C., Ord. 31, r. 29, and title DISCOVERY ETC., Vol. XI., p. 35.

(*t*) Partnership Act, 1890 (53 & 54 Vict. c. 39), s. 15; and see title PARTNERSHIP,

SECT. 3.
Hearsay.

contractors concerning the joint undertaking is receivable against the others, whether sued or suing jointly or severally (*u*).

The interest entitling such evidence to be received must, however, be of a joint, and not merely of a common, nature. Thus, though the admissions of joint tenants would be evidence against each other, the rule does not extend to those of tenants in common (*a*), nor to mere co-part-owners of a vessel, as distinguished from co-partners therein or in a part thereof (*b*). Moreover, the admissions must have been made during the continuance of the joint interest, and not before it commenced (*c*), nor after it had ceased (*d*). The same rule applies to co-representatives. Thus, admissions made by a trustee as to the receipt of money will bind his co-trustees where they are personally liable, though not otherwise (*e*). But it does not extend to co-parties in legal proceedings, *e.g.*, respondent and co-respondent (*f*), nor *à fortiori* to the case of principal and surety, for here, as the surety contracts with the creditor, there is no privity between him and the debtor (*g*).

The admissions of an agent are evidence against his principal, either when expressly authorised by the latter, or when made on the principal's behalf in the ordinary course of some business or transaction in which the agent acted as his representative (*h*). The agent's admissions, however, must have been made to a third person, mere reports to his own principal not being evidence against the latter (*i*). Agents.

Under this head admissions made by the directors (*k*) or manager (*l*), but not by the secretary (*m*), of a company, have been received against it, when made in the course of transactions with third persons, and not as confidential communications to the company's own shareholders (*n*). So, admissions by a station-master as to the loss of goods at his station have been received against the railway company (*o*), while those by a night inspector have been rejected (*p*). Particular agents.

(*u*) See *Wood v. Braddick* (1807), 1 Taunt. 104.

(*a*) Taylor, Law of Evidence, 10th ed., ss. 750, 751; *Dan v. Brown* (1825), 4 Cowen, 483, 492 (American case). An acknowledgment by one of two executors and devisees in trust of real estate against the wish of the other is not binding on the two in their capacity of trustees (*Astbury v. Astbury*, [1898] 2 Ch. 111); nor if it does not relate to the affairs of the executorship (*Fac v. Waters* (1840), 12 Ad. & El. 43).

(*b*) *Jaggers v. Binnings* (1815), 1 Stark. 64.

(*c*) *Catt v. Howard* (1820), 3 Stark. 3; *Tunley v. Evans* (1845), 2 Dow. & L. 747.

(*d*) *Parker v. Morrell* (1848), 2 Ph. 453.

(*e*) *Skaipe v. Jackson* (1824), 3 B. & C. 421; *Jago v. Jago* (1893), 68 L. T. 654.

(*f*) *Crawford v. Crawford* (1886), 11 P. D. 150.

(*g*) *Bain v. Cooper* (1842), 9 M. & W. 701; *Re Kitchin, Ex parte Young* (1881), 17 Ch. D. 668, C. A.

(*h*) See title AGENCY, Vol. I., p. 215.

(*i*) *Re Devala Provident Gold Mining Co.* (1883), 22 Ch. D. 593; *Cooper v. Metropolitan Board of Works* (1883), 25 Ch. D. 472, C. A.

(*k*) *Ibid.*

(*l*) *Simmons v. London Joint Stock Bank* (1890), 62 L. T. 427.

(*m*) *Bruff v. Great Northern Rail. Co.* (1858), 1 F. & F. 341; *Burnside v. Dayrell* (1849), 3 Exch. 224. See title COMPANIES, Vol. V., p. 244.

(*n*) *Re Devala Provident Gold Mining Co.*, *supra*.

(*o*) *Kirkstall Brewery Co. v. Furness Rail. Co.* (1874), L. R. 9 Q. B. 468.

(*p*) *Great Western Rail. Co. v. Willis* (1865), 34 L. J. (C. P.) 195.

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Hearsay.

Similarly, the admissions of the captain of a ship are evidence against the owners, but not generally those of the officers or crew (*q*), unless made in the ship's log (*r*), nor those of the pilot (*s*).

Husband and wife.

The admissions of a wife are not, in general, receivable against her husband. Where, however, he has either expressly appointed her his agent in that behalf, or has impliedly done so, as by allowing her to conduct his business in his absence, her admissions made in the ordinary course thereof are evidence against him. Thus, her admissions as to the receipt of goods have been held to bind her husband (*t*); though not those relating to matters outside the conduct of the business—*e.g.*, the terms of his tenancy of the premises (*u*).

Solicitor and counsel.

In civil cases, the admissions of a solicitor, or of his managing clerk or agent, if made during the actual progress of litigation, are evidence against his client in the same proceeding (*a*). Indeed, if made for the express purpose of dispensing with proof at the trial, they will generally be conclusive against the client (*b*); otherwise they amount merely to *prima facie* evidence of the facts involved (*c*). Admissions made before litigation commenced (*d*), or casually in mere conversation (*e*), or to persons other than the opposite party (*f*), will, not, however, bind the client. The rule is somewhat narrower in the case of counsel; for whereas the admissions of a solicitor bind the client if made at any time during the proceedings for which he is retained, those of counsel only bind when made on the particular occasion for which he is instructed (*g*).

References.

On similar principles, when a party refers to a third person for information or an opinion on a given subject, the latter's reply is, at all events, *prima facie* evidence against the former (*h*); and if the reference has been made under an agreement in that behalf, it will probably be conclusive (*i*).

(*q*) *The Actaeron* (1853), 1 Ecc. & Ad. 17c.

(*r*) *The Solway* (1885), 10 P. D. 137; *The Earl of Dumfries* (1885), 10 P. D. 31.

(*s*) *The Schwalbe* (1859), Sw. 521.

(*t*) *Clifford v. Burton* (1823), 1 Bing. 199; *Meredith v. Foulner* (1843), 11 M. & W. 202.

(*u*) *Ibid.*

(*a*) *Elton v. Larkins* (1832), 5 C. & P. 385; *Doe d. Wetherell v. Bird* (1835), 7 C. & P. 6; *Blackstone v. Wilson* (1857), 26 L. J. (EX.) 229; and see title SOLICITORS. An admission by a solicitor made fraudulently is not binding on the client (*Williams v. Preston* (1882), 20 Ch. D. 672, C. A.).

(*b*) *Elton v. Larkins*, *supra*; *Langley v. Oxford (Earl)* (1836), 5 L. J. (EX.) 166.

(*c*) *Holt v. Squire* (1825), Ry. & M. 282.

(*d*) *Wagstaff v. Wilson* (1832), 4 B. & Ad. 339.

(*e*) *Petch v. Lyon* (1846), 16 L. J. (Q. B.) 393; *Watson v. King* (1846), 3 C. B. 608.

(*f*) *Wilson v. Turner* (1808), 1 Taunt. 398.

(*g*) *Richardson v. Peto* (1840), 1 Man. & G. 896; *R. v. Greenwich County Court (Registrar)* (1885), 15 Q. B. D. 54, C. A.; and see title BARRISTERS, Vol. II., p. 401.

(*h*) *Williams v. Innes* (1808), 1 Camp. 364; *Daniel v. Pitt* (1808), 1 Camp. 366, n.; *Lloyd v. Willan* (1794), 1 Esp. 178.

(*i*) *Price v. Hollis* (1813), 1 M. & S. 105. But an admission by an arbitrator that his award was improperly made is not admissible in an application to set it aside (*Re Whitley and Roberts' Arbitration*, [1891] 1 Ch. 558).

SUB-SECT. 3.—*Statements by Deceased Persons.*

SECT. 3.

Hearsay.

639. The second group of exceptions to the hearsay rule consists of statements made by persons since deceased, which are admitted in proof of the facts asserted if made under certain specified conditions considered to afford a *prima facie* guarantee of their accuracy.

Statements
by persons
since
deceased.

The declarations so admissible are:—(i.) Declarations against Interest. (ii.) Declarations in the course of Duty. (iii.) Declarations as to Public Rights. (iv.) Declarations as to Pedigree. (v.) Dying Declarations in cases of Homicide. (vi.) Declarations by Testators as to their Wills.

Declarations falling under the first two headings are admissible upon any issue; the others are only admissible to prove the particular issue specified.

(i.) *Declarations against Interest.*

640. Oral or written declarations made by deceased persons against their pecuniary or proprietary interests are admissible to prove the facts stated.

Declarations
against
interest.

Declarations which acknowledge the payment of money due to the declarant, or charge him with the receipt of sums for which he is accountable to another, will satisfy the first-named requirement (k); and declarations which have been made when the declarant was in actual possession of property, and have operated in disparagement of his title thereto, will satisfy the second requirement (l).

Require-
ments.

On the other hand, if the statement, though against interest in other respects, does not affect the pecuniary or proprietary rights of the declarant, it will be rejected. Thus, where it was sought to prove the marriage of A. and B. by the statement of a deceased clergyman that he had married them—the circumstances being such that to have done so would render him liable to a criminal prosecution—the evidence was rejected on the ground that the detriment involved was not one of a pecuniary or proprietary nature (m).

(k) *Foster v. M'Mahon* (1847), 11 L. Eq. R. 287, 299; *In the Goods of Thomas* (1871), 41 L. J. (P. & M.) 32; *Wills v. Palmer* (1904), 53 W. R. 169. An entry made by a deceased accoucheur, in his own account-book, of the payment of his charges for attending a confinement on a certain date was received, as being against pecuniary interest, to prove the date of the child's birth (*Higham v. Ridgway* (1808), 10 East, 109; 2 Smith, L. C., 11th ed., 327). But the books of a firm in which entries against interest have been made by a deceased partner are not on that account admissible (*Re Fountaine, Re Dowler, Fountaine v. Amherst* (Lord), [1909] 2 Ch. 382, C. A.); see also *Vivian v. Moot, Vivian v. Walker* (1881), 44 L. T. 210.

(l) *Peaceable v. Watson* (1811), 4 Taunt. 16; *Carne v. Nicoll* (1835), 1 Bing. (N. C.) 430; *Doe d. Welsh v. Langfield* (1847), 16 M. & W. 497; *R. v. Exeter Guardians* (1869), L. R. 4 Q. B. 341. A statement made by a person, while engaged in felling timber on certain land, that the land belonged to a third person, was received, after proof of the declarant's death, as evidence of the facts asserted. In this case the mere felling of timber was held to be a sufficient act of ownership to imply seisin in the declarant, so as to let in his statement in derogation of that *prima facie* title (*Doe d. Stansbury v. Arkwright* (1833), 5 C. & P. 575; see also *Gery v. Redman* (1875), 1 Q. B. D. 161).

(m) *The Sussex Peerage* (1844), 11 Cl. & Fin. 85, 108, 11 L. L.; *R. v. Birmingham Overseers* (1861), 1 B. & S. 763.

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Hearsay.

The declarations must have been against interest at the time they were made; it is not sufficient that they might possibly turn out to be so afterwards (*n*). Thus, where, in order to prove that A., a deceased bankrupt, owed money to B., an admission of that fact in the bankrupt's statement was tendered as being a declaration against interest, since there might be a surplus, after payment of debts, which would be diminished by the debt to B., the court rejected the evidence on the ground that the statement was not one which was, when made, adverse to the bankrupt (*o*). So, a statement of the terms of a contract will not be presumed to be against the interest of either party (*p*). But an acknowledgment by a deceased creditor of money received by him on account of a debt is receivable as a declaration against interest if made before, though not after, the debt has become statute-barred (*q*).

**Knowledge
unnecessary
in declarant.**

641. Declarations against interest are admissible although the declarant had no personal knowledge of the facts stated, but spoke or wrote merely from hearsay (*r*); and although he might even have had an interest to misstate the facts. These circumstances affect the weight, not the admissibility, of the evidence. Moreover, the declarations are receivable to prove not only the precise fact which is against interest, but any other connected facts which are necessary to explain the former, even though these may operate in the declarant's favour (*s*). On this principle, accounts have been admitted, some items of which charge the declarant, although other connected items discharge him, or even show a balance in his favour, since it is not to be presumed that a man will charge himself falsely for the mere purpose of getting a discharge; and, in the latter case, the debit items would still be against interest, since they diminish the balance in his favour (*t*). On the other hand, disconnected items, although contained in the same document or statement, will be excluded (*a*).

(ii.) *Declarations in the course of Duty.*

**Declarations
in the course
of duty.**

642. Statements made by a deceased person in the course of his duty and in the ordinary routine of his business are admissible in certain circumstances to prove the facts alleged in the pleading.

To be admissible upon this ground the statement must (a) relate to some act or transaction performed by the person making it in the ordinary course of his business and duty; (b) be made in the

(*n*) *Massey v. Allen* (1879), 13 Ch. D. 558.

(*o*) *Re Tollemache, Ex parte Edwards* (1884), 14 Q. B. D. 415.

(*p*) *R. v. Worth (Inhabitants)* (1843), 4 Q. B. 132.

(*q*) *Briggs v. Wilson* (1854), 5 De G. M. & G. 12, C. A.

(*r*) *Taylor v. Witham, Witham v. Taylor* (1876), 3 Ch. D. 605; *Percival v. Nanson* (1851), 7 Exch. 1.

(*s*) *Taylor v. Witham, Witham v. Taylor, supra*; *Hudson v. The Swiftsure (Owners)*, *The Swiftsure* (1900), 82 L. T. 389.

(*t*) *Rouse v. Brenton* (1828), 3 Man. & Ry. (K. B.) 133, 269; *Williams v. Geaves* (1838), 8 C. & P. 592; *Clark v. Wilmot* (1841), 1 Y. & C. Ch. Cas. 53; *R. v. Worth (Inhabitants)* (1843), 12 L. J. (M. C.) 47.

(*a*) *Doe d. Kinglake v. Bevis* (1849), 7 C. B. 456; *Knight v. Waterford (Marquis)* (1841), 4 Y. & C. (Ex.) 283, 293-295.

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Hearsay.

ordinary course of his business under a duty to make it; and (c) be made at or near the time at which the act or transaction to which it relates was performed (b).

(a) The entries made in business books by clerks and servants recording the transactions performed by them in their employers' business form the earliest and most frequent illustrations of the first of the above rules (c). Such entries have been admitted, for instance, after the death of the persons who made them, to prove the delivery of goods (d), the delivery of a solicitor's bill (e), the posting of letters (f), the payment of rates (g), the service of an order of the Court of Aldermen (h), and the presentment (i) and dishonour (k) of a bill of exchange. It is not necessary that the actual entry should be made by the hand of the deceased person who himself carried out the transaction recorded. It is sufficient if he sign the entry (l), or do any act by which he adopts it as his own, or if it be made by someone employed or authorised to make it for him. In such cases it is not required, to make the entry admissible, that the person who actually wrote it should be called as a witness, although he may be still alive (m).

Book entries.

(b) The statement must not only relate to some act done by the person making it, but must be made by him in performance of a duty to make it (n). Such duty may be imposed by or implied

Duty to make declaration.

(b) See *Mercer v. Denne*, [1905] 2 Ch. 538, C. A., per VAUGHAN WILLIAMS, L.J., at p. 558.

(c) See this rule stated in *Smith v. Blakey* (1867), 1 L. R. 2 Q. B. 326, per BLACKBURN, J.; *The Henry Coxon* (1878), 3 P. D. 156; and *Ryan v. Ring* (1889), 25 L. R. Ir. 184.

(d) *Pitman v. Maldox* (1699), 2 Salk. 690; *Price v. Torrington (Earl)* (1703), 1 Salk. 285; 2 Smith, L. C., 11th ed., 320; *Rowercroft v. Bassett* (1802), Peake, Add. Cas. 199.

(e) *Champneys v. Peck* (1816), 1 Stark. 404.

(f) *Pratt v. Fairclough* (1812), 3 Camp. 305; *Hagedorn v. Reid* (1813), 3 Camp. 377. An entry, however, of letters to be posted is not sufficient by itself to prove the postage (*Rowlands v. De Vecchi* (1882), Cab. & El. 10).

(g) *R. v. St. Mary, Warwick (Inhabitants)* (1853), 1 E. & B. 816.

(h) *R. v. Cope* (1835), 7 C. & P. 720, 726.

(i) *Sutton v. Gregory* (1797), Peake, Add. Cas. 150.

(k) *Poole v. Dicus* (1835), 1 Bing. (N. C.) 649.

(l) This was done in *Price v. Torrington (Earl)*, *supra*. In *Brain v. Freeman* (1843), 11 M. & W. 773, it was the duty of a workman at a coal mine to give notice to the foreman of sales. The foreman, being unable to write, employed another man to enter the sales for him in his books. The entries were read over to the foreman every evening. In an action for coal sold, after the death of both the workman and the foreman, the person who made the entries was called, and produced the book containing them. The entries were held to be inadmissible, apparently upon the ground that they were merely the entries of the foreman, who had no personal knowledge of the sales, which were merely reported to him. He could not have proved them had he been alive. In *Fox v. Bearblock* (1881), 17 Ch. D. 429, an entry in a minute book of King's College, Cambridge, relating to proceedings of the college in 1803, in the handwriting of the person who usually made the entries, but not authenticated by the signature of the registrar, as was the general practice in connection with such entries, was rejected owing to this irregularity; see also *Bradshaw v. Widdrington*, [1902] 2 Ch. 430, C. A., as to entries in a solicitor's books; compare *Re Fountaine, Re Dowler, Fountaine v. Amherst (Lord)*, [1909] 2 Ch. 382, 396, C. A.

(m) Compare *Doe d. Graham v. Hawkins* (1841), 2 Q. B. 212.

(n) *Smith v. Blakey*, *supra*; *Massey v. Allen* (1879), 13 Ch. D. 554;

SECT. 3.
Hearsay.

Duty of
professional
men.

from the terms, rules, or ordinary practice of the business in which he is employed, as in the case of clerks and servants, or may arise from a statutory obligation (o).

Professional men may also, for the due performance of the work they are employed to do, be under an obligation to their clients to ascertain and record facts, so as to render their records as to such facts admissible after their death as having been made in the course of duty (p). The existence of such a duty in any particular case must depend largely upon the particular facts as to the nature and terms of the employment, but in general there is no such duty upon a solicitor to record transactions carried out by him for his clients (q), nor upon a medical man to inform his patients of the nature of their illness (r), as to render such statements by them admissible upon the principle in question.

Statement
must be
contem-
poraneous
with act.

(c) In the case of a statement made in the course of duty it is, lastly, essential that it be contemporaneous—that is, it must be shown to have been made at or near the time when the transaction which it records was performed (s). In this respect the rule as to

Trotter v. Muckean (1879), 13 Ch. D. 574; *R. v. Dukinfield (Inhabitants)* (1848), 11 Q. B. 678, per ERLE, J., at p. 686; *Doe d. Padwick v. Skinner* (1848), 3 Exch. 81, per PARKE, B., at p. 88. In *R. v. Worth (Inhabitants)* (1843), 4 Q. B. 132, entries in a book made by a master of the terms upon which his servants were hired were rejected upon the ground that he was under no duty to make them.

(o) See *Evans v. Merthyr Tydfil Urban Council*, [1899] 1 Ch. 241, C. A., per LINDLEY, M.R., at p. 250, where a survey of Crown lands, made by a surveyor in performance of a duty cast upon him by statute, was held admissible on this ground, and *North Staffordshire Rail. Co. v. Hanley Corporation* (1909), 73 J. P. 477, C. A.

(p) See *Mellor v. Walmesley*, [1903] 2 Ch. 164, C. A., where entries of measurements made by a deceased surveyor in a field book for the purpose of making a report in the exercise of his profession were admitted on the ground that it was his duty to make and record the measurements, without which he could not arrive at his ultimate conclusion; see also *Doe d. Patteshall v. Turford* (1832), 3 B. & Ad. 890.

(q) *Hope v. Hope*, [1893] W. N. 20, C. A. Such statements have, however, been admitted. In *Doe d. Patteshall v. Turford*, *supra*, an entry of service of a notice to quit made by a deceased solicitor upon a duplicate of the notice kept in his office was admitted as evidence of the service. It was there shown to be the practice and duty of the clerks to make such entries, and the court assumed that the solicitor would himself do what he required of his clerks. Similarly, in *Rawlins v. Rickards* (1860), 28 Beav. 370, entries made by a deceased solicitor in his diary relating to a deed prepared by him and executed by his client, also deceased, were admitted as made in the ordinary course of business and duty. The rule as stated in the earlier cases is that the entry must be made not so much in the ordinary course of duty as in the ordinary course of business; see, e.g., *Doe d. Patteshall v. Turford*, *supra*, per TAUNTON, J., at p. 898. The general result seems to be that while a solicitor's clerk owes a duty to his employer to make such entries, the solicitor himself owes none to his client.

(r) *Dawson v. Dawson* (1905), 22 T. L. R. 52.

(s) *Champneys v. Peck* (1816), 1 Stark. 404; *Doe d. Patteshall v. Turford*, *supra*, per PARK, J., at p. 898; *Doe d. Padwick v. Skinner*, *supra*; *Eastern Union Rail. Co. v. Symonds* (1850), 5 Exch. 237; *Turner v. Hutchinson* (1861), 8 L. T. 815. In *Pritt v. Fairclough* (1812), 3 Camp. 305, the court was satisfied on this point by evidence that the clerk making entries in a copy letter-book was punctual in performing his duties. In *The Henry Coxon* (1878), 3 P. D. 156, one of the grounds upon which entries in a ship's

statements made in the course of duty differs from that regulating the admissibility of statements against interest.

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Such statements are also to be distinguished from statements against interest made by persons since dead, in that they are admitted as evidence only of the particular fact or facts which the person making them was under a duty to state or record, and their admission does not extend to any other facts stated or recorded, however closely such facts may be connected with the admissible portion of the statement (*t*).

If the above conditions are fulfilled, it is immaterial whether the statements sought to be proved were made orally or in writing. Oral statements made by deceased persons in the course of duty are admissible upon the same principles as written statements, though obviously different considerations arise in measuring the weight and effect to be attributed to them (*a*).

Writing
immaterial.

Oral statements, however, made by a deceased person subsequently to and in contradiction of an admissible written statement made by him in the course of his duty are inadmissible (*b*), and statements made by an attesting witness to a deed are similarly inadmissible after his death for the purpose of showing that the deed was a forgery (*c*).

Oral contra-
diction of
written
statement.

(iii.) *Declarations as to Public Rights.*

643. Declarations by deceased persons of competent knowledge, made *ante litem motam*, are receivable to prove ancient rights of a public or general nature.

Ancient
public rights.

This exception to the hearsay rule is allowed partly on the ground of necessity, since without such evidence ancient rights could rarely be established; and partly on the ground that the public nature of the rights minimises the risks of misstatement.

The term "public right" imports a right exercisable by every member of the State, *e.g.*, a right of highway (*d*), or of fishery in tidal rivers (*e*); a "general right" is one which affects some

log by a deceased mate were rejected was that they were not contemporaneous, the collision to which they referred having happened on a Saturday, and the entries not having been made until the following Monday.

(*t*) *Chambers v. Bernasconi* (1831), 1 Tyr. 335; (1834) 4 Tyr. 531, Ex. Ch., where, it being the duty of a sheriff's officer to record the execution by him of a warrant of arrest, his memorandum, stating the arrest at a certain place, was held inadmissible as evidence, after his death, to prove the place at which the arrest was effected. See also *Davis v. Lloyd* (1844), 1 Car. & Kir. 275; *Smith v. Blakey* (1867), 1 R. 2 Q. B. 326, per BLACKBURN, J., at p. 332; *The Henry Coxon* (1878), 3 P. D. 156; and *Sturla v. Freccia* (1880), 5 App. Cas. 623, per Lord SELBORNE, L.O., at p. 633.

(*a*) *Stapylton v. Clough* (1853), 2 E. & B. 933, per Lord CAMPBELL, O.J., at p. 937; *Turner v. Hutchinson* (1861), 3 L. T. 815, per WILLIAMS, J., at p. 816. In *Dawson v. Dawson* (1905), 22 T. L. R. 52, an oral statement by a deceased doctor to his patient as to the nature of her illness was rejected solely on the ground that he was under no duty to make it; see also *R. v. Buckley* (1873), 13 Cox, C. O. 293.

(*b*) *Stapylton v. Clough*, *supra*, where the oral statement was not made in the course of business.

(*c*) *Stobart v. Dryden* (1836), 1 M. & W. 615.

(*d*) *Crease v. Barrett* (1835), 1 Cr. M. & R. 919.

(*e*) *Neill v. Devonshire (Duke)* (1882), 8 App. Cas. 135.

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Hearsay.

Private
rights.

considerable section of the community, *e.g.*, a right of common (*f*), or a right to elect the churchwardens of a certain parish (*g*).

Statements by deceased persons as to private rights are not admissible, since such rights are less likely to be commonly known, and more likely to be misrepresented by interested persons (*h*). If, however, the private right is identical with a public one (*i*), or the question is whether the particular right involved is public or private (*k*), the declarations will be admissible.

Competency.

With regard to the competency of the declarant, the rule is that, in the case of a public right, all members of the State are presumed to possess competent knowledge, so that its absence in any particular instance affects merely the weight, and not the admissibility, of the evidence; whereas, in the case of a general right, competent knowledge will not be presumed, but must be specially proved (*l*), *e.g.*, by residence in, or other connection with, the locality (*m*).

Declarations
must be *ante*
litem motam.

Moreover, to obviate bias, the declarations are required to have been made *ante litem motam*, which means not merely before the commencement of legal proceedings, but before even the existence of any actual controversy, concerning the subject-matter of the declarations (*n*). So strictly has this requirement been enforced that the fact that such a dispute was unknown to the declarant (*o*), or was fraudulently begun with a view to shut out his declarations (*p*), has been held immaterial. Where, however, the declarations were made before any dispute had arisen, though avowedly for the purpose of preventing future controversy, they have been received (*q*); as also where the right involved had come only collaterally, but not directly, in question in prior legal proceedings (*r*). Thus, in an action between a lord of a manor and his tenant, where the question was as to the mode in which a customary fine should be assessed, depositions showing this and made in an ancient suit between a tenant and a former lord, but in which suit only the amount of the fine, and not its mode of assessment, was in question, were received (*s*). Declarations made in the obvious interests of the declarant will, generally speaking, be rejected (*t*); though, if no dispute has arisen, or no claim has been

(*f*) *Dunraven (Lord) v. Llewellyn* (1850), 15 Q. B. 791, Ex. Ch.; *Nicholls v. Parker* (1805), 14 East, 331, n.

(*g*) *Berry v. Banner* (1792), Peake, 212 [156].

(*h*) *Dunraven (Lord) v. Llewellyn*, *supra*.

(*i*) *Thomas v. Jenkins* (1837), 6 Ad. & El. 525.

(*k*) *R. v. Bliss* (1837), 7 Ad. & El. 550.

(*l*) *Rogers v. Wood* (1831), 2 B. & Ad. 245; *Crease v. Barrett* (1835), 1 Cr. M. & B. 919, 928, 929; *Mercer v. Denne*, [1905] 2 Ch. 538, 560, C. A.

(*m*) *Freeman v. Phillipps* (1816), 4 M. & S. 486; *Newcastle (Duke) v. Broxtowe (Hundred)* (1832), 4 B. & Ad. 273; *Mercer v. Denne*, *supra*.

(*n*) *Berkeley Peerage Case* (1811), 4 Camp. 401, 417, Il. L.; *Davies v. Lowndes* (1843), 6 Man. & G. 473, 518, Ex. Ch.

(*o*) *Berkeley Peerage Case*, *supra*; *Shedden v. A.-G.* (1860), 30 L. J. (P. M. & A.) 217.

(*p*) *Shedden v. A.-G.*, *supra*.

(*q*) *Berkeley Peerage Case*, *supra*; *Monkton v. A.-G.* (1831), 2 Russ. & M. 147; *Shedden v. A.-G.*, *supra*.

(*r*) *Freeman v. Phillipps*, *supra*; *Devonshire (Duke) v. Neill* (1877), 2 L. R. Ir. 132, 156, 157.

(*s*) *Freeman v. Phillipps*, *supra*.

(*t*) *Brockelbank v. Thompson*, [1903] 2 Ch. 344, 352, where in an action by a

contemplated, the mere fact that the declarations might tend to support the declarant's own title will not of itself be sufficient to exclude them (a).

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Hearsay.

Declarations to be admissible under this head must, in general, directly assert or deny the public right in question, and not relate merely to particular facts which may support or negative it. The omission, however, of all mention of the right in documents or instruments which might be expected to refer to it is strong, and sometimes conclusive, evidence of its non-existence (b).

Must be
explicit.

Declarations as to public rights may be admissible in a variety of forms. Those most commonly tendered are mere oral statements by deceased persons of competent knowledge; but greater weight will naturally be attached to depositions taken on oath in former suits, provided the same right was only incidentally, and not directly, involved; for in the latter case the objection *post litem motam* will apply (c).

Form.

Old deeds reciting the public or general rights are also often received under this head (d), but not copies or abstracts thereof (unless as secondary evidence), since the contents of a document are in the nature of a particular fact, and, as such, inadmissible (e). Maps and surveys are also receivable, provided they were made by or under the direction of deceased persons of competent knowledge (f), or at least were used by such persons to define the general right, and not merely to establish some particular fact (g).

Old deeds.

(iv.) *Declarations as to Pedigree.*

644. Declarations by deceased relations, made *ante litem motam* (h), are admissible to prove matters of pedigree.

Declarations
as to pedigree.

Such declarations are receivable partly on the ground of necessity, better evidence of the facts being often unobtainable, and partly because the peculiar means of knowledge possessed by the

lord of a manor for trespass, to which the defendant pleaded a right of church way, and the plaintiff, in disproof, tendered a memorandum by a former lord, stating that only certain classes of tenants had the right claimed, and the evidence was rejected upon this as well as upon other grounds.

(a) *Doe d. Jenkins v. Davies* (1817), 10 Q. B. 314.

(b) *Anglesey (Marquis) v. Hatherton (Lord)* (1842), 10 M. & W. 218; *Portland (Duke) v. Hill* (1866), L. R. 2 Eq. 765.

(c) *Freeman v. Philipps* (1816), 4 M. & S. 486; *Devonshire (Duke) v. Neill* (1877), 2 L. R. 1r. 132; *Crease v. Barrett* (1835), 1 Cr. M. & R. 919; *Evans v. Merthyr Tydfil Urban Council*, [1899] 1 Ch. 241, C. A.; *Mercer v. Denne*, [1905] 2 Ch. 538, C. A.

(d) *Brett v. Beales* (1829), 10 B. & C. 508; *Curzon v. Lomax* (1803), 5 Esp. 60.

(e) *Doe d. Padwick v. Willcomb* (1851), 6 Exch. 601.

(f) *Hammond v. Bradstreet* (1854), 10 Exch. 390; *Smith v. Lister* (1895), 72 L. T. 20; *Mercer v. Denne*, *supra*; *Asheton-Smith v. Owen* (1906), 75 L. J. (Ch.) 181, 188, 192, C. A.; see also *R. v. Norfolk County Council* (1910), 26 T. L. R. 269.

(g) *Daniel v. Wilkin* (1852), 7 Exch. 429; *Pipe v. Fulcher* (1858), 1 E. & E. 111; *Smith v. Lister*, *supra*; *Vyner v. Wirrall Rural District Council* (1909), 73 J. P. 242.

(h) As to what is the commencement of a *lis mota*, see *Frederick v. A.-G.* (1874), L. R. 3 P. & D. 270. The declaration must be spontaneous (*Hill v. Hibbit* (1870), 19 W. R. 250).

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Hearsay.

declarant, and his absence of interest to misrepresent, clothe the declarations with a *prima facie* probability of truth.

To constitute a "matter of pedigree" there must be a genealogical question actually in issue in the proceedings (*i*), and the declarations must relate either directly thereto, or at all events to some incident of family history required for the proof of such issue (*k*).

Competency
of declarant,

645. Declarations to be admissible under this head must have been made by blood-relations of the family, or by their consorts, and not by persons who are merely related to the latter and not to the former (*l*), nor *à fortiori* by friends, neighbours, or servants of the family (*m*), or the family solicitor (*n*). Declarations by illegitimate relations are inadmissible under this rule, on the principle that a bastard being *filius nullius* can have no relations (*o*); though an admission by a deceased person of his own illegitimacy would always be evidence against his representatives as an admission (*p*), and a declaration by a deceased father that the father was not married at the date of his son's birth is evidence of the latter's illegitimacy (*q*).

Requirements
for admissi-
bility.

No very strict rule applies to the competency of the declarants. Thus, it is not essential that they should have had personal knowledge of the facts stated; it is sufficient if they spoke merely from what they had heard in the family, though if the hearsay was avowedly derived from strangers it will be rejected (*r*). Nor need the declarations relate to contemporaneous events, for if so the whole object of the rule might be nullified (*s*); accordingly, they

(*i*) Stephen, Digest of the Law of Evidence, 8th ed., art. 31.

(*k*) Thus, in an action of ejectment, the question whether A. is the heir-at-law of B. (*Doe d. Banning v. Griffin* (1812), 15 East, 293), or in administration proceedings, whether A. is the next of kin to B. (*In the Goods of Thompson* (1887), 12 P. D. 100), would be within the rule, and on such an inquiry the death of B., or of any of B.'s relations entitled in priority to A., would be a "matter of pedigree" provable by the declarations of deceased members of the family (*Doe d. Banning v. Griffin, supra*). Evidence of the same kind is also receivable on issues of legitimacy (*Re Perton, Pearson v. A.-G.* (1885), 53 L. T. 707). On the other hand, in an action for use and occupation against a tenant *pur autre vie*, who had held over after the death of the *cestui que vie*, the death of the latter was held not to be a "matter of pedigree," and so not provable as above (*Whitlock v. Waters* (1830), 4 C. & P. 375). And in an action for goods sold, to which the defence was infancy, an affidavit by the infant's deceased father, made in a former Chancery action to which the present plaintiff was not a party, was rejected to prove the date of the infant's birth (*Haines v. Guthrie* (1884), 13 Q. B. D. 818, C. A.), the purpose for which the evidence was required not being a genealogical one.

(*l*) *The Shrewsbury Peerage* (1858), 7 H. L. Cas. 1, 23.

(*m*) *Johnson v. Lawson* (1824), 2 Bing. 86.

(*n*) *Re Palmes, Palmes v. R.*, [1901] W. N. 146.

(*o*) *Doe d. Bamford v. Barton* (1837), 2 Mood. & R. 28; *Doe d. Jenkins v. Davies* (1847), 10 Q. B. 314.

(*p*) *Re Perton, Pearson v. A.-G.*, *supra*.

(*q*) *Murray v. Milner* (1879), 12 Ch. D. 845; see also *Re Turner, Glenister v. Harding* (1885), 29 Ch. D. 986; *The Aylesford Peerage* (1885), 11 App. Cas. 1.

(*r*) *Davies v. Loundes* (1843), 6 Man. & G. 473, 527, Ex. Ch.; *Shedden v. A.-G.* (1860), 30 L. J. (P. M. & A.) 217.

(*s*) *Monkton v. A.-G.* (1831), 2 Russ. & M. 147, 157, 158; *Davies v. Loundes*, *supra*.

have been received to prove matters occurring many generations before the birth of the declarant (*t*).

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Hearsay.

Declarations under this head may be made in any form, *e.g.*, oral statements, family correspondence, recitals in wills and settlements, inscriptions on tombstones, coffin-plates, hatchments, family portraits, rings, or pedigrees (*a*); or entries in family Bibles etc. With regard to the last-mentioned, these are receivable not on the ground of the sacred nature of the volumes, but because of the custom of using them as family registers. Family acknowledgment of the entries will, therefore, be implied, without requiring proof of the identity, blood-relationship, or even, possibly, the death of the declarants (*b*).

Form
immaterial.

(v.) *Declarations by Dying Persons.*

646. In trials for homicide, the dying declarations of the deceased are admissible to prove the cause and circumstances of his death. The grounds of admission are necessity, since if the evidence of the victim were excluded such crimes might often go unpunished, and the sense of impending death, which supplies the most potent of all incentives to speak the truth (*c*).

Dying
declarations.

(vi.) *Declarations by Testators.*

647. Declarations made by deceased testators as to their wills are receivable in certain cases (*d*), and are sometimes regarded as constituting exceptions to the hearsay rule.

Declarations
by testators.

These declarations, however, will, in almost every case, be found to be examples, not of hearsay, but of original evidence, *i.e.*, they are receivable not to prove the truth of the facts stated, but merely to show the mental condition of the testator; while, when tendered for the former, and not the latter purpose, they have, with the single exception presently mentioned, been uniformly rejected.

648. Such declarations may, then, be tendered as original evidence, but not as hearsay, for three main objects:—(1) To establish the *factum* of the will; (2) to show what are its contents; and (3) to assist in its interpretation; and when so tendered it is, in general, immaterial whether they were made before, at, or after its execution.

When may
be used.

Such declarations are not receivable as direct proof of the execution or revocation of the will, seeing that the effect of receiving them might be to substitute a mere statement by the testator for the proper and regular evidence of the fact required by the Wills Act (*e*),

Factum of the
will.

(*t*) *Davies v. Loundes*, (1843), 6 Man. & G. 473, 527, Ex. Ch.; Hubback, *Evidence of Succession*, p. 659.

(*a*) Taylor, *Law of Evidence*, 10th ed., ss. 648–657.

(*b*) *Berkeley Peerage Case* (1811), 4 Camp. 401, H. L.; *Monkton v. A.-G.* (1831), 2 Russ. & M. 147, 158; *Hubbard v. Lees and Porden* (1866), L. R. 1 Exch. 255; and see *Payne v. Bennett* (1904), 20 T. L. R. 203.

(*c*) *R. v. Woodcock* (1789), 1 Leach, 500, *per* EYRE, C.B., at p. 504; *R. v. Perry*, [1909] 2 K. B. 697, C. O. A. As to dying declarations, see title CRIMINAL LAW AND PROCEDURE, Vol. IX., pp. 393, 589.

(*d*) See title WILLS.

(*e*) *Atkinson v. Morris*, [1897] P. 40, C. A.; and see title WILLS.

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Hearsay.

but where the required formalities are shown to have been substantially complied with, post-testamentary declarations by the testator, acknowledging the validity of the will, have been received to support the presumption of due execution arising from a partial compliance with the statute (*f*). So, to show that certain papers formed part of the will, declarations by a testatrix, made before its execution, that she intended to leave her property in a certain manner, which corresponded with the provisions contained in those papers, and declarations, after the execution, that she believed she had effected this intention in her will, were received as showing that her mind continued in the same state after the will as before it (*g*). Again, to show whether an instrument has been executed as a deed or will (*h*), or whether a will has been destroyed, *animo revocandi*, or otherwise (*i*), declarations of intention by the testator are receivable.

**Contents of
the will.**

Declarations by a testator are admissible as secondary evidence of the contents of a lost will. Thus, a draft signed by him, oral instructions given to his solicitor, and statements to third persons as to the provisions he was about to make, were in a well-known case received as presumptive evidence that the testator probably made the dispositions which his declarations foreshadowed (*h*). Post-testamentary declarations implying that he had made such dispositions, were in the same case also received, as exceptions to the hearsay rule; but this portion of the decision has been subjected to serious criticism, and it is doubtful whether it would now be followed, even in a similar state of facts (*a*). Declarations of intention by the testator are also admissible to rebut the presumption that alterations in his will were made after its execution; while his mere hearsay assertions as to their date have been rejected (*b*).

**Interpreta-
tion of the
will.**

Declarations of testators may also, in certain cases, be resorted to in aid of the interpretation of the will (*c*).

SUB-SECT. 4.—Statements in Public Documents.

**Public
documents.**

649. The third group of exceptions to the hearsay rule comprises statements in public documents, which are receivable to prove the facts stated, on the general grounds that they were made by the authorised agents of the public, in the course of official duty, and

(*f*) *Clarke v. Clarke* (1879), 5 L. R. Ir. 47, C. A.

(*g*) *Gould v. Lakes* (1880), 6 P. D. 1. Although this case, in terms, professed to follow *Sugden v. St. Leonards (Lord)* (1876), 1 P. D. 154, C. A., it does not in effect do so, but lays down a different, and, it is submitted, the correct, principle as above stated.

(*h*) *In the Goods of Shinn* (1890), 15 P. D. 156. In this case the testatrix had executed a deed-poll which disposed of all her property and was attested by two witnesses. A subsequent declaration that "I have not mentioned it in the paper, but would like B. to have £10 after my death," was received to show that she intended the deed to operate as a will, and not *inter vivos*.

(*i*) *Giles v. Warren* (1872), L. R. 2 P. & D. 401.

(*k*) *Sugden v. St. Leonards (Lord)*, *supra*.

(*a*) *Woodward v. Goulstone* (1886), 11 App. Cas. 469; *Atkinson v. Morris*, [1897] P. 40, C. A.

(*b*) *Doe d. Shallcross v. Palmer* (1851), 16 Q. B. 747.

(*c*) See title **WILLS**.

respecting facts which were of public interest, or required to be recorded for the benefit of the community (*d*).

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Hearsay.

The following documents come within this category :—(i.) Public Statutes, Parliamentary Journals, and Government Gazettes. (ii.) Public Registers. (iii.) Public Surveys, Assessments, and Reports. (iv.) Official Certificates. (v.) Corporation, Company, and Bankers' Books. (vi.) Histories, Scientific Works etc.

(i.) *Public Statutes, Parliamentary Journals, and Government Gazettes.*

650. Statements contained in any public statute, Speech from the Throne (*e*), royal proclamation (*f*), parliamentary journal (*g*), Government gazette (*h*), or State paper, are admissible, even against strangers, to prove facts of a public, but not of a private, nature. Public statutes etc.

Such statements, however, unless otherwise provided, are only *prima facie*, and not conclusive, evidence of the facts asserted (*i*). On the other hand, private Acts, even when judicially noticed, are wholly inadmissible against strangers, not only to prove the facts recited (*k*), but even to fix a person with notice thereof (*l*).

(ii.) *Public Registers.*

651. Entries in public registers are evidence of the facts recorded, even against strangers, provided the book was required by law to be kept for public reference, and the entries were made promptly, and by the proper officer (*m*). Public registers.

There must be a public duty to keep the register, and the information must be required to be preserved for the public use and benefit; registers kept under private authority, or for the benefit or information merely of private individuals, are inadmissible (*n*).

Under the first-named head may be classed parish registers, which formerly were required to be kept under the authority of the common law (*o*), and now are kept under that of various statutes (*p*). Parish registers etc.

(*d*) Taylor, Law of Evidence, 10th ed., s. 1591; *Sturla v. Freccia* (1880), 5 App. Cas. 623.

(*e*) *R. v. Franklin* (1731), 17 State Tr. 626, 636—638.

(*f*) *R. v. Sutton* (1816), 4 M. & S. 532; *R. v. De Berenger* (1814), 3 M. & S. 67.

(*g*) *A.-G. v. Bradlaugh* (1885), 14 Q. B. D. 667, C. A.

(*h*) *R. v. Holt* (1793), 5 Term Rep. 436; *A.-G. v. Theakstone* (1820), 8 Price, 89.

(*i*) *R. v. Greene* (1837), 6 Ad. & El. 548; *R. v. Franklin*, *supra*.

(*k*) *Beaufort (Duke) v. Smith* (1849), 4 Exch. 450; *Polini v. Gray*, *Sturla v. Freccia* (1879), 12 Ch. D. 411, C. A.

(*l*) *Ballard v. Way* (1836), 1 M. & W. 520.

(*m*) *Doe d. France v. Andrews* (1850), 15 Q. B. 756; *Doe d. Warren v. Bray* (1828), 8 B. & C. 813; *Sturla v. Freccia* (1880), 5 App. Cas. 623, 644.

(*n*) *Henry v. Leigh* (1813), 3 Camp. 499; *Huntley v. Donovan* (1850), 15 Q. B. 96; *Irish Society (Governor etc.) v. Derry* (1846), 12 Cl. & Fin. 641, H. L.; *Sturla v. Freccia* (1880), 5 App. Cas. 623. As to a statement in Lloyd's List being notice of a state of blockade, see *Bain v. Case* (1829), 3 C. & P. 496.

(*o*) *Doe d. Wollaston v. Barnes* (1834), 1 Mood. & R. 386.

(*p*) See the Parochial Registers Act, 1812 (52 Geo. 3, c. 146) (as to baptisms and burials), and the Births and Deaths Registration Act, 1836 (6 & 7 Will. 4, c. 86), s. 31,

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On the other hand, early Nonconformist registers were not required to be kept by any legal authority, and so were inadmissible. By statute, however, registers of the latter class may now, in many cases, be received, upon proof of deposit with the Registrar-General, entry in his list, and notice to the opponent of a party's intention to produce them (*g*); while, with regard to the births, marriages, and deaths of Nonconformists since 1836, registers thereof are now admissible under General Registration Acts (*r*). Bishops' registers have, at common law, been admitted on this principle to prove a right of nomination to a curacy (*s*), and vestry books to prove the due election of a parish officer (*t*); but an entry in an old parish book, made by a parish officer, purporting to relieve the parish from its liability to support a certain pauper, has been rejected, since the entry concerned merely the rights of two parishes *inter se*, and thus was not of a public nature (*a*). So a register of attendances of the medical officer of a union, kept under the orders of the Poor Law Commissioners, was held inadmissible for the same reason (*h*).

Under various statutes a large number of registers kept under legal authority in various public offices are receivable, usually as *prima facie*, but in some cases as conclusive, evidence of the facts recorded (*c*).

(*g*) See the Non-parochial Registers Act, 1840 (3 & 4 Vict. c. 92), and the Births and Deaths Registration Act, 1858 (21 & 22 Vict. c. 25).

(*r*) See the Births and Deaths Registration Act, 1836 (6 & 7 Will. 4, c. 86), s. 31, amended by the Births and Deaths Registration Act, 1874 (37 & 38 Vict. c. 88), and the Marriage Act, 1898 (61 & 62 Vict. c. 58).

(*s*) *Arnold v. Bath and Wells (Bishop)* (1829), 5 Bing. 316.

(*t*) *R. v. Martin* (1809), 2 Camp. 100.

(*a*) *R. v. Debenham (Inhabitants)* (1818), 2 B. & Ald. 185.

(*h*) *Merrick v. Wakley* (1838), 8 Ad. & El. 170.

(*c*) The following are some of the chief registers rendered admissible by statute:—Registers kept at the Patent Office, under the Patents and Designs Act, 1907 (7 Edw. 7, c. 29), ss. 28, 52, and the Trade Marks Act, 1905 (5 Edw. 7, c. 15), s. 50; Registers of Copyright, kept under the Copyright Act, 1842 (5 & 6 Vict. c. 45), s. 11, the International Copyright Acts, 1814 (7 & 8 Vict. c. 12), s. 8, and 1886 (49 & 50 Vict. c. 33), ss. 7, 8, and the Fine Arts Copyright Act, 1862 (25 & 26 Vict. c. 68), ss. 4, 5; Registers of Newspapers, kept under the Newspaper Libel and Registration Act, 1881 (44 & 45 Vict. c. 60), s. 15; Registers of Deeds, Wills, and Charges affecting land in Yorkshire, under the Yorkshire Registries Act, 1884 (47 & 48 Vict. c. 54), ss. 9, 20, 21, 51, and in Middlesex, under the Middlesex Registry Act, 1708 (7 Ann. c. 20), ss. 6, 12, 19, amended by the Middlesex Registry Act, 1891 (54 & 55 Vict. c. 10); Registers of Voters, under the Ballot Act, 1872 (35 & 36 Vict. c. 33); Regimental Registers, kept under the Army Act, 1881 (44 & 45 Vict. c. 58), s. 163; Registers of Merchant Ships, kept under the Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), ss. 64, 695 (evidence may be given by the defendant, in an action, for limitation of liability, that the registered tonnage is under-estimated (*The Recepta* (1889), 14 P. D. 131)). Register of Convictions kept under the Summary Jurisdiction Act, 1879 (42 & 43 Vict. c. 49), s. 22, to prove previous convictions in the same court (see *Police Commissioners v. Donovan*, [1903] 1 K. B. 895). As to office copies of entries in the Register kept under the Land Transfer Acts, 1875 (38 & 39 Vict. c. 81) and 1897 (60 & 61 Vict. c. 65), see Land Transfer Rules, 1903, r. 260, and Brickdale's Land Transfer Acts (ed. 1905), pp. 455, 464; and title REAL PROPERTY AND CHATELS REAL. As to the effect of entries in the register, see *Capital and Counties Bank, Ltd. v. Rhodes*, [1903] 1 Ch. 631, C. A., and *A.-G. v. Odell*, [1906] 2 Ch. 47, C. A.

The entries must have been made by the officer whose duty it was to make them, or by his deputy (*d*), and with reasonable promptness (*e*). And errors, irregularities, and erasures of a trifling character will not, in general, exclude the entries, but merely affect their weight (*f*).

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Hearsay.Entries made
in due course

Colonial and foreign registers are also admissible under this head, provided that, in the former case, they are kept under the authority either of Colonial or of English law (*g*), and that in the latter they are kept under the sanction of public authority, and are recognised as authentic by the tribunals of their own country (*h*).

Colonial and
foreign
registers.(iii.) *Public Surveys, Assessments, and Reports.*

652. Surveys, assessments, inquisitions, and reports are evidence of the truth of the matters stated, even against strangers, if made under public authority and concerning matters of public interest (*i*). To render such documents admissible there must have been a judicial, or *quasi*-judicial, duty to inquire, undertaken by a public officer, and the matter must have been required to be ascertained for a public purpose (*k*). Inquisitions made for the purpose of ascertaining the rights of the Crown in the estates of deceased persons are within the rule (*l*), but not those made for some merely temporary object (*m*), nor are surveys admissible when made of lands which only devolved on the Crown after, and not before, the survey (*n*). Land-tax assessments are evidence of the assessment upon the persons and for the property named (*o*), though they are not evidence as to the seisin of land (*p*); and the report of a committee of the General Medical Council, finding a dentist guilty of professional misconduct, has been considered to be a proceeding *in rem* affecting his status, and to be admissible as *prima facie* evidence of such misconduct in an action by a third party against the dentist in

Public
surveys etc.Land-tax
assessments.

(*d*) *Doe d. Warren v. Bray* (1828), 8 B. & C. 813.

(*e*) *Ibid.* In this case entries made more than a year after the occurrence were excluded.

(*f*) *Lyell v. Kennedy*, *Kennedy v. Lyell* (1889), 14 App. Cas. 437, *per* Lord SELBORNE, at p. 449.

(*g*) *Veans v. Dall* (1878), 83 L. T. 141; Taylor, Law of Evidence, 10th ed., s. 1593.

(*h*) *Lyell v. Kennedy*, *Kennedy v. Lyell*, *supra*.

(*i*) For example, entries made by the constable as to the wind and weather (*The Catherine Maria* (1866), L. R. 1 A. & E. 53).

(*k*) *Sturla v. Freccia* (1880), 5 App. Cas. 623. Judges' notes are not evidence of the statements made by a witness (*Griffin's Divorce Bill*, [1896] A. C. 133); but a report made by an Irish judge, for the information of another Irish court, is admissible evidence in a proceeding between the same parties in England of what took place before him and what he decided (*Houstoun v. Sligo (Marquis)* (1885), 29 Ch. D. 448, C. A.). When matters in issue have formed the subject of proceedings reported in the law reports, the report is not evidence of the facts stated therein (*Shepherd v. Bray*, [1906] 2 Ch. 235).

(*l*) *Beaufort (Duke) v. Smith* (1849), 4 Exch. 450.

(*m*) *Mercer v. Denne*, [1905] 2 Ch. 538, O. A.

(*n*) *Daniel v. Wilkin* (1852), 7 Exch. 429.

(*o*) *Doe d. Strode v. Seaton* (1831), 2 Ad. & El. 171.

(*p*) *Doe d. Stansbury v. Arkwright* (1833), 2 Ad. & El. 182, n.

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Hearsay.**Reports.**

question (g). On the other hand, the confidential report of a committee appointed by a public department of a foreign State to ascertain the fitness of a candidate for a public office in that State has been rejected as evidence of the age and family history of such candidate, such authority not being a legal one for a public purpose, and the facts stated not being of a public nature (r).

(iv.) *Official Certificates.***Official
certificates.**

653. Certificates by public officers, duly authorised by law for the purpose, are in certain cases receivable in proof of the facts certified.

At common law, certificates of matters of fact not coupled with matters of law are usually said to be inadmissible, even though given by the Sovereign under his Sign Manual (s). If a person is bound to record a fact, the proper evidence thereof is, it has been considered, a copy of the record, duly authenticated; but as to matters he is not bound to record his certificate, being extra-judicial, is merely the unsworn statement of a private person, and as such will be rejected (t).

**Matters
triable by
certificate.**

Certain important matters, however, were from very early times triable by certificate merely, the results being received as conclusive evidence of the facts found, *e.g.*, that of the King's Marshal as to military service, that of the Lord Mayor and aldermen (by the Recorder) as to the customs of London (u), and that of a bishop as to marriage, bastardy, or excommunication (a). There were other cases, however, in which the certificates of high functionaries, though recognised as evidence, were allowed only a *primâ facie* effect (b), *e.g.*, heralds' funeral certificates, which were, and even at the present day are, admitted to prove the matters of pedigree therein contained (c).

**Certificates
admissible by
common law.**

654. Partly in analogy to the above, and partly on grounds of convenience, the certificates of public officers are still, in a few instances, receivable at common law by way of exception to the hearsay rule, although the cases establishing them are neither uniform nor very satisfactory. Thus, a certificate or letter from a Secretary of State in his official capacity has, in qualification of the original common law doctrine above stated, been held equivalent to that of His Majesty, and conclusive of the matters certified, *e.g.*, the independence of a foreign Sovereign (d). In other cases, however, the certificates of such officials have been held merely *primâ facie* evidence (e). So an ambassador's certificate has, with

(g) *Hill v. Clifford*, [1907] 2 Ch. 236, C. A.; affirmed, on other grounds, *sub nom. Clifford v. Timms*, [1908] A. C. 12.

(r) *Sturla v. Freccia* (1880), 5 App. Cas. 623.

(a) *Omichund v. Barker* (1745), Willes, 538, 549, 550; but see *Mighell v. Johore (Sultan)*, [1894] 1 Q. B. 149, C. A.

(t) Taylor, *Law of Evidence*, 10th ed., s. 1784.

(u) *London Corporation v. Cox* (1867), L. R. 2 H. L. 239.

(a) See Gresley, *Law of Evidence in Equity*, 1st ed., pp. 179—182.

(b) *Ibid.*

(c) *Sturla v. Freccia*, *supra*.

(d) *Mighell v. Johore (Sultan)*, *supra*.

(e) *Ferguson v. Benyon* (1867), 16 W. R. 71 (the certificate of a Secretary of

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somewhat questionable propriety, been received to prove foreign law (*f*). And by long-established practice justices' certificates as to encroachments on, or repairs to, highways are admissible as evidence of those facts (*g*); and those of a notary public to prove the protest abroad of a foreign bill of exchange (*h*).

655. By statute, also, various matters are provable by the certificates of public officers, such documents being rendered in some cases conclusive, but in general only *prima facie*, evidence of the facts certified (*i*), and of the necessary preliminaries having been performed (*k*). Thus, the registrar's certificate of the incorporation of a company is conclusive that all requisitions in respect of registration, or matters precedent or incidental thereto, have been complied with (*l*); while a certificate under the common seal of the company is *prima facie* evidence of the title of the holder to the shares specified (*m*). So, the registrar's certificate of the registration of a British ship is *prima facie* evidence of the matters contained therein or indorsed thereon (*n*), and the certificate of the Registrar of Building Societies that new rules were duly passed is conclusive that all preliminary steps were duly taken (*o*). A certificate of justices that a charge of assault has been dismissed is evidence of the fact of such dismissal (*p*), and under the Sale of Food and Drugs Act, 1875 (*q*), the analyst's certificate is rendered sufficient

Certificates
admissible by
statute.

State for India admitted to prove the competency of a local official to administer oaths); *Whaley v. Carlisle* (1866), 17 L. C. L. R. 792 (a passport signed by a Secretary of State admitted to prove that the person described was abroad on a certain date).

(*f*) *In the Goods of Oldenburg (Prince)* (1884), 9 P. D. 234; *In the Goods of Klingenan* (1862), 32 L. J. (P. M. & A.) 16; these cases were doubted by the late Mr. Taylor, Law of Evidence, 8th ed., s. 1784A, note.

(*g*) *R. v. Randall* (1862), 1 Keb. 256; *R. v. Mowbey (Bart.)* (1796), 6 Term Rep. 619, 635.

(*h*) Bayley on Bills, 490; compare *Geralopulo v. Wieler* (1851), 10 C. B. 690.

(*i*) As to the question whether a certificate which a statute says is to be "sufficient" evidence is therefore to be regarded as conclusive, see *Board of Trade v. Sailing Ship "Glenpark," Ltd.*, [1903] 2 K. B. 324, affirmed [1904] 1 K. B. 682, O. A., and *Garbutt v. Durham Joint Committee*, [1904] 2 K. B. 514, O. A.; and see further as to the distinction between sufficient and conclusive evidence, *Narraclough v. Greenhough* (1867), L. R. 2 Q. B. 612, Ex. Ch. An attestation paper of a soldier, though evidence that the answers set down were given, is no evidence that they were true (*Chertsey Union Guardians v. Surrey (Clerk of Peace)* (1893), 69 L. T. 384). As to certificates by teachers of public elementary schools in relation to attendance or standard of children, see title EDUCATION, Vol. XII., p. 66. A declaration which would by itself be conclusive is not so if it goes on to state facts which show that it is not true (*Allison v. Johnson* (1902), 46 Sol. Jo. 686).

(*k*) *Waddington v. Roberts* (1868), L. R. 3 Q. B. 579.

(*l*) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), ss. 16, 17; and see title COMPANIES. Vol. V., p. 67. Where the assistant registrar had authority to sign in the absence of the registrar the absence was presumed from the fact that the assistant signed (*Baker v. Cave* (1857), 1 H. & N. 674).

(*m*) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 23.

(*n*) Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), ss. 64, 695.

(*o*) *Dewhurst v. Clarkson* (1854), 3 E. & B. 194; followed *Rosenberg v. North-umberland Building Society* (1889), 22 Q. B. D. 373, C. A.

(*p*) Offences against the Person Act, 1861 (24 & 25 Vict. c. 100), ss. 44, 45.

(*q*) 38 & 39 Vict. c. 63, s. 21. The certificate must contain such particulars as will enable the court to decide whether the adulteration charged is proved

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evidence against the defendant of the result of the analysis, unless he requires the analyst to be called as a witness, or gives rebutting proof. Statutory certificates admissible under this head must be distinguished from mere certified copies of documents, which, though loosely called "certificates," are receivable only as secondary evidence of the originals (r).

(v.) *Corporation, Company, and Bankers' Books.*

**Corporation
and company
books.**

656. At common law the official books of a corporation are admissible, even in favour of the corporation and against strangers, to prove the public acts of the corporation, provided they were publicly kept as the corporation books (s) and the entries were made by the proper officer (t). Entries as to private matters, however, are only receivable as admissions against the corporation, or members who have acquiesced in them, and are not evidence in its own favour (a).

The books of public corporations and companies are, however, often rendered admissible by statute to prove their contents, both as to public and private transactions. Thus, under the Municipal Corporations Act, 1882 (b) (incorporated with the Local Government Act, 1888 (c)), the minute books of a corporation are receivable in evidence without further proof, and similar provisions apply to minute books of education committees and of managers of public elementary schools (d), and to the registers and minute books kept under the Companies Clauses Consolidation Act, 1845 (e), and the Companies (Consolidation) Act, 1908 (f).

**Bankers'
books.**

With regard to bankers' books, special and important statutory provisions apply, and copies of entries therein are now receivable in all legal proceedings as *prima facie* evidence of the transactions and accounts recorded, upon proof that the book was, at the time of the entry, one of the ordinary books of the bank, that it is in the custody or control of the bank, and that the entries were made in the usual course of business (g).

(vi.) *Histories, Scientific Works etc.*

Histories.

657. Accredited public histories are receivable in evidence as being in the nature of public documents, or, at all events, of general reputation, to prove ancient facts of a public, but not of a private or local, nature.

(*Newby v. Sims*, [1894] 1 Q. B. 478; *Fortune v. Hanson*, [1896] 1 Q. B. 202); and see title FOOD AND DRUGS.

(r) As to certified copies, see p. 524, *post*.

(s) *Shrewsbury Mercers etc. (Warden etc.) v. Hart* (1823), 1 C. & P. 113.

(t) *R. v. Motherell* (1718), 18 Stra. 93; see also p. 555, *post*.

(a) *Hill v. Manchester and Salford Water Works Co.* (1833), 5 B. & Ad. 866. As to resolutions passed by the provisional committee of a railway, see *Rennie v. Clarke* (1850), 5 Exch. 292.

(b) 45 & 46 Vict. c. 50, s. 22.

(c) 51 & 52 Vict. c. 41, s. 75.

(d) Education Act, 1902 (2 Edw. 7, c. 42), Sched. I., A. (4) and B. (9).

(e) 8 & 9 Vict. c. 16, ss. 9, 98.

(f) 8 Edw. 7, c. 69, ss. 33, 71.

(g) Bankers' Books Evidence Act, 1879 (42 & 43 Vict. c. 11), ss. 3, 4; and see further, p. 554, *post*, and title BANKERS AND BANKING, Vol. I., pp. 643-647.

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Thus, "Speed's Chronicle" has been admitted to prove the date of decease of an English queen (*h*), and "Collier's Ecclesiastical History," "Hooker's Polity," and other authoritative historical and theological works, to prove matters of Church doctrine and usage (*i*), while the Chronicles of Stowe and Dugdale have been rejected in proof of the creation of a peerage (*j*), and "Camden's Britannia" in proof of a local custom to sink salt pits (*k*).

Scientific books and records are also receivable on the same ground (*l*). Thus, the "Carlisle Tables" have been admitted to show the average duration of life at a particular age, proof having been given that they were generally accepted as authoritative by insurance companies (*m*); the British Pharmacopœia, as evidence of the recognised standard for drugs (*n*); and the Almanack annexed to the Book of Common Prayer, as evidence of the matters contained in it (*o*). So, also, public maps, generally offered for public sale, have been admitted to show matters of general geographical notoriety, such as the relative situations of towns or counties (*p*), and for some purposes specifications of patents from the records of the Patent Office have been admitted (*q*).

Scientific
works etc.

Public maps
etc.

SECT. 4.—Opinions.

658. Opinions, whether of the community (reputation) or of individuals, are, in general, inadmissible in proof of material facts. Opinions.

The ground of exclusion of such evidence is that opinions, in so far as they may be founded on no evidence, or evidence not recognised by law, are worthless, and in so far as they may be founded on legal evidence, tend to usurp the functions of the court and jury, whose province alone it is to draw conclusions of law or fact (*r*).

The above rule is, however, relaxed in the following instances, mainly on the ground of necessity, since better evidence is, in such cases, often either difficult or impossible to obtain.

SUB-SECT. 1.—General Reputation.

659. General reputation is receivable in proof of public rights (*s*), and family repute in proof of matters of pedigree, on the same grounds, and subject to the same limitations, as declarations by Reputation.

(*h*) *Brounker (Lord) v. Athlins* (1682), Skin. 14; and see *Bridgewater's (Lord) Case* (undated), cited *ibid.*, 15, H. L.

(*i*) *Read v. Lincoln (Bishop)*, [1892] A. C. 644, 653, P. C.; *Ridgdale v. Clifton* (1877), 2 P. D. 276, P. C.

(*j*) *The Vaux Peerage* (1837), 5 Cl. & Fin. 526, H. L.

(*k*) *Stainer v. Droitwich Corporation* (1695), 1 Salk. 281.

(*l*) *E.g.*, maps and surveys made by persons of repute in that connection on questions of public rights (*R. v. Norfolk County Council* (1910), 26 T. J. R. 269).

(*m*) *Rowlley v. London and North Western Rail. Co.* (1873), L. R. 8 Exch. 221, Ex. Ch.

(*n*) *Dickins v. Randerson*, [1901] 1 K. B. 437.

(*o*) *Tutton v. Darke* (1860), 5 H. & N. 647.

(*p*) *R. v. Orton* (1873), and *R. v. Jameson* (1896), cited Stephen, Digest of the Law of Evidence, art. 35; see also *North Staffordshire Rail. Co. v. Hanley Corporation* (1910), 73 J. P. 477, C. A.

(*q*) *Clark v. Adie* (No. 2) (1877), 2 App. Cas. 423, 431.

(*r*) Best, Law of Evidence, 10th ed., s. 511.

(*s*) *Barracough v. Johnson* (1838), 8 Ad. & El. 99.

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Opinions. deceased persons concerning those facts (*t*); indeed, the generic term “reputation” is often applied indiscriminately to both species of evidence. Where, however, the existence of a marriage is in question, whether as a matter of pedigree or not, evidence of repute is receivable, not merely from members of the family in question, but also from friends and neighbours (*u*). And it will not affect the admissibility of the evidence, though it may its weight, that such repute is divided or discontinuous (*a*), provided always that it is general in its nature, and not founded merely on the assertions of some particular person, for then it will cease to be admissible as reputation, and can only be received from deceased members of the family, and in a case which is strictly one of pedigree (*b*).

Reputation of identity. General reputation is also sometimes admitted in proof of identification. Thus, the general repute existing in a testator’s family or neighbourhood has been received to identify a legatee (*c*), or the subject-matter of a devise (*d*); and to show that a libel referred to the plaintiff, evidence may be given that he was publicly jeered at in consequence of the libel (*e*).

SUB-SECT. 2.—Opinions of Experts.

Opinions of experts.

660. The opinions of experts are, in general, admissible whenever the subject is one a knowledge of which can only be acquired by special training or experience. When, however, it is one upon which the jury are as competent to form an opinion as the witness, or when the court is assisted by assessors (*f*), such evidence will be rejected.

When expert evidence admitted.

Under the first head are included matters of science, art, and trade, the genuineness of handwriting, and foreign law. Thus, the opinions of medical men have been received as to the existence of insanity (*g*), or the cause of disease or death (*h*); those of a keeper of public records as to alterations in a will (*i*); those of actuaries as to the average duration of life in calculating annuities (*k*); those of engineers as to the cause of obstruction to a harbour (*l*); those of shipbuilders and marine surveyors as to the construction of a ship (*m*); and (provided the court is not sitting with assessors)

(*t*) See pp. 463 *et seq.*, *ante*.

(*u*) *Elliott v. Totnes Union* (1892), 57 J. P. 151.

(*a*) *Andreues v. Uthwatt* (1886), 2 T. L. R. 895; *Re Haynes, Haynes v. Carter* (1906), 94 L. T. 431.

(*b*) *Shedden v. A.-G.* (1860), 30 L. J. (P. M. & A.) 217.

(*c*) *Re Gregory's Settlement and Will* (1865), 34 Beav. 600.

(*d*) *Anstee v. Nelms* (1856), 1 H. & N. 225; compare *Re Steel, Wappett v. Robinson*, [1903] 1 Ch. 135.

(*e*) *Cook v. Ward* (1830), 4 Moo. & P. 99; *Du Bost v. Beresford* (1810), 2 Camp. 511.

(*f*) *The Kestrel* (1881), 6 P. D. 182; *The Assyrian* (1890), 63 L. T. 91, C. A.

(*g*) Taylor, Law of Evidence, 10th ed., s. 1417; *R. v. Wright* (1821), Russ. & Ry. 456.

(*h*) *Ibid.*

(*i*) *Finch v. Combe*, [1894] P. 191.

(*k*) *Rowley v. London and North Western Rail. Co.* (1873), L. R. 8 Exch. 221 Ex. Ch.

(*l*) *Folkes v. Chadd* (1782), 3 Dong. (K. B.) 157.

(*m*) *The Robin*, [1892] P. 95.

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Opinions.

those of nautical witnesses as to the proper navigation of a ship (*n*). The opinions of shopkeepers are admissible to show the average waste resulting from retail sales (*o*); those of accountants to discriminate between losses chargeable to capital and income (*p*); and now (according to the great weight of authority) those of underwriters as to the "materiality" of facts connected with marine insurance (*q*).

On the other hand, experts will not be allowed to give their opinions upon the construction of documents, for this, being a matter of law, belongs solely to the court (*r*); nor upon matters of legal or moral obligation (*s*); nor upon what would probably have happened had the parties acted in one way rather than another (*a*). And, where the question is as to the probable cause of an injury which occurred to cattle while in a railway truck, the opinion of cattle drovers may be rejected (*b*).

When not
admitted.

661. An expert, in order to be competent as a witness, need not have acquired his knowledge professionally; it is sufficient, so far as the admissibility of the evidence goes, if he has made a special study of the subject, or acquired a special experience therein (*c*). Thus, hospital students, dressers, and unqualified practitioners may be permitted to testify as medical experts (*d*); and accountants who are conversant with the business of life insurance as actuaries (*e*). So foreign law has frequently been proved by witnesses who, though not professional lawyers, followed some occupation which gave them peculiar means of knowing the law in question (*f*).

Competency
of expert.

In every case in which the opinions of experts are admissible, the grounds of such opinions may be inquired into, either in chief or, as is more usual, in cross-examination. And facts and experiments, even though not themselves relevant to the issue, are also receivable in corroboration or rebuttal of the opinion (*g*).

Examination
of experts.

(*n*) *Sills v. Brown* (1840), 9 C. & P. 601; *Penwick v. Bell* (1844), 1 Car. & Kir. 312; and see *M'Naghten's Case* (1843), 10 Cl. & Fin. 200, II. 1., *per* TINDAL, C.J., at p. 212.

(*o*) *M'Fadden v. Murdock* (1867), 1 I. R. O. L. 211.

(*p*) *Bond v. Barrow Hematite Steel Co.*, [1902] 1 Ch. 353.

(*q*) See 1 Arnould, *Marine Insurance*, 8th ed., s. 626, where the cases are collected and considered; and title *INSURANCE*.

(*r*) *Grove v. Bulwagoy Estate and Trust Co.* (1898), *Times*, 30th March; *Bowes v. Shand* (1877), 2 App. Cas. 455; *Betts v. Menzies* (1862), 10 H. L. Cas. 117.

(*s*) *Campbell v. Rickards* (1833), 5 B. & Ad. 840, *per* Lord DENNAN, C.J., at p. 846.

(*a*) *Ibid.*

(*b*) *Smith v. Midland Rail. Co.* (1887), 57 J. T. 813.

(*c*) *R. v. Silverlock*, [1894] 2 Q. B. 766, C. C. R.

(*d*) Best, *Law of Evidence*, 10th ed., s. 516.

(*e*) *Rowley v. London and North Western Rail. Co.* (1873), L. R. 8 Exch. 221, Ex. Ch.

(*f*) *Vander Donckt v. Thellusson* (1849), 8 C. B. 812, where a Belgian merchant and commissioner of stocks and bills of exchange was permitted to prove the Belgian law affecting bills; *Re Whitelegg*, [1899] P. 267; see pp. 487 *et seq.* *post.*

(*g*) *Birrell v. Dryer* (1884), 9 App. Cas. 345; *R. v. Heseltine* (1873), 12 Cox, C. C. 404; also the fact that the witness acted on the opinion which he formed (*Stephenson v. River Tyne Improvement Commissioners* (1869), 17 W. R. 590).

SECT. 4. * Moreover, experts may refresh their memories by reference to accredited works on their special topics—*e.g.*, a lawyer to codes and reports, a valuer to price lists, a doctor to medical treatises (*h*), or a skilled mechanician to former patents and specifications (*i*).

SUB-SECT. 3.—Opinions of Ordinary Witnesses.

Opinions of
ordinary
witnesses.
Identity.

662. The opinions of ordinary witnesses are admissible as to identity, handwriting, age, and certain other miscellaneous matters.

Thus, they may testify to their belief that the prisoner in the dock is the person they saw committing a crime; or that a photograph, which is produced, is the likeness of some absent party (*k*); or, in a case of infringement, that an engraving in court resembles an unproduced picture (*l*). So, in cases of libel, the friends and neighbours of the plaintiff may say that, on reading the libel, they considered it referred to him (*m*). And the same rule has been applied to the case of a written threat (*n*).

In affidavits used in interlocutory proceedings deponents are allowed to testify to their information and belief, provided that the grounds thereof are set out, otherwise not (*o*).

Handwriting.

663. A party's handwriting may, amongst other means, be proved by the opinion of witnesses who are acquainted with it. The knowledge requisite for this purpose may have been acquired by the witness having, at any time, either (1) seen the party write; or (2) received communications purporting to come from him in answer to those addressed to him by the witness; or (3) observed, in the ordinary course of business, documents purporting to be in the party's handwriting (*p*). On the other hand, knowledge acquired by a non-expert witness for the express purpose of qualifying him to prove the party's handwriting at the trial will not suffice to admit the evidence (*q*). Testimony thus admitted is considered to be primary, and not secondary, in its nature, and so will not be excluded, even though better evidence of the handwriting in question could be obtained (*r*).

Age

664. The opinions of ordinary witnesses are receivable on questions of age. Thus, on a charge of ill-treating certain children

(*h*) *The Sussex Peerage* (1844), 11 Cl. & Fin. 85, 114, 115, H. L.; *Collier v. Simpson* (1831), 5 C. & P. 73.

(*i*) *Clark v. Adie* (No 2) (1877), 2 App. Cas. 423, 431, 437.

(*k*) *Prith v. Prith*, [1896] P. 74. In matrimonial cases, however, the court will not act upon identification by photograph alone (*ibid.*).

(*l*) *Lucas v. Williams & Sons*, [1892] 2 Q. B. 113, 116, C. A.

(*m*) *R. v. Barnard, Ex parte Gower (Lord R.)* (1879), 43 J. P. 127; *Hulton (L.) & Co. v. Jones*, [1910] A. C. 20; and see title LIBEL AND SLANDER.

(*n*) *R. v. Hendy* (1850), 4 Cox, C. C. 243.

(*o*) R. S. C., Ord. 38, r. 3; *Re Anthony, Birrell, Pearce & Co., Doig v. Anthony, Birrell, Pearce & Co., Re Same, (Gross v. Same)*, [1899] 2 Ch. 50; *Re Young (J. L.) Manufacturing Co., Young v. Young (J. L.) Manufacturing Co.*, [1900] 2 Ch. 758.

(*p*) *Doe d. Mudd v. Suckermore* (1836), 5 Ad. & El. 703, 730, 731; *Re Clarence Hotel, Ilfracombe, Ltd.* (1909), 54 Sol. Jo. 117. The third heading applies also to the proof of ancient handwriting (*The Fitzwaller Peerage* (1843), 10 Cl. & Fin. 193, H. L.).

(*q*) *R. v. Crouch* (1850), 4 Cox, C. C. 163; *Stranger v. Searle* (1793) 1 Esp. 14.

(*r*) *Lucas v. Williams & Sons*, *supra*.

SECT. 4.
Opinions.

under sixteen years old, the testimony of the mistress of an elementary school at which they attended, that she believed they were under that age, may be received; as also similar evidence by policemen and others who have seen the children (s).

665. In cases of libel and slander, opinions are sometimes received as to the meaning of the words. Thus, though such evidence cannot be admitted to show that ordinary words were used in their ordinary sense, yet it is otherwise where a slanderous meaning is imputed to apparently innocent words. In such cases, however, a foundation must always be laid by first asking the witness whether there was anything in the circumstances of the case, or the conduct or tone of the speaker, to prevent the words from conveying their ordinary meaning. The question may then be asked: "What did you understand by the words?" (a).

Libel actions.

666. In practice, although not perhaps in strictness, witnesses called to prove a prisoner's character are allowed to speak to their individual opinion thereof, and not merely to his general reputation in the community (b).

Evidence as to character.

SECT. 5.—*Judgments* (c).

667. A judgment is not evidence of any fact which was neither directly decided, nor a necessary ground of the decision. Thus, it is never evidence of matters which merely came collaterally in question, or were incidentally cognisable, or which can only be inferred by argument from the decision (d). Still less is it evidence of the truth of any *obiter dictum* of the court (e).

Judgments.

It should be noticed, too, that judgments may have a different evidential effect according as they are pronounced for or against a party. Thus, a conviction against a parish for non-repair of a road is conclusive of its liability to repair; but an acquittal, which does not, like a conviction, ascertain any specific fact, is no evidence for the parish of its non-liability to repair (f).

Moreover, in general, all judgments when tendered as evidence are impeachable on the grounds that they are not final (g), or not on the merits (h), or were rendered without jurisdiction (i), or were obtained by fraud (k).

(a) *R. v. Cox*, [1898] 1 Q. B. 179, C. C. R.

(a) *Daines v. Hartley* (1818), 3 Exch. 200; *Brunswick (Duke) v. Harmer* (1850), 3 Car. & Kir. 10.

(b) See p. 479, *ante*.

(c) As to judgments and their operation, see titles ESTOPPEL, pp. 326 *et seq.*, *ante*; JUDGMENTS AND ORDERS.

(d) *Kingston's (Duchess) Case* (1776), 20 State Tr. 537; 2 Smith, L. C., 10th ed. 731.

(e) *Re Vitoria, Ex parte Vitoria*, [1894] 2 Q. B. 387, C. A.; *King v. Henderson*, [1898] A. C. 720, P. C.; *Re Allsop and Joy's Contract* (1889), 61 L. T. 213, per CHITTY, J.

(f) *R. v. Wick St. Lawrence (Inhabitants)* (1833), 5 B. & Ad. 526; *R. v. St. Pancras (Inhabitants)* (1794), Peake, 286 [220].

(g) *Nouvion v. Freeman* (1889), 15 App. Cas. 1.

(h) *Re Orrell Colliery and Fire Brick Co.* (1879), 12 Ch. D. 681.

(i) Taylor, *Law of Evidence*, 10th ed., ss. 1714—8. A foreign judgment may be impeached for a substantial defect, but not on the ground of irregularity of procedure (*Pemberton v. Hughes*, [1899] 1 Ch. 781, C. A.).

(k) *Birch v. Birch*, [1902] P. 130, C. A.; *Abouloff v. Oppenheimer* (1882), 10

SECT. 5.
Judgments.

Conclusive
evidence of
existence and
effect.

Judgments
admitted to
contradict a
witness.

668. Every judgment is conclusive evidence against all the world of its own existence, date, and legal effect. The reason is that, being a public transaction of a solemn nature, it is conclusively presumed to have been truly recorded. But this presumption only extends to what has been called the substantive as distinguished from the judicial portions of the record (*l*).

669. Judgments, and especially convictions, are also sometimes admitted in this connection to contradict a witness who has denied or sworn to facts inconsistent with them; or to explain the character in which a party has sued in or defended a former action. In such cases, however, the record is not relied on as showing the truth of the facts found, but merely as evidence for the collateral purposes specified.

Part III.—Modes of Proof.

SECT. 1.—Admissions for Purposes of Trial.

Admissions
for purposes
of trial.

670. Admissions for the purposes of trial may be made on the record by actual or implied admissions on the pleadings (*m*), or by express admissions (*n*), or in answer to interrogatories (*o*), or may be made by agreement between the parties or on notice (*p*).

SECT. 2.—Judicial Notice.

SUB-SECT. 1.—English Law, Customs, and Practice.

Equity.

Common law.

671. The judges are bound to recognise and take notice of all equitable estates, titles, and rights, and all equitable duties and liabilities appearing incidentally in the course of any cause or matter, and, subject thereto, to recognise and give effect to all legal claims and demands, and all estates, titles, rights, duties, obligations, and liabilities existing by the common law or by any custom (*q*).

Q. B. D. 295, C. A. As to setting aside a consent order on the ground of mistake, see *Huddersfield Banking Co., Ltd. v. Lister (Henry) & Son, Ltd.*, [1895] 2 Ch. 273, C. A.

(*l*) Best, Law of Evidence, 10th ed., s. 590; and see title ESTOPPEL, pp. 323, 331 *et seq.*, 339 *et seq.*, *ante*. Thus, if A. is charged with larceny of B.'s goods and is acquitted, and afterwards sues B. for malicious prosecution, the record of A.'s acquittal is conclusive proof of that fact against B.; but it is neither conclusive, nor even admissible, evidence to show that A. was innocent, or that B. was the prosecutor, or was actuated by malice (*Leggett v. Tollervey* (1811), 14 East, 302). And, similarly, if A. obtains judgment against B. as surety for C., this judgment is conclusive evidence in an action by B. against C. of the amount paid by B.; but it is neither conclusive nor admissible evidence of B.'s liability to pay it (*King v. Norman* (1847), 4 C. B. 884; and compare *Re Kitchin, Ex parte Young* (1881), 17 Ch. D. 668, C. A.).

(*m*) See title PLEADING.

(*n*) See p. 456, *ante*.

(*o*) As to answers to interrogatories, see title DISCOVERY, INSPECTION, AND INTERROGATORIES, Vol. XI., pp. 108—113.

(*p*) See title PRACTICE AND PROCEDURE.

(*q*) Judicature Act, 1873 (36 & 37 Vict. c. 66), s. 24 (4), (6), as to judges of

They are also bound to take notice of all public Acts of Parliament (a), and of all Acts of Parliament whatever passed since the year 1850, unless the contrary is expressly provided by the particular Act in question (b).

SECT. 2.
Judicial
Notice.

Statutes.

Scotch law
not noticed.

672. The English courts take notice of the prevalence in Ireland of the common law of England (c), but questions of Scottish law must be decided as questions of fact upon evidence in all English courts except the House of Lords, which, as the "*commune forum* of the three countries" (d), takes judicial notice of the law of each so far as it is material to the issues raised by the record in all cases that come before it (e).

In accordance with these principles, the court takes notice of every branch of English law, including the principles of international law, ecclesiastical law, marine law (f), the emanations from the Crown pursuant to statute, such as the articles of war and rules made under the Army Act as distinguished from rules not so made (g), the law and customs of Parliament, the existence and extent of the privileges of each House of Parliament (h), and the order and course of the proceedings therein (i), and the privileges of the Crown, e.g., the privileges with respect to the royal palaces (k).

673. The court will take judicial notice of usages which are embodied in the law merchant (l), and of commercial or other usages which have been proved sufficiently often in the courts of law (m), and the court is bound to know and recognise such usages without proof (n). For example, the custom of merchants by which bills of lading are drawn in sets of three or more, and their

Usages of law
merchant.

the High Court and Court of Appeal, and ss. 89, 91, as to judges of inferior courts. The common law courts took judicial notice of the rules of equity before the Judicature Act (*Simis v. Marryat* (1851), 17 Q. B. 281; *Neeves v. Burrough* (1849), 14 Q. B. 501).

(a) *R. v. Sutton* (1816), 4 M. & S. 532.

(b) Interpretation Act, 1889 (52 & 53 Vict. c. 63), s. 9; and see p. 525, *post*.

(c) *Re Nesbitt* (1844), 14 L. J. (M. C.) 30.

(d) *Cooper v. Cooper* (1888), 13 App. Cas. 88, *per* Lord WATSON, at p. 104.

(e) *Cooper v. Cooper*, *supra*; *Lyell v. Kennedy*, *Kennedy v. Lyell* (1889), 14 App. Cas. 437. Similarly in a colony or dependency the court takes judicial notice of the law there prevalent (*Secretary of State for Foreign Affairs v. Charlesworth, Pilling & Co.* (1901), 17 T. L. R. 265, P. C.).

(f) *Chandler v. Grieves* (1792), 2 Hy. Bl. 606, note a.

(g) *Bradley v. Arthur* (1825), 4 B. & C. 292, 304.

(h) *Stockdale v. Hansard* (1839), 9 Ad. & El. 1, 112; *Middlesex Sheriff's Case* (1840), 11 Ad. & El. 273; *Burdett v. Abbot* (1811), 14 East, 1, 148; (1817), 5 Dow, 165, 199, H. L.; *Wason v. Walter* (1868), L. R. 4 Q. B. 73; *Bradlaugh v. Gossett* (1884), 12 Q. B. D. 271; *Shaftsbury's (Earl) Case* (1677), 1 Mod. Rep. 144; and see title PARLIAMENT.

(i) *Lake v. King* (1668), 1 Wms. Saund. 120, 131 b.

(k) *Elderton's Case* (1703), 2 Ld. Raym. 978; *Winter v. Miles* (1809), 10 East, 578; *A.-G. v. Donaldson* (1842), 10 M. & W. 117; *A.-G. v. Dakin* (1870), L. R. 4 H. L. 338; and see title CONSTITUTIONAL LAW, Vol. VI., p. 409.

(l) See title CUSTOM AND USAGES, Vol. X., pp. 256, 273.

(m) *Ibid.*, p. 272; and *Jones v. Peppercorne* (1858), 28 L. J. (CH.) 158.

(n) For list of usages of which judicial notice is taken, see title CUSTOM AND USAGES, Vol. X., pp. 256, 272—299.

SECT. 2.
Judicial
Notice.

effect when so drawn, are now part of the law of which the court will take notice without proof (o), and the court will take judicial notice of the customs which govern the descent of land in certain parts of England (p), as opposed to manorial customs in contravention of the common law, which must be proved.

Customs of
the City of
London.

674. The customs of the City of London were always noticed by the City court, and, after being certified by the Recorder, by the court to which the certificate was given (q). The following customs have been certified by the Recorder and acted upon by the court, namely, the custom of foreign attachment (r), the custom that a shop in the City of London in which goods are publicly exposed for sale is *market overt* for goods professedly dealt in there (s), the custom that a married woman carrying on a trade apart from her husband within the City is to be charged with liability as a *feme sole* (t), the nature of the office of a liveryman (u), and the customary distribution of a freeman's estate upon his death intestate (a). Since the Judicature Act, 1873, all courts will take notice of the customs so certified (b). A custom (c) of general application, which has been judicially noticed and acted upon, and is in effect part of the common law in the locality where it exists, can only be abolished or extinguished by Act of Parliament (d), while usage, being based purely upon habitual practice, may by disuse lose its notoriety and disappear (e).

Practice.

675. From the earliest times the superior courts took notice of the "customs and courses of every of the King's Courts" (f). The High Court of Justice, being now one court (g), takes judicial notice of the jurisdiction of the several branches into which it is divided by the statutes under which it is constituted, and of the rules made thereunder, which govern its practice and procedure,

(o) *Glyn Mills & Co. v. East and West India Dock Co.* (1882), 7 App. Cas. 591; *Sanders v. Maclean* (1883), 11 Q. B. D. 327, C. A.

(p) See title CUSTOM AND USAGES, Vol. X., p. 237.

(q) *Ibid.*, p. 237; and *Piper v. Chappell* (1815), 14 M. & W. 624.

(r) *Crosby v. Hetherington* (1842), 4 Man. & G. 933; *Westoby v. Day* (1853), 2 E. & B. 605; *Levy v. Lovell* (1880), 14 Ch. D. 234, C. A.; *London Corporation v. London Joint Stock Bank* (1831), 6 App. Cas. 393.

(s) *Market-Overt Case* (1596), 5 Co. Rep. 83 b; *Lyons v. De Pass* (1840), 11 Ad. & El. 326; *Crane v. London Dock Co.* (1864), 5 B. & S. 313; *Hargreave v. Spink*, [1892] 1 Q. B. 25.

(t) *Lavie v. Phillips* (1765), 3 Burr. 1776; see Married Women's Property Act, 1882 (45 & 46 Vict. c. 75), s. 1.

(u) *King v. Clerk* (1697), 1 Salk. 319.

(a) *Bruin v. Knott* (1842), 12 Sim. 436; *Blunt v. Luck* (1856), 26 L. J. (Ct.) 148, C. A. This custom was abolished by stat. (1856) 19 & 20 Vict. c. 94, s. 1.

(b) 36 & 37 Vict. c. 66, ss. 24 (6), 89, 91.

(c) As to the distinction between a custom and a particular trade or local usage, see title CUSTOM AND USAGES, Vol. X., p. 221.

(d) *Ibid.*, p. 246.

(e) *Ibid.*, p. 251.

(f) *Lane's Case* (1586), 2 Co. Rep. 16 b; compare *Dobson v. Bell* (1676), 2 Lev. 176; *Pugh v. Robinson* (1786), 1 Term Rep. 116. In *Dance v. Robson* (1829), Mood. & M. 294, printed copies of the rules circulated among the court's officers for their guidance were accepted as evidence of the rules.

(g) See title COURTS, Vol. IX., p. 51.

SECT. 2.
Judicial
Notice.Records of
the court.

and have themselves the force of an enactment (*h*). The rules governing the practice and procedure of inferior courts, if made under statutory authority, are judicially noticed by all courts (*i*). The court is entitled to look at its own records and proceedings in any matter (*k*), and takes judicial notice of any illegality appearing therein on the part of any party by reason of which it considers that its assistance should be refused to such party, although the illegality is not pleaded or relied upon by the opposite party (*l*). It has also taken notice of the privileges and obligations of solicitors as officers of the court (*m*), of the practice of the taxing masters (*n*), and of the fact that the assizes may continue for longer than one day (*o*).

SUB-SECT. 2.—Colonial and Foreign Laws.

676. The English courts cannot take judicial notice of foreign laws, and in this connection the laws of any British colony or any Colonial laws must be proved.

(*h*) *Longman v. East* (1877), 3 C. P. D. 142, C. A., per BRETT, L.J., at p. 156; and see *Schneider v. Butt & Co.* (1881), 8 Q. B. D. 701, C. A.; *Re Mills' Estate, Ex parte Commissioners of Works and Public Buildings* (1886), 34 Ch. D. 24, C. A.; *Re Fisher*, [1894] 1 Ch. 450, C. A.

(*i*) See pp. 512–553, *post*.

(*k*) *Craen v. Smith* (1869), L. R. 4 Exch. 146.

(*l*) See *Evans v. Richardson* (1817), 3 Mer. 469; and *Griffiths v. Fleming*, [1909] 1 K. B. 805, C. A., per FARWELL and KENNEDY, L.JJ., at p. 820. The rule *ex turpi causa non oritur actio* applies in actions for recovery of property as well as in actions arising out of contract, but the illegality must be directly connected with the action (*Gordon v. Metropolitan Police (Chief Commissioner)* (1910), 26 T. L. R. 645, C. A., and must not be merely collateral (*Ferri v. Hall* (1854), 15 C. B. 207). In *Scott v. Brown, Doering, McNab & Co., Slaughter and May v. Brown, Doering, McNab & Co.*, [1892] 2 Q. B. 724, C. A., the court refused to entertain an action to recover the price of shares, the facts of the plaintiff's case disclosing a criminal conspiracy to which he was a party; and in *Gedge v. Royal Exchange Assurance Corporation*, [1900] 2 Q. B. 214, the court took notice of the invalidity of an "honour" policy of marine insurance under the Marine Insurance Act, 1745 (19 Geo. 2, c. 37), s. 1 (which Act is now repealed and re-enacted by Marine Insurance Act, 1906 (6 Edw. 7, c. 41; see also Marine Insurance (Gambling Policies) Act, 1909 (9 Edw. 7, c. 12)), and refused to entertain an action upon it, although in neither case was the illegality pleaded or relied upon by the defendants. See, however, *Buchanan & Co. v. Füber* (1899), 4 Com. Cas. 223, 227, n., where BIGHAM, J., at the request of the parties heard an action upon a similar policy as if it did not contain the clause which rendered it null and void, and *Connolly v. Consumers' Cordage Co.* (1903), 89 L. T. 347, P. C.; see also *Royal Exchange Assurance Corporation v. Sjöförsäkrings Aktiebolaget Vega*, [1902] 2 K. B. 384, C. A.; *Luckett v. Wood* (1908), 24 T. L. R. 617; and *Chatterton v. Secretary of State for India in Council*, [1895] 2 Q. B. 189, 191, C. A. (judge at the trial bound to refuse to allow an action for libel based upon an official state communication to proceed, whether objection were taken by the parties or not). In *Willis v. Lovick*, [1901] 2 K. B. 195, it was held that the Gaming Act, 1892 (55 & 56 Vict. c. 9), if relied on in a county court, must be pleaded, but now the plaintiff is not entitled to maintain an action contrary to the provisions of this Act or of the Gaming Act, 1845 (8 & 9 Vict. c. 109), by reason of such Acts not having been pleaded as a defence (County Court Rules, Ord. 10, r. 18, as amended 1909).

(*m*) *Stokes v. Mason* (1808), 9 East, 421, 426; *Walford v. Flectwood* (1845), 14 M. & W. 449; *Day v. Ward* (1886), 17 Q. B. D. 703; *Re A Solicitor, Ex parte Hales*, [1907] 2 K. B. 539; and see Judicature Act, 1873 (36 & 37 Vict. c. 66), s. 87, and, as to the privileges and obligations of solicitors as officers of the court, title SOLICITORS.

(*n*) *Cobbett v. Wood*, [1908] 2 K. B. 420, C. A.

(*o*) *Whitaker v. Wisbey* (1852), 12 C. B. 44, 56.

SECT. 2.
Judicial
Notice.
—

part of the British dominions are treated as foreign (*p*). Such laws must be pleaded and proved as facts by properly qualified witnesses (*q*), or ascertained by the machinery provided, in the case of the law of any part of the British dominions, by the British Law Ascertainment Act, 1859 (*r*).

And also
foreign law.

The court requires the foreign law to be proved in each case in which it is material that it should be ascertained, and will not act upon the authority of a previous decision upon it in a similar case in this country (*s*).

Conflict of
laws.

Where reliance is placed by any party upon a difference between the law of England and any foreign law, the burden of proving such a difference lies upon the party who asserts its existence (*t*).

Competency
of witness to
foreign law.

A witness is not accepted as competent to prove foreign law unless he possesses special knowledge of the subject in question derived from practical experience. Knowledge acquired by study alone is not a sufficient qualification (*a*), but it is required that the witness should have had experience as judge or practising advocate in a court in which the foreign law to be proved is administered, or have held some office or position in which he has become familiar with it (*b*).

(*p*) But as to colonial statutes, see Evidence (Colonial Statutes) Act, 1907 (7 Edw. 7, c. 16).

(*q*) *Fremoult v. Dedire* (1718), 1 P. Wms. 429, 431; *Mostyn v. Fabrigas* (1774), 1 Cowp. 161, 174; *Ganer v. Lanesborough* (1790), 1 Peake, 18; *R. v. Brennan* (1817), 16 L. J. (Q. B.) 289, per PATTESON, J., at p. 290; *R. v. Povey* (1852), 22 L. J. (M. C.) 19, C. C. R.; *Nelson (Earl) v. Bridport (Lord)* (1845), 8 Beav. 527, per Lord LANGDALE, M.R., at p. 536; *R. v. Brixton Prison (Governor), Ex parte Percival* (1907), 71 J. P. 148, per Lord ALVERSTONE, C.J., at p. 150; *Brailey v. Rhodesia Consolidated, Ltd.*, [1910] 2 Ch. 95, per WARRINGTON, J., at p. 102. It seems formerly to have been the practice to refer questions of foreign law to a master to report. Questions of Scotch law were so referred in *Glover v. Strothoff* (1786), 2 Bro. C. C. 33; *Anstruther v. Adair* (1834), 2 My. & K. 513; *Williams v. Williams* (1841), 3 Beav. 547; and *McCall v. McCall* (1843), 2 Con. & Law. 184, but as to evidence of the law of Scotland by affidavit, see *Re Fitzgerald, Surman v. Fitzgerald*, [1904] 1 Ch. 573, C. A.

(*r*) 22 & 23 Vict. c. 63; and see p. 490, *post*.

(*s*) *McCormick v. Garnett* (1854), 5 De G. M. & G. 278, C. A.

(*t*) *Spain (King) v. Machado* (1827), 4 Russ. 225; *Smith v. Gould, The Prince George* (1842), 4 Moo. P. C. C. 21; *Pickering v. Stephenson* (1872), L. R. 14 Eq. 322; *Male v. Roberts* (1800), 3 Esp. 163.

(*a*) *Bristow v. Sequeville* (1850), 5 Exch. 275; *In the Goods of Bonelli* (1875), 1 P. D. 69; and *Re Turner, Meyding v. Hinchcliff*, [1906] W. N. 27, per KEKEWICH, J.

(*b*) *Re Todd, Shand v. Kidd* (1854), 19 Beav. 582 (evidence as to Scotch law given by a solicitor practising in Scotland rejected, and evidence required to be given by an advocate); *Cartwright v. Cartwright* (1878), 26 W. R. 684 (evidence of English barrister practising in Canadian appeals before the Privy Council held inadmissible to prove Canadian law); *R. v. Savage* (1876), 13 Cox, C. C. 178 (Roman Catholic priest, who had on many occasions performed the marriage ceremony in Scotland, held incompetent to prove Scotch marriage law). On the other hand, in *The Sussex Peerage* (1844), 11 Cl. & Fin. 85, 134, H. L., a Roman Catholic bishop, who was bound in order to discharge his duties to make himself acquainted with the matrimonial law of Rome, was held competent to give evidence upon it as being *peritus virtute officii*; and see *Vander Donckt v. Thellusson* (1849), 8 O. B. 812 (merchant and stockbroker at Brussels, held capable of proving the Belgian law of negotiable instruments); *In the Goods of Dost Aly Khan* (1880), 6 P. D. 6 (Persian law proved by a secretary to the Persian embassy in London and the Persian minister at Vienna, it being shown

In giving evidence as to foreign law the witness may refer to authorities, laws, and treatises thereon, for the purpose of refreshing his memory and as part of the materials on which he bases his opinion (*c*), and is entitled to refer to and state the effect of any written law without being bound to produce a copy of it (*d*).

If, however, the witness produces any text-book, decision, code, or other legal document, as stating or representing the foreign law, the court is entitled to deal with it and give the same effect to it as to any other portion of the evidence (*e*), and, in the event of conflicting oral evidence being given, may itself examine the documents referred to, or construe the written law, and form its own conclusion thereon (*f*).

SECT. 2. JUDICIAL NOTICE.

Reference to documents etc.

The court may examine documents referred to.

677. The construction of a foreign document by the application to it of the foreign law when ascertained is for the judge, and not for the witness. Where a written contract is made in a foreign country, and in a foreign language, the court, in order to interpret it, must first obtain a translation of the instrument; secondly, an explanation of the terms of art (if it contains any); thirdly, evidence of any foreign law applicable to the case; and fourthly, evidence of

Construction of foreign documents.

that all persons in the Persian diplomatic service were required to be thoroughly versed in Persian law); in *the Goods of Whitelegg*, [1899] P. 267 (evidence of notary public, acquainted with the law of Chili, though not a Chilean lawyer nor practising in Chili, accepted with hesitation, to prove Chilean law); *Cooper-King v. Cooper-King*, [1900] P. 65 (ex-governor of Hong-Kong permitted to prove the law of that colony); and *Wilson v. Wilson*, [1903] P. 157 (English barrister admitted to prove the Maltese marriage laws, of which he had in the exercise of his profession made a special study). In *Lacon v. Higgins* (1822), 3 Stark. 178, French law was proved by a French vice-consul in London, but no question as to his qualification or competence appears from the report to have been raised. See also pp. 480, 481, *ante*.

(*c*) *The Sussex Peerage* (1844), 11 Cl. & Fin. 85, 114—117, II. L.; *Nelson (Earl) v. Bridport (Lord)* (1845), 8 Beav. 527, per Lord LANGDALE, M.R., at p. 538.

(*d*) *De Bode's (Baron) Case* (1846), 8 Q. B. 208, 251, where the earlier cases are discussed.

(*e*) See *Concha v. Murrietta*, *De Mora v. Concha* (1889), 40 Ch. D. 543, C. A., per LOPES, L.J., at p. 554.

(*f*) *Craster v. Thomas*, [1909] 2 Ch. 348, 357. In *Lindo v. Belisario* (1795), 1 Hag. Con. 216, and *Dalrymple v. Dalrymple* (1811), 2 Hag. Con. 54, Lord STOWELL followed this course. In *Lacon v. Higgins* (1822), 3 Stark. 178, ABBOTT, C.J., construing the French marriage code, expressed the opinion that the formalities prescribed were merely directory, but, after hearing further oral evidence, held the contrary; in *Trimbey v. Vignier* (1834), 1 Bing. (N. C.) 151, after hearing conflicting opinions from French advocates upon the French code, the court construed the code itself; in *Bremer v. Freeman* (1857), 10 Moo. P. C. C. 306, the Judicial Committee decided between the opposite opinions of French advocates by examining the decisions of French courts and the works of text-writers referred to in the argument; in *Prowse v. European and American Steam Shipping Co.* (1860), 13 Moo. P. C. C. 484, an Act of the Legislative Council of India and rules as to navigation and compulsory pilotage being admitted, the court decided their proper effect and construction; see also *United States of America v. McRae* (1867), 3 Ch. App. 79 (construction of an American Act of Congress); *Craster v. Thomas*, *supra* (construction of Indian Succession Act, 1865 (Act X. of 1865)); *Macdonald v. Macdonald* (1872), L. R. 14 Eq. 60 (inference from written opinion of a Scotch advocate on point of Scotch law not expressly stated in the opinion). See, however, *Cocks v. Purday* (1846), 2 Car. & Kir. 269, 270; *The Sussex Peerage*, *supra*; and *Nelson (Earl) v. Bridport (Lord)*, *supra*, at pp. 534—539.

SECT. 2.
Judicial
Notice.

The court follows its own laws of evidence and procedure.

any peculiar rules of construction, if any such rules exist, by the foreign law. With this assistance the court must interpret the contract itself on ordinary principles of construction (*g*).

678. In considering a question of foreign law, the court follows its own rules of evidence and procedure, and not those of the foreign country (*h*), and all questions which relate to the enforceability, as opposed to the validity, of a contract are matters of procedure, and therefore governed by the law of the tribunal in which the remedy is sought (*i*). In this connection it is to be observed that the provisions of the English Statutes of Limitation and of the Statute of Frauds are regarded as matters of procedure and evidence, and are applied, as part of the *lex fori*, to cases otherwise determined in accordance with the appropriate foreign law (*k*).

British Law Ascertainment Act, 1859.

679. Instead of deciding a question of the law of any part of the British dominions as a question of fact upon the evidence of witnesses, the court may have recourse to the provisions of the British Law Ascertainment Act, 1859 (*l*). Under this Act the court may, if of opinion that it is necessary or expedient for the proper disposal of any action (*m*) pending before it to ascertain such law, remit a case stating the facts to one of the superior courts in such part of the British dominions for its opinion upon the law (*n*). The facts to be stated in the case may be ascertained by the verdict of a jury or other competent mode, or may be agreed by the parties, or settled by such person or persons as may have been appointed by the court for the purpose in the event of the parties not agreeing (*o*). When the case has been prepared, the court or a judge thereof must approve it and settle the questions of law arising upon the facts stated, and the questions of law, together with the case, are then remitted to the court whose opinion is desired (*p*).

Practice.

The court has a discretion whether it will send a case for the

(*g*) *Di Sora v. Phillipps* (1863), 10 H. L. Cas. 624, *per* Lord CRANWORTH, at p. 633. Compare *Stearns Kaarsen Fabrick Gouda Co. v. Heintzmann* (1864), 17 C. B. (N. S.) 56; and *Chatenay v. Brazilian Submarine Telegraph Co.*, [1891] 1 Q. B. 79, C. A. The report in *Williams v. Williams* (1841), 3 Beav. 547, that the construction of a Scotch settlement according to Scotch law was referred to a master for report is inaccurate (*Di Sora v. Phillipps*, *supra*, *per* Lord CHELMSFORD, at p. 641).

(*h*) *Appleton v. Braybrook (Lord)* (1817), 6 M. & S. 34; *Yates v. Thomson* (1835), 3 Cl. & Fin. 544, H. L.; *Clark v. Mullick* (1840), 3 Moo. P. C. 252, 268; *Ferguson v. Pyffe* (1841), 8 Cl. & Fin. 121; and see title CONFLICT OF LAWS, Vol. VI., pp. 302–308.

(*i*) See title CONFLICT OF LAWS, Vol. VI., p. 302.

(*k*) *Ibid.*, pp. 306, 307.

(*l*) 22 & 23 Vict. c. 63; and see title PRACTICE AND PROCEDURE.

(*m*) “Action” here includes every judicial proceeding instituted in any court, civil, criminal, or ecclesiastical (*ibid.*, s. 5).

(*n*) *Ibid.*, s. 1.

(*o*) *Ibid.*

(*p*) *Ibid.*; see *Lord v. Colvin* (1860), 1 Drew. & Sm. 24 (case for opinion of Scotch court); *Login v. Coorg (Princess)* (1862), 30 Beav. 632 (case for opinion of court in India); *Topham v. Portland (Duke)* (1863), 1 De G. J. & Sm. 517, C. A.; *Wilson v. Moore* (1864), 12 W. R. 1137; and *Eglinton (Earl) v. Lamb* (1867), 15 L. T. 657 (cases ordered to be sent for the opinion of the Court of Session in Scotland); and *Re Moses, Moses v. Valentine*, [1908] 2 Ch. 235 (case for the opinion of the Transvaal court suggested but not sent).

SECT. 2.
Judicial
Notice.
—

opinion of another court or itself decide the question raised upon evidence (*q*).

The court whose opinion is desired may hear the parties or counsel on the case, or may pronounce its opinion without so doing, and may take such further procedure as it thinks proper for pronouncing its opinion (*r*). Upon the opinion being pronounced a copy, certified by an officer of the court pronouncing it, is given to each of the parties to the action requiring it (*s*), and any of the parties may lodge the copy of the opinion with the court in which the action is pending, and move it to apply the opinion to the facts stated in the case (*t*).

The opinion may be applied as a statement of the foreign law to the facts of the case, or be submitted to the jury with the other facts of the case as evidence, or conclusive evidence, as the court trying the action may think fit, of the foreign law therein stated (*a*). The House of Lords and the Privy Council, in the event of an appeal thereto in the action, may review, adopt, or reject any such opinion pronounced by any court whose judgments are respectively reviewable by them (*b*).

Similar provisions are made by the Foreign Law Ascertainment Act, 1861 (*c*), for ascertaining the law of any foreign country or State with the Government of which this country may enter into a convention for the purpose, but, as up to the present no such convention has been made with any foreign Government, the Act cannot be applied.

Foreign Law
Ascertain-
ment Act,
1861.

680. All proclamations, treaties, and other acts of state of any foreign State or of any British colony may be proved in any court of justice, or before any person having by law or by consent of parties authority to hear, receive, and examine evidence, by production of a copy purporting to be sealed with the seal of the foreign State or British colony to which the original document belongs (*d*).

Colonial acts
of state.

By the Colonial Laws Validity Act, 1865 (*e*), the certificate of the clerk or other proper officer of a legislative body in any colony, to the effect that the document to which it is attached is a true copy of any colonial law assented to by the governor of such colony, or of any bill reserved for the signification of the pleasure of the Crown by the governor, is made *prima facie* evidence that the document so certified is a true copy of the law or bill, and, as the case may be, that the law has been duly and properly passed and assented to, or that the bill has been duly and properly passed and presented to the governor; and any proclamation purporting to be published by authority of the governor in any newspaper in the colony signifying

Colonial
statutes.

(*q*) *Lord v. Colvin* (1860), 1 Drew. & Sm. 24, per KINDERSLEY, V.-G.

(*r*) British Law Ascertainment Act, 1859 (22 & 23 Vict. c. 63), s. 1.

(*s*) *Ibid.*, s. 2.

(*t*) *Ibid.*, s. 3.

(*a*) *Ibid.*

(*b*) *Ibid.*, s. 4.

(*c*) 24 & 25 Vict. c. 11.

(*d*) Evidence Act, 1851 (14 & 15 Vict. c. 99), s. 7.

(*e*) 28 & 29 Vict. c. 63, s. 6.

SECT. 2.
Judicial
Notice.

Prints of
Colonial Acts
etc.

the Crown's disallowance of such law or assent to such bill is made *prima facie* evidence of such disallowance or assent.

Copies of Acts, ordinances, and statutes passed by the Legislature of any British possession, and of orders, regulations, and other instruments issued or made thereunder, are admissible in evidence in all courts of justice in the United Kingdom, if purporting to be printed by the Government printer (*f*).

SUB-SECT. 3.—*Time.*

The
almanack.

681. The almanack is part of the common law and established by statute (*g*), and the court takes judicial notice of the succession of years, months, and days (*h*), of the years of each sovereign's reign and the years in the calendar to which they correspond (*i*), and of the days of the week upon which the days in the calendar fall (*k*).

Time.

Any expression of time in Acts of Parliament, deeds, and other legal instruments means, in the case of Great Britain, Greenwich mean time, and in the case of Ireland, Dublin mean time, unless otherwise specifically stated (*l*), but judicial notice is taken, if necessary, of the fact that a place lies east or west of Greenwich, and therefore has a different time from Greenwich time (*m*), though not of the times at which the sun rises and sets (*n*).

SUB-SECT. 4.—*Affairs of State, States of War and Peace, Foreign Rulers, Officers of State.*

Home
Government.

682. The courts take judicial cognisance of the Government of the country and the great officers of state by whom it is carried on (*o*), of the order and course of proceedings in Parliament (*p*),

(*f*) Evidence (Colonial Statutes) Act, 1907 (7 Edw. 7, c. 16), s. 1 (1). The Act applies to all such documents both prior and subsequent to the date on which it came into force (*ibid.*), and obviates the difficulty which arose in *R. v. Brixton Prison (Governor), Ex parte Percival* (1907), 71 J. P. 148. This case, in so far as it decided that a colonial statute must be proved, is rendered obsolete by the Act.

(*g*) *R. v. Dyer* (1703), 6 Mod. Rep. 41; *Brough v. Parkings* (1704), 2 Ld. Raym. 992; Calendar (New Style) Act, 1750 (24 Geo. 2, c. 23); Calendar Act, 1751 (25 Geo. 2, c. 30); see also title TIME.

(*h*) *R. v. Brown* (1828), Mood. & M. 163; *Hurvy v. Broad* (1704), 2 Salk. 626.

(*i*) *Holman v. Burrow* (1702), 2 Ld. Raym. 794; *R. v. Smith* (1838), 2 Mood. & R. 109; *R. v. Pringle* (1840), 2 Mood. & R. 276; *Henry v. Cole* (1702), 2 Ld. Raym. 811.

(*k*) *Hoyle v. Cornwallis (Lord)* (1720), 1 Stra. 387; *Hanson v. Shackleton* (1835), 4 Dowl. 48; *Pearson v. Shaw* (1844), 7 I. L. R. 1.

(*l*) Statutes (Definition of Time) Act, 1880 (43 & 44 Vict. c. 9). The words "sunset" and "sunrise" in the Local Government Act, 1888 (51 & 52 Vict. c. 41), s. 85 (1), are not expressions of time within the meaning of the Definition of Time Act, but mean the actual time of sunset and sunrise according to local and not Greenwich mean time (*Gordon v. Cann* (1899), 63 J. P. 324). See also title TIME.

(*m*) *Curtis v. March* (1858), 3 H. & N. 866.

(*n*) *Collier v. Nokes* (1849), 2 Car. & Kir. 1012; *Tutton v. Darke, Nixon v. Freeman* (1860), 5 H. & N. 647.

(*o*) In *Whaley v. Carlisle* (1866), 17 I. C. L. R. 792, the court took notice that Lord Hawkesbury was foreign minister in 1803; and see *R. v. Jones* (1809), 2 Camp. 131.

(*p*) *Lake v. King* (1668), 1 Wms. Saund. 131 b.

and of the commencements, prorogations, and sessions of Parliaments (g).

SECT. 2.
Judicial
Notice.

They also take notice of the existence and titles of foreign States recognised by the British Government as independent (v'), and of the territorial limits of their dominions (s).

Foreign
States.

The status of a foreign ruler will be noticed by the court in accordance with the recognition afforded to him by the British Government (t). In order to inform itself upon such points the court will, if necessary, communicate with the proper Government authority in this country (a).

Judicial notice will be taken of the fact that this country is at war with any other, when such is the case (b), and of the existence of a state of war between other countries, when that fact is officially recognised by the Government of this country (c).

Existence of
a state of war.

SUB-SECT. 5.—Geography.

683. The court takes judicial notice of the existence, extent, and geographical position of the British dominions and of the territory of foreign States (d). Geography.

(g) *R. v. Wilde* (1670), 1 Lev. 296; *Birt v. Rothwell* (1697), 1 Ld. Raym. 210, 343.

(r) *Taylor v. Barclay* (1828), 2 Sim. 213; *United States of America v. Wagner* (1867), 2 Ch. App. 582. The existence and status of foreign States not so recognised are not noticed by the judges (*Berne (City) v. Bank of England* (1804), 9 Ves. 317), but must be proved by evidence (*Yrisarri v. Clement* (1826), 3 Bing. 432).

(s) *Foster v. Globe Venture Syndicate, Ltd.*, [1900] 1 Ch. 811.

(t) *Mighell v. Johore (Sultan)*, [1894] 1 Q. B. 149, C. A.

(a) In *Foster v. Globe Venture Syndicate, Ltd.*, *supra*, the court applied for information to the Foreign Office; in *Mighell v. Johore (Sultan)*, *supra*, to the Colonial Office. In *The Charkieh* (1873), L. R. 4 A. & E. 59, in addition to communicating with the Foreign Office, the court had recourse to other sources of information for the purpose of determining the status of the Khedive of Egypt. Such a course, however, is incorrect, the answer of the appropriate Government Office alone being conclusive (*Mighell v. Johore (Sultan)*, *supra*, per Lord Esher, M.R., at p. 158).

(b) *R. v. De Berenger* (1814), 3 M. & S. 67; *Alcinous v. Nigreu* (1854), 4 E. & B. 217.

(c) It being the duty of the court to take notice of such facts as affecting the Government of the country, it is submitted that the law is as stated in the text, although in *Dolder v. Huntingfield (Lord)* (1805), 11 Ves. 283, Lord ELDON said during argument, "You would be obliged upon an indictment for a libel to prove that France is now at war with Austria, not as to the war with this country, the courts taking judicial notice of that with reference to our own country;" see also *Thelluson v. Costling* (1803), 4 Esp. 266.

(d) In *Cooke v. Wilson* (1856), 1 C. B. (N. S.) 153, CROWDER, J., at p. 164, held that the court was bound to take notice of the existence of the colony of Victoria, and CRESSWELL, J., at p. 163, that it must recognise that that colony was out of England. In *Birrell v. Dryer* (1884), 9 App. Cas. 345, where the question was whether the words "St. Lawrence" in a policy of marine insurance included the Gulf of St. Lawrence, or were confined to the river of that name, Lord BLACKBURN said, at p. 352: "I think that the court should take judicial notice of the geographical position and general names applied to such districts as this, in short, of all that we see on the Admiralty chart of this part of the sea." In *Foster v. Globe Venture Syndicate, Ltd.*, *supra*, FARWELL, J., held himself bound to take judicial notice whether a tract of land between the Atlas Mountains and the river Nun was the territory of the tribes of Suss or of the Sultan of Morocco, and applied to the Foreign Office for information

SECT. 2.

Judicial
Notice.County etc.
divisions.

Judicial notice is taken of the counties into which England and Wales are divided, and of those which are maritime counties, but not of the distance of one county from another, nor of the particular places situated within each county (*e*), unless such situation is recognised by statute (*f*), nor of the particular diocese within which any town is situated (*g*).

A court of quarter sessions for a county takes judicial notice of the petty sessional divisions into which the county is divided (*h*).

SUB-SECT. 6.—*Notorious Facts.*Notorious
facts

684. Judicial notice is taken of various facts the universal notoriety or regular recurrence of which in the ordinary course of nature or business has made them familiar to the judges (*i*).

upon the question. The Foreign Jurisdiction Act, 1890 (53 & 54 Vict. c. 37), s. 4, provides that any question as to the existence or extent of any jurisdiction of the Crown in a foreign country, arising in proceedings in a court in the British dominions or held under British authority, is to be submitted to the Secretary of State, whose decision for the purpose of the proceedings is final. It is to be observed that the provisions under which service of a writ of summons, or notice of a writ of summons, issuing out of the High Court may be allowed out of the jurisdiction assume a knowledge of geography in the court. See, *e.g.*, R. S. C., Ord. 11, r. 5, under which, in such cases, the court is required to limit a time for appearance, such time to depend on the place or country where or within which the writ is to be served or the notice given. It is submitted, however, that the court, in accordance with the authorities as to English geography, will not, in general, take judicial notice of the exact position of particular places abroad, or of their relative distances from one another or from places in this country. In *Kearney v. King* (1819), 2 B. & Ald. 301, the court declined to take judicial notice that there was only one place named Dublin in the world, and therefore refused to construe an allegation in the declaration that a bill was drawn in Dublin as meaning drawn in Dublin in Ireland.

(*e*) *Deysel's Case* (1821), 4 B. & Ald 243, *per* BAYLEY, J., and BEST, J. The court refused to take notice that Ivelchesier was in the county of Somerset (*R. v. Burridge* (1735), 3 P. Wms. 439, 496); that the Tower of London was in the city of London (*Brune v. Thompson* (1842), 2 Q. B. 789); that Bedford Row was in the county of Middlesex (*Thorne v. Jackson* (1846), 3 C. B. 661); that the board room of the Holborn Union Workhouse was in Middlesex (*R. v. St. George, Bloomsbury (Inhabitants)* (1855), 4 E. & B. 520); that Holborn might not be in Surrey (*Humphreys v. Budd* (1841), 9 Dowl. 1000). In *R. v. Sharpe* (1838), 8 C. & P. 436, the court took notice that the county of Stafford was in England; in *R. v. St. Maurice (Inhabitants)* (1851), 16 Q. B. 908, that the city of York was the county of a city, having, by statute, the same limits; and in *R. v. Isle of Ely (Inhabitants)* (1850), 15 Q. B. 827, that by statute the Isle of Ely was a division of a county. In every statute passed after the year 1850 and before January 1st, 1890, "county" is to be construed, unless the contrary intention appears, as including a county of a city and a county of a town (Interpretation Act, 1889 (52 & 53 Vict. c. 63), s. 4).

(*f*) *R. v. Holborn Union Guardians* (1856), 6 E. & B. 715.

(*g*) *R. v. Sympton* (1724), 2 Ld. Raym. 1379.

(*h*) *R. v. Whittles* (1849), 13 Q. B. 248, *per* Lord DENMAN, C.J., at p. 253.

(*i*) Thus, notice has been taken of the impossibility of predicting fortunes by reference to the aspect of the stars (*Penny v. Hanson* (1887), 18 Q. B. D. 476); of the great difference in the value of money in the years 1189 and 1868 (*Bryant v. Foot* (1868), L. R. 3 Q. B. 497, Ex. Ch.); of the position of the University of Oxford as a national institution created for the advancement of religion and learning (*Oxford Poor Rate Case* (1857), 8 E. & B. 184); and of the position of an undergraduate at college rendering it, *prima facie*, not unreasonable that he should require a watch (*Peters v. Fleming* (1840), 6 M. & W. 42).

The court takes notice of the usual period of gestation, so that proof of non-access by a husband to his wife during the time within which a child of which she is delivered must, in the ordinary course of nature, have been conceived, is sufficient to establish the fact that he was not the child's father (*k*).

SECT. 2.
Judicial
Notice.

Period of
gestation.

The ordinary nature of young children, their tendency to do mischievous acts, and their propensity to meddle with anything which comes in their way, have on several occasions formed the subject of judicial notice (*l*), and it has been held reasonable and natural to expect that a horse should bite and kick one of his own kind (*m*), but not that he should so act towards a child (*n*).

Mischievous
nature of
children.

With regard to matters of business, the judges will take notice of the usual hours during which the business of banking is carried on (*o*), and of the nature and incidents of the employment of a broker on the London Stock Exchange (*p*). So, too, in questions relating to the publication of a libel, the court takes notice of the ordinary course of the business of the post office and of the stamps of the post office upon letters, and recognises that the contents of a telegram are necessarily communicated to all the clerks through whose hands it passes (*q*), and that a post-card is an unenclosed document capable of being read by the servants both of the post office and of the place at which it is delivered (*r*).

Ordinary
course of
business.

SUB-SECT. 7.—Official Seals and Signatures.

685. Courts will take judicial notice of the following seals:—

The Great Seals of the United Kingdom, and of England, Ireland, and Scotland (*s*); the Privy Seal (*a*); the Wafer Seals (Great and

Seals of
public offices.

(*k*) *R. v. Luffe* (1807), 8 East, 193; *Heathcote's Divorce Bill* (1851), 1 Macq. 277, II. L., where non-access until within a fortnight, and six lunar months and one week of the birth, respectively, were proved; *Bosville v. A.-G.* (1887), 12 P. D. 177, 178; and see title HUSBAND AND WIFE.

(*l*) See *Lynch v. Nurdin* (1841), 1 Q. B. 29; *Williams v. Eady* (1893), 10 T. L. R. 41, O. A., per BURNETT, M.R.; *Sullivan v. Creed*, [1904] 2 I. R. 317, C. A.; *Cooke v. Midland Great Western Railway of Ireland*, [1909] A. C. 229, per Lord ATKINSON, at p. 237.

(*m*) *Lee v. Raley* (1865), 18 C. B. (N. S.) 722; *Ellis v. Loftus Iron Co.* (1874), L. R. 10 C. P. 10.

(*n*) *Cox v. Burbidge* (1863), 13 C. B. (N. S.) 439.

(*o*) See *Parker v. Gordon* (1806), 7 East, 385; *Elford v. Teed* (1813), 1 M. & S. 28; *Jamson v. Swinton* (1810), 2 Taunt. 224; *Wilkins v. Jadis* (1831), 2 B. & Ad. 188.

(*p*) *Johnson v. Kearley*, [1908] 2 K. B. 514, C. A., per FLETCHER MOULTON, L.J., at p. 528.

(*q*) *Williamson v. Freer* (1874), L. R. 9 C. P. 393.

(*r*) *Robinson v. Jones* (1879), 4 L. R. Ir. 391, approving and following *Williamson v. Freer*, *supra*; *Sadgrove v. Hole*, [1901] 2 K. B. 1, C. A. In practice the judges, no doubt, make use of their own private knowledge and experience of many matters of which, if in issue in an action, they would not take judicial notice. Thus, in speaking of the evidence given to support an alleged custom governing dealings between brewers and distillers, in the course of which Messrs. Meux & Co. were referred to, JAMES, V.-C., is reported to have said that he might take judicial notice that they were very large brewers in London (*Dawn v. City of London Brewery Co.* (1869), L. R. 8 Eq. 155, 164).

(*s*) *Melville's (Lord) Case* (1806), 29 State Tr. 550.

(*a*) *Lane's Case* (1586), 2 Co. Rep. 16 b, 17 b.

SECT. 2.
Judicial
Notice.

Privy) (*b*); the Seals (Great and Privy) of the Duchies of Cornwall (*c*) and Lancaster (*d*); the Seal of the Corporation of London (*e*); the Seals of the old Superior Courts of Justice, the old Admiralty Court (*f*), and any other court authorised by statute to use a seal (*g*), *e.g.*, the Probate (*h*), Divorce (*i*), and Bankruptcy Courts, and those of the judge and registrars of the last-named (*k*); the seals of the Central Office of the Royal Courts of Justice, and its various departments (*l*); those of the various District Registries (*m*), the Enrolment Office in Chancery (*n*), the County Courts (*o*), and the Court of the Vice-Warden of the Stannaries (*p*). Moreover, many public offices and bodies are authorised by statute to use distinctive seals, which are directed either to be noticed judicially, or to be received in evidence without proof of genuineness, *e.g.*, the seals of the Patent (*q*) and Record (*r*) Offices, and of the Local Government Board (*s*) and the Board of Education (*t*).

Seals of
persons
authorised to
administer
oaths.

With regard to affidavits and similar documents required for the purpose of any court or matter in England, but sworn in any place out of England, judicial notice will be taken of the seals of any person authorised (otherwise than by the law of any foreign country) to administer oaths therein. Such persons are, in Scotland and Ireland, the Channel Islands, or His Majesty's dominions, whether colonial or foreign, any court, judge, notary public, or other duly authorised official; and in foreign countries the various British diplomatic and consular agents (*u*).

Corporate
bodies.

On the other hand courts will not take judicial notice of the seals of the Bank of England (*x*), nor of corporations (*y*) (other than that of London (*z*)); nor, perhaps, of county councils, unless expressly so provided (*a*).

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- (*b*) Crown Office Act, 1877 (40 & 41 Vict. c. 41), s. 4.
 (*c*) Duchy of Cornwall Management Act, 1863 (26 & 27 Vict. c. 49), s. 2.
 (*d*) Taylor, Law of Evidence, 10th ed., s. 6.
 (*e*) *Doe d. Woodmass v. Mason* (1793), 1 Esp. 53.
 (*f*) *Tooker v. Beaufort* (1756), Say. 297; *Green v. Waller* (1703), 2 Ld. Raym. 891, 893.
 (*g*) *Doe d. Duncan v. Edwards* (1839), 9 Ad. & El. 554.
 (*h*) Court of Probate Act, 1857 (20 & 21 Vict. c. 77), s. 22.
 (*i*) Matrimonial Causes Act, 1857 (20 & 21 Vict. c. 85), s. 13.
 (*k*) Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 137.
 (*l*) R. S. C., Ord. 61, rr. 6, 7.
 (*m*) Judicature Act, 1873 (36 & 37 Vict. c. 66), s. 61.
 (*n*) Petty Bag Act, 1849 (12 & 13 Vict. c. 109).
 (*o*) County Courts Act, 1888 (51 & 52 Vict. c. 43), s. 180.
 (*p*) Stannaries Act, 1836 (6 & 7 Will. 4, c. 106), s. 19.
 (*q*) Patents and Designs Act, 1907 (7 Edw. 7, c. 29), s. 64.
 (*r*) Public Record Office Act, 1838 (1 & 2 Vict. c. 94), s. 11.
 (*s*) Local Government Board Act, 1871 (34 & 35 Vict. c. 70), s. 5.
 (*t*) Board of Education Act, 1899 (62 & 63 Vict. c. 33), s. 7.
 (*u*) R. S. C., Ord. 38, r. 6; Commissioners for Oaths Act, 1889 (52 & 53 Vict. c. 10), ss. 3, 6, extended by the Commissioners for Oaths Act, 1891 (54 & 55 Vict. c. 50), s. 2. The court does not recognise the consular agent of another country (*In the Goods of De Salazar* (1873), 21 W. R. 776).
 (*x*) *Doe d. Bank of England v. Chambers* (1836), 4 Ad. & El. 410.
 (*y*) *Ibid.*
 (*z*) See p. 486, *ante*.
 (*a*) Taylor, Law of Evidence, 10th ed., s. 14. As to a document which ought

686. Courts will take judicial notice of the following signatures:—

SECT. 2.
Judicial
Notice.

Signatures.

The Royal Sign Manual, and the signatures of the principal Secretaries of State (*c*); those of the judges of the superior courts to any judicial or official document (*d*), of the judges and registrars in bankruptcy (*e*), of the examiners (*f*), and, with respect to company matters, of any officer of the Courts of Chancery and Bankruptcy in England and Ireland, or of Session in Scotland, or of the Registrar of the Stannaries (*g*). So, also, the signatures to affidavits etc. of the various persons mentioned as authorised to administer oaths in places out of England (*h*), as well as those of a colonial notary (*i*), or of a foreign notary to a protest abroad of a foreign bill (*k*), though not to an affidavit (*l*).

It has been said, however, that the signatures of the Lords of the Treasury (*m*) will not be judicially noticed, nor, apparently, will those of the Attorney-General, or Public Prosecutor (*n*).

Lords of the
Treasury and
law officers.

SECT. 3.—Presumptions.

SUB-SECT. 1.—In General.

687. Where facts are not proved directly, but are inferred with more or less probability from facts that have been so proved, the inference is called a presumption of fact, or *presumptio hominis*.

Presumptions.

The practical necessities of a trial, however, often oblige the court to treat as established some fact of which there has been given either no evidence at all, or evidence whose probative force depends, not on its own power to carry conviction to the mind of a jury, but on a rule of law giving it such force. Such rules are called presumptions of law. Of these, some do not permit evidence of a contrary tendency to be given, and are, therefore, called irrebuttable, conclusive, or absolute presumptions, or *presumptiones juris et de jure*. Others take effect *prima facie*, but may be displaced by evidence, and are called rebuttable, conditional, inconclusive, or disputable presumptions, or *presumptiones juris*.

Distinctions.

In some cases the same rule has, at different periods of its history, been treated as a presumption of fact, a rebuttable presumption of law, an irrebuttable presumption, or a rule of substantive law (*o*); and the remedy, if any, open to a party to

to have been sealed but could not be owing to there being no official seal, see *Re Court Bureau, Ltd.*, [1891] W. N. 9.

(*c*) *Mighell v. Johore (Sultan)*, [1891] 1 Q. B. 149, C. A.

(*d*) Evidence Act, 1845 (8 & 9 Vict. c. 113), s. 2 (*Blades v. Lawrence* (1874), L. R. 9 Q. B. 374).

(*e*) Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 137.

(*f*) R. S. O., Ord. 37, r. 18.

(*g*) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 225.

(*h*) See p. 496, *ante*.

(*i*) *Brooke v. Brooke* (1881), 17 Ch. D. 833 (*Nye v. Macdonald* (1870), L. R. 3 P. C. 331, 343; *Re Davies, Davies v. Atkinson*, [1909] W. N. 212).

(*k*) *Chester v. Noyes* (1815), 4 Camp. 129.

(*l*) *Re Earl's Trust* (1858), 4 K. & J. 300, C. A.

(*m*) *R. v. Jones* (1809), 2 Camp. 131.

(*n*) *R. v. Turner*, [1910] 1 K. B. 346, C. C. A.

(*o*) See Thayer on Evidence, 1898, pp. 323, 324, "We find the rule about

SECT. 3.
Presump-
tions.

whose detriment the rule has been disregarded has varied accordingly.

688. A presumption of fact is an inference which a jury, or a judge when an action is being tried without a jury, in their discretion, may or may not draw; a rebuttable presumption of law is a legal rule to be applied by the court, in the absence of conflicting evidence; while between an irrebuttable presumption and a rule of substantive law the difference is often a mere matter of terms (*p*).

Effect of
presumption
of law.

The nature of a presumption of law is that the court treats as established some fact of which no evidence has been given, and when rebuttable, it can have no weight capable of being put in the balance against opposing evidence which is believed. It does not follow that such a presumption may be rebutted in every case by any evidence, however slight. The rebutting evidence is to be considered on its merits: its credibility is neither increased nor diminished by the existence of the presumption; but, if it is believed, the presumption is displaced. Where, however, two rebuttable presumptions of inconsistent character arise, they neutralise each other, and the matter must be decided on the evidence actually adduced (*a*). The chief effects of rebuttable presumptions of law are to determine the incidence of the burden of proof, and to prove negative assertions, which very often can be established in no other way (*b*).

SUB-SECT. 2.—Conclusive.

Conclusive
presumptions.

689. Irrebuttable presumptions of law are a small and unsatisfactory class, and almost all the rules which have at various times been regarded as such are now treated either as rebuttable (*c*) or as belonging, not to the domain of evidence, but to that of substantive

a seven years' absence (*i.*) coming into existence in the form of a judicial declaration about what may or may not fairly be inferred by a jury in the exercise of their logical faculty" (presumption of fact) . . . " (*ii.*) passing into the form of an affirmative rule of law requiring that death be assumed under the given circumstances" (rebuttable presumption of law); and at p. 317 it is shown that "The familiar doctrine about prescription used to be put as an ordinary rule of presumption; in twenty years there arose a *prima facie* case of a lost grant or of some other legal origin. The judges at first laid it down that, if unanswered, twenty years of adverse possession justified the inference, then that it 'required the inference,' *i.e.*, it was the jury's duty to do what they themselves would do in settling the same question, namely, to find the fact of the lost grant; and at last this conclusion was announced as a rule of the law of property, to be applied absolutely."

(*p*) *E.g.*, the rule that a child under seven cannot commit a crime may be classed indifferently under either head. As to this presumption and the rebuttable presumption that a child between seven and fourteen has no *animus malus*, see title CRIMINAL LAW AND PROCEDURE, Vol. IX., p. 239.

(*a*) *R. v. Willshire* (1881), 6 Q. B. D. 366, C. C. R. In *Jayne v. Price* (1814), 5 Taunt. 326, it was said by HEATH, J., that "a presumption may be rebutted by a contrary and stronger presumption"; but this, apparently, refers to presumptions of fact, as in that case it had been left to the jury to draw the proper inference from the evidence.

(*b*) *Over v. Harwood*, [1900] 1 Q. B. 803, *per* CHANNELL, J.

(*c*) *E.g.*, the presumption that a child born of a married woman is legitimate used to be regarded as indisputable (Co. Litt. 241 a), but it may now be rebutted (see p. 504, *post*).

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tions.
—

law (*d*). Thus, the rule that ignorance of the law does not excuse, or relieve from the consequences of, a crime, or from liability under a contract, has sometimes been expressed as an irrebuttable presumption that every person who is subject to the law is acquainted with it (*e*).

SUB-SECT. 3.—*Rebuttable.*

690. The most important of the rebuttable presumptions of law are those relating to innocence, intention, death, marriage, legitimacy, and the regularity and validity of official acts and documents. Rebuttable presumptions.

691. There is a general presumption that all acts and conduct are in accordance with law and morality. A party, therefore, who charges another with any description of wrong-doing must always give at least *prima facie* evidence of guilt before the party accused can be called on for an answer (*f*). The sufficiency of the evidence of guilt is, of course, a further question; and, in general, the more serious the charge, the more clearly must it be proved (*g*). Thus, to justify a conviction for crime, the jury must be satisfied of the guilt of the accused beyond any reasonable doubt (*h*); while, in civil cases, they may act on a mere preponderance of probability (*i*). Persons between the ages of seven and fourteen are presumed innocent of criminal intent, but if such intent be proved, then *malitia supplet aetatem* (*k*). Homicide, however, will be presumed to be felonious, unless the contrary appears (*l*). Presumption of innocence.

Where intention is material, it is usually, though not invariably, presumed that a man intended the natural and probable consequences of his acts (*m*). Intention.

(*d*) *E.g.*, as to the rebuttable presumption of valid delivery of a bill in favour of a holder in due course, see Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), s. 21 (2); as to the so-called irrebuttable presumptions that a child under seven cannot be guilty of crime, and that a boy under fourteen cannot commit rape, see title CRIMINAL LAW AND PROCEDURE, Vol. IX., pp. 239, 389, note (*g*).

(*e*) *Brett v. Rigden* (1568), 1 Plowd. 340, 343; *Mildmay's Case* (1584), 1 Co. Rep. 175 a, 177 b; *Bilbie v. Lumley* (1802), 2 East, 469; *Stevens v. Lynch* (1810), 12 East, 38; *R. v. Esop* (1836), 7 C. & P. 456; *Martindale v. Falkner* (1846), 2 C. B. 706; *R. v. Tewkesbury Corporation* (1868), L. R. 3 Q. B. 629; *R. v. Coote* (1873), 9 Moo. P. C. C. (N. S.) 463.

(*f*) *R. v. Burdett* (1820), 4 B. & Ald. 95; *Williams v. East India Co.* (1802), 3 East, 192 (where omission to give a certain notice amounts to a crime, there is a presumption that the notice was given, so as to put the burden of proof on the party denying the notice). But see *Huggins v. Ward* (1873), L. R. 8 Q. B. 521; *Over v. Harwood*, [1900] 1 Q. B. 803 (breach of the duty to notify a child's vaccination will not be presumed, therefore absence of such notification is *prima facie* evidence of non-vaccination); *Lord v. Lord*, [1900] P. 297 (co-respondent to a divorce petition presumed not to know that the respondent was married). As to evidence of a breach of covenant involving forfeiture of a lease, see *Tolman v. Portbury* (1870), L. R. 5 Q. B. 288, Ex. Ch., and title LANDLORD AND TENANT.

(*g*) *R. v. Hobson* (1823), 1 Lew. C. C. 261, *per* HOLROYD, J.

(*h*) *R. v. White* (1865), 4 F. & F. 383.

(*i*) *Cooper v. Slade* (1858), 6 H. L. Cas. 746, *per* WILLES, J., at p. 772.

(*k*) See title CRIMINAL LAW AND PROCEDURE, Vol. IX., pp. 239, 240.

(*l*) *R. v. Cavendish* (1873), 8 I. R. C. L. 178, C. O. R.; and see title CRIMINAL LAW AND PROCEDURE, Vol. IX., p. 570.

(*m*) See title CRIMINAL LAW AND PROCEDURE, Vol. IX., pp. 236, 389, note (*g*); *R. v. Burdett*, *supra*.

SECT. 3.

Presump-
tions.Life and
death.

692. With regard to human life, there is no presumption of law by which the fact that a particular person was alive on a given date can be established, it being in every case a question of fact for the jury, or judge sitting as such (*n*). As to death, on the other hand, there exists an important presumption, for if it is proved that for a period of seven years no news of a person has been received by those who would naturally hear of him if he were alive (*o*), and that such inquiries and searches as the circumstances naturally suggest have been made, there arises a legal presumption that he is dead (*p*). There is no legal presumption, however, either that he was alive up to the end of that period (*q*), or that he died at any particular point of time during the seven years (*r*). And if it be necessary to establish that a person, who, after the lapse of seven years, is presumed to be dead, died at any particular date within that period, this must be proved as a fact by evidence raising that inference, *e.g.*, that when last heard of he was in bad health, or exposed to unusual perils, or had failed to apply for a periodical

(*n*) *Re Phené's Trusts* (1870), 5 Ch. App. 139; *Re Aldersey, Gibson v. Hall*, [1905] 2 Ch. 181; *Benyon v. Olive* (1731), 2 Stra. 920 (even after sixty years); *R. v. Willshire* (1881), 6 Q. B. D. 366, C. C. R. (after twelve years); *R. v. Jones* (1883), 15 Cox, C. C. 284, C. C. R. (after seventeen years).

(*o*) As to what constitutes news of a person, see *Prudential Assurance Co. v. Edmunds* (1877), 2 App. Cas. 487, where the House of Lords was equally divided.

(*p*) *Wills v. Palmer* (1904), 53 W. R. 169; *Re Bowden* (1904), 21 T. L. R. 13; *Re Callicott*, [1899] P. 189. A person who marries again, whose wife or husband has been absent for seven years and has not been known by such person to be living, cannot be convicted of bigamy; see title CRIMINAL LAW AND PROCEDURE, Vol. IX., p. 533.

(*q*) *Nepean v. Doe d. Knight* (1837), 2 M. & W. 894, Ex. Ch., see especially per Lord DENMAN, C.J., at p. 913; *Re Phené's Trusts*, *supra*; *Re Aldersey, Gibson v. Hall*, *supra*; *Re Benham's Trusts* (1867), 37 L. J. (Ct.) 265 (discharging the order made in S. C., L. R. & Eq. 416, upon a presumption that life continues for seven years from last news of a person); *It. v. Lumley* (1869), L. R. 1 C. C. R. 196 (a question of fact for the jury whether a person was alive four years after he was last heard of); *Re Rhodes, Rhodes v. Rhodes* (1887), 36 Ch. D. 586 (disapproving *Re Westbrook's Trusts*, [1873] W. N. 167); *In the Goods of Matthews*, [1898] P. 17. The following statement of the rule, therefore, cannot now be accepted: "The presumption of the duration of life, with respect to persons of whom no account can be given, ends at the expiration of seven years from the time when they were last known to be living" (*Doe d. George v. Jesson* (1805), 6 East, 80, per Lord ELLENBOROUGH, C.J., at p. 85); nor can the case (*Hopewell v. De Pinna* (1809), 2 Camp. 113) decided in accordance with such statement.

(*r*) *Nepean v. Doe d. Knight*, *supra*; *Re Phené's Trusts*, *supra*; *In the Goods of How* (1858), 1 Sw. & Tr. 53; *In the Goods of Peck* (1860), 29 L. J. (P. M. & A.) 95; *In the Goods of Smith* (1861), 2 Sw. & Tr. 508; *Dunn v. Snowden* (1862), 2 Drew. & Sm. 201 (the marginal note is inaccurate in saying that a person presumed dead under the rule as to seven years' absence "must be taken to have lived to the end of the seven years" (*Thomas v. Thomas* (1864), 2 Drew. & Sm. 298, per KINDERSLEY, V.-O., at p. 302)); *In the Goods of Turner* (1864), 3 Sw. & Tr. 476; *Re Lewes' Trusts* (1871), 6 Ch. App. 356; *Re Rhodes, Rhodes v. Rhodes*, *supra*; *Re Aldersey, Gibson v. Hall*, *supra*; *In the Goods of Winstone*, [1898] P. 143 (grant of letters of administration to remain in registry to end of the seven years). *Re Tindall's Trust* (1861), 30 Beav. 151, seems not to have been seriously argued, and to be inconsistent with the leading cases. On an application for leave to presume death it is essential that the applicant should state a belief that the death occurred on or after the alleged date (*In the Goods of Hurlston*, [1898] P. 27; *Re Jackson* (1903), 87 L. T. 747).

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payment upon which he was dependent for support (s). While, where a party's case depends on establishing that a given person, who is presumed to be dead, was alive or dead at a particular time within the seven-years period, and there is no evidence at all on the subject, success or failure will depend on the incidence of the burden of proof (t). A legatee, for example, now presumed to be dead, may have disappeared less than seven years before the death of the testator, and no evidence may be forthcoming as to the date of his death. The party, then, on whom lies the burden of proving either that the legatee died before, or that he survived, the testator will fail to make out his case (a). It seems, however, that where a settlement contains a trust for a person named, that person must, in proceedings based on the trust, be taken, until the contrary is shown, to have been in existence at the date of the settlement (b).

Life and
death.

The presumption of death, it is to be observed, will not arise in the mere absence of evidence with regard to the person whose life is in question, for, when it has been shown that he was alive at some particular date, it is open to the jury to find that he continued alive (c), unless there is sufficient reason for the presumption

(s) *Webster v. Birchmore* (1807), 13 Ves. 362 (J. H. not heard of for twenty-three years. When he last appeared he was in a very bad state of health, and was to have returned in six months. Death within six years from last news was presumed); *Dowley v. Winfield* (1844), 14 Sim. 277; *Lakin v. Lakin* (1865), 34 Beav. 443, per ROMILLY, M.R., at p. 450; *Re Beasley's Trusts* (1869), L. R. 7 Eq. 498; *Re Henderson's Trusts* (1868), cited in L. R. 7 Eq. 500; *Hickman v. Upsall* (1875), L. R. 20 Eq. 136 (a person dependent on quarterly payments made his last application for such payment in March; he was presumed to have died soon after the June payment became due); *Patterson v. Black* (1780), 1 Park on Insurance, 8th ed., 920 (7th ed., 644); *Watson v. King* (1815), 1 Stark. 121; *R. v. Twynning, Gloucestershire (Inhabitants)* (1819), 2 B. & Ald. 386 (a soldier on active service); *Sillick v. Booth* (1841), 1 Y. & C. Ch. Cas. 117; *Ommaney v. Stilwell* (1856), 23 Beav. 328 (decision on probabilities as to a member of Sir John Franklin's expedition). A ship left port, and was never heard of again. She encountered a violent storm the day after she sailed. A man on board was held to have died within two days of sailing (*Re Rhodes, Rhodes v. Rhodes* (1887), 36 Ch. D. 586, ex rel. NORTH, J., citing a case, in which he was counsel, decided by JAMES, V.-C., at p. 591); *In the Goods of Connor* (1892), 29 L. R. Ir. 261 (child, born in 1868, who was motherless in Paris during the siege, presumed as a fact to have died before 1872).

(t) *Lumbe v. Orton* (1859), 8 W. R. 111; *Re Green's Settlement* (1865), L. R. 1 Eq. 288; *Re Lewes' Trusts* (1871), 6 Ch. App. 356; *Re Walker* (1871), 7 Ch. App. 120, followed in *Re Benjamin, Neville v. Benjamin*, [1902] 1 Ch. 723.

(a) The case given by way of illustration in the text arose in *Thomas v. Thomas* (1864), 2 Drew. & Sm. 298; and in *Re Phené's Trusts* (1870), 5 Ch. App. 139. In the former, the onus lay on the next of kin, who failed in the action through inability to prove the pre-decease of the legatee; in the latter, the onus lay on the representatives of the legatee, whose survival they were unable to prove, and therefore failed, although the two cases, therefore, seem to be governed by the same principle the head-note in *Re Phené's Trusts*, *supra*, states that that case overruled *Thomas v. Thomas*, *supra*. See, further, *In the Goods of Nicholls* (1872), L. R. 2 P. & D. 461; *Elliott v. Smith* (1882), 22 Ch. D. 236 (testator and a legatee both drowned in the *Princess Alice*).

(b) *Re Corbishley's Trusts* (1880), 14 Ch. D. 846.

(c) *R. v. Willshire* (1881), 6 Q. B. D. 366, C. C. R. (W. was convicted of bigamy in 1868. There was no evidence other than the conviction to show that W.'s then wife was alive in 1868, and no evidence that she continued alive thereafter; nevertheless it was a question for the jury whether she was still alive in 1880); *R. v. Jones* (1883), 15 Cox, C. C. 284, C. C. R. (J. married in 1865, and lived with his

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of death coming into force (*d*). Once, however, this does come into force, then, although the presumption does not fix the date of death, yet it raises a legal inference that such person died at some date within that period, and so displaces any presumption of fact that life continued for the whole of the seven years (*e*).

Life and
death.

The presumption of death, however, even where it arises, is not always applied in a uniform manner. Thus, in an action by a lessor, or reversioner, to recover an estate dependent on a life, the presumption of the death of the *cestui que vie* will arise on the mere proof of his absence for seven years (*f*). While, where an application for the payment of funds out of court is made upon presumption of death, advertisements for the missing person must have been issued, in addition to the making of proper inquiries (*g*). On the other hand, as against the Commissioners for the Reduction of the National Debt, death will not be presumed at all, but must be proved by evidence (*h*).

The presumption of death has been thought to be confined to cases where there are in evidence no circumstances which afford ground for a different conclusion; and it has accordingly been held to have no application to the case of a person who would have been unlikely to communicate with his friends (*i*). More recent decisions, however, appear to throw doubt on this restriction (*k*).

wife; but how long, or when they separated, or whether she was still alive, or what he knew as to her continued existence, were not shown. He was convicted of bigamy in 1882; *R. v. Harborne (Inhabitants)* (1835), 2 Ad. & El. 540 (the writer of a letter, dated 17th March, taken to be alive on the following 11th April). But the presumption is of fact, not of law (*R. v. Twynning, Gloucestershire (Inhabitants)* (1819), 2 B. & Ald. 386 (W. enlisted for a soldier, went abroad on active service, and was never again heard of. His wife, about a year after his departure, married again. The second marriage held to be valid), explained in *Lapsley v. Grierson* (1848), 1 H. L. Cas. 498, 505). In *Wilson v. Hodges* (1802), 2 East, 312, Lord ELLENBOROUGH, C.J., following the old case of *Throgmorton v. Walton* (1624), 2 Roll. Rep. 461, held that "where the issue is upon the life or death of a person once shown to be living, the proof of the fact lies on the party who asserts the death." But as he based that proposition upon the principle "that the presumption is that the party continues alive until the contrary be shown," it must be received subject to the later decisions.

(*d*) *Doe d. Frances v. Andrews* (1850), 15 Q. B. 756 (the mere fact that no witness called has heard of the person in question is not sufficient to raise the presumption); *Doe d. Lloyd v. Deakin* (1821), 4 B. & Ald. 433 (unanswered evidence that a tenant for life had not been seen for fourteen years by a person who was not related to him, but resided in the neighbourhood, raised the presumption of death); *Re Creed* (1852), 1 Drow. 235 (effective inquiry must be made before the presumption will arise); *M'Mahon v. M'Elroy* (1869), 5 L. R. Eq. 1.

(*e*) *Pennfather v. Pennfather* (1872), 6 I. R. Eq. 171, is, perhaps, inconsistent with the text. A son went abroad, and a month later his father died. The son was never again heard of, but the Vice-Chancellor presumed, as a fact, that he survived his father.

(*f*) Stat. (1666) 18 & 19 Car. 2, c. 11.

(*g*) *Re Allin's Legacy* (1867), 17 L. T. 60.

(*h*) *Woodhouselee (Lord) v. Dalrymple* (1861), 4 L. T. 455, C. A.

(*i*) *Watson v. England* (1844), 14 Sim. 28 (a girl of seventeen ran away from home; four years later she wrote to her sister that she was going abroad. Nothing more was heard of her. No ground for the presumption of death after seven years); *Bowden v. Henderson* (1854), 2 Sm. & G. 360.

(*k*) *Willyams v. Scottish Widows Fund Life Assurance Society* (1888), 52 J. P.

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tions.

Where several persons perish in the same disaster, there is, in the absence of evidence on the point (*l*), no presumption as to the order in which they died, or that they died at the same time (*m*). The *onus probandi* lies on the party who asserts survival, or concurrent decease, or pre-decease (*n*).

Where legal rights, dependent on the fact, or date, of the death of a person have to be adjudicated, and such fact or date cannot be determined on evidence or presumption, and the question cannot be solved by the incidence of the burden of proof, the court will make the best order that it can in the circumstances (*o*).

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death.

With regard to trustees, it has been held that they must guide themselves by the presumption of death, in the same manner as a court of law would do (*p*).

471; *Wills v. Palmer* (1904), 53 W. R. 169 (in each of which cases the death was presumed after seven years' absence of a man who, under the circumstances, was not likely to communicate with friends).

(*l*) *Broughton v. Randall* (1596), Cro. Eliz. 502 (of two men who were "hanged in one cart," one was found to have survived the other, from movements of the limbs, etc.).

(*m*) *Wing v. Angrave* (1860), 8 H. L. Cas. 183; *Underwood v. Wing* (1855), 4 De G. M. & G. 633; *Hitchcock v. Beardsley* (1738), West temp. Hard. 445 (husband and wife); *Mason v. Mason* (1816), 1 Mor. 308 (father and son); *In the Goods of Wainwright* (1858), 1 Sw. & Tr. 257; *In the Goods of Ewart* (1859), 1 Sw. & Tr. 258 (husband and wife); *Wollaston v. Berkeley* (1876), 2 Ch. D. 213 (husband and wife); *In the Goods of Alston*, [1892] P. 142; *In the Goods of Johnson* (1897), 78 L. T. 85; *In the Estates of Bruce* (1909), 26 T. L. R. 381; *In the Goods of Beynon*, [1901] P. 141. In the following cases, presumptions as to *commorientes* were adopted, but it is to be observed that they were decided in the ecclesiastical courts, and under the influence of the civil law (as to the extensive use of presumptions in that system, see Thayer on Evidence (ed. 1898), pp. 311--315):—*Presumption that the parties died at the same moment* (*Wright v. Netherwood* (1793), 2 Salk. 593, n. (6th ed. by Evans); *Taylor v. Diplock* (1815), 2 Phillim. 261; *Satterthwaite v. Powell* (1838), 1 Curt. 705). *Presumption that husband survived wife* (*Colvin v. Procurator-General* (1827), 1 Hag. Ecc. 192; *In the Goods of Selwyn* (1831), 3 Hag. Ecc. 748; *In the Goods of Murray* (1837), 1 Curt. 696).

(*n*) *Wing v. Angrave*, *supra*; *Barnett v. Tugwell* (1862), 31 Beav. 232.

(*o*) *Bailey v. Hammond* (1802), 7 Ves. 590 (payment ordered on a recognisance to refund in the event of a claim); *Cuthbert v. Purrier* (1847), 2 Ph. 199 (successive orders in respect of a fund in court to answer an annuity to a person who had been heard of since 1815); *Re Milham's Trust* (1852), 15 Beav. 507 (M. transported for seven years in 1838. He fulfilled the period of his sentence, but no more was known of him. His children claimed a fund to which they were entitled on his death. No order as to capital: future dividends to be paid to the applicants on their undertaking to refund if M. should prove to be alive); *Danby v. Danby* (1859), 5 Jur. (N. S.) 54 (a young man, who was likely to correspond with his friends, went abroad in delicate health, and had not been heard of for some years. A fund was ordered into court on a *prima facie* presumption that he had pre-deceased his father, who died within two years of his going abroad); *Re Rhodes, Fraser v. Renton* (1873), 28 L. T. 392 (uncertain whether legatee had or had not survived testator); *Wollaston v. Berkeley* (1876), 2 Ch. D. 213 (husband and wife perished in same disaster. Failure of trusts of their marriage settlement, in the absence of evidence or presumption of survivorship); *In the Estate of Walker*, [1909] P. 115 (modification of the usual form of administrator's oath in case of presumption of death).

(*p*) *Dobson v. Pattinson* (1857), 3 Jur. (N. S.) 1202. But the Bank of England is not obliged to act on evidence of death which a court would accept as sufficient (*Prosser v. Bank of England* (1872), L. R. 13 Eq. 611).

SECT. 3.
Presump-
tions.

Issue.
Marriage.

693. There is no presumption of law as to whether a deceased person had issue or not (*q*), nor as to whether a woman is or is not past child-bearing at any particular age (*r*).

If it is proved that two persons lived together as man and wife, and were esteemed and reputed as such by those who know them, it will be presumed, until the contrary is shown, that they had been lawfully and validly married (*s*).

But in proceedings of a penal nature, such as bigamy or adultery, the presumption, if it were set up, would be neutralised by that of the innocence of the party charged, and therefore in such cases the marriage must be proved by evidence (*t*).

Legitimacy.

694. A child born of a married woman, during the continuance of the marriage, or within the period of gestation (*u*) after its termination, is presumed to be legitimate. This presumption may only be rebutted by proof that the husband was impotent at the time when the child might have been begotten, or had no opportunity at such time for sexual intercourse with his wife, or by cogent evidence that, though such opportunity existed, nevertheless the child was not the offspring of the husband (*a*); but from the moment when

(*q*) *Richards v. Richards* (1731), 15 East, 294, n.; *Doe d. Banning v. Griffin* (1812), 15 East, 293; *Re Jackson, Jackson v. Ward*, [1907] 2 Ch. 354.

(*r*) *Re White, White v. Edmond*, [1901] 1 Ch. 570; *Re Hoeking, Michell v. Loe* (1898), 67 L. J. (CH.) 662, C. A.; and compare *Re Thornhill, Thornhill v. Niron*, [1904] W. N. 112, C. A., and *Re Summers's Trusts* (1874), 22 W. R. 639.

(*s*) *Piers v. Piers* (1849), 2 H. L. Cas. 331 (validity of a ceremony of marriage impugned on slight evidence that a special licence, which was necessary, had not been obtained. The evidence distrusted, on a balance of probabilities); *Doe d. Fleming v. Fleming* (1827), 4 Bing. 266; *Patrickson v. Patrickson* (1865), L. R. 1 P. & D. 86; *Sastry Velaidar Aroneyary v. Sembecutty Vaigalie* (1881), 6 App. Cas. 364, P. C.; *Fox v. Bearblock* (1881), 44 L. T. 508; *Re Thompson, Langham v. Thompson* (1904), 91 L. T. 680; *Re Shephard, George v. Thyer*, [1904] 1 Ch. 456; *Re Haynes, Haynes v. Carter* (1906), 94 L. T. 431 (divided repute).

(*t*) See title CRIMINAL LAW AND PROCEDURE, Vol. IX., pp. 389, note (*q*). 393, note (*t*), 534; and *Birt v. Barlow* (1779), 1 Doug. (K. B.) 171 (exim. con.); *Evans v. Evans and Robinson* (1859), 28 L. J. (C. & M.) 137, n. (divorce).

(*u*) As to which see *Bosvile v. A.-G.* (1887), 12 P. D. 177, and p. 495, *ante*.

(*a*) *Morris v. Davies* (1837), 5 Cl. & Fin. 163, H. L. (the mother was living in adultery at the time when the child was begotten, she concealed the child's birth from her husband and denied it to him; the husband ignored the child; and the wife's paramour treated it as his own. These facts were held to rebut the presumption of legitimacy, although the husband was not impotent and had opportunities of intercourse with his wife); *Banbury Peerage Case* (1811), 1 Sim. & St. 153, H. L.; *Head v. Head* (1823), 1 Sim. & St. 150; *Cope v. Cope* (1833), 1 Mood. & R. 289; *R v. Mansfield (Inhabitants)* (1841), 1 Q. B. 444 (refusal to infer illegitimacy from the fact that the wife was living in adultery at all material times); *Hargrave v. Hargrave* (1846), 9 Beav. 552; *Plowes v. Bossey* (1862), 2 Drew. & Sm. 145 (this report is free from a misapprehension which occurs in others: *per* KINDERSLEY, V.-C., in *Atchley v. Sprygg* (1864), 10 L. T. 16); *Re Parsons' Trust* (1868), 18 L. T. 704 (presumption of legitimacy of child born three weeks after his parents' marriage); *Gardner v. Gardner* (1877), 2 App. Cas. 723; *Hawes v. Dräger* (1883), 23 Ch. D. 173; *Bosvile v. A.-G.* (1887), 12 P. D. 177; *Gordon v. Gordon*, [1903] P. 141. Declarations or testimony of husband or wife cannot be accepted as evidence of illegitimacy of wife's child (*Cope v. Cope*, *supra*; *R v. Sourton (Inhabitants)* (1836), 5 Ad. & El. 180; *R v. Mansfield (Inhabitants)*, *supra*; *Re Walker and Re Jackson* (1885), 53 L. T. 660). But if non-access (*i.e.*, absence of opportunity for intercourse) is established by admissible evidence, the mother's declarations or testimony as to paternity may be received (*R v. Luffe* (1807), 8 East, 193; *Legge v. Edmonds* (1855), 25 L. J. (CH.) 125).

an order is made authorising the parties to live apart the presumption as to access and legitimacy of children is reversed (b).

SECT. 8.
Presump-
tions.

Ancient
documents.

695. Written documents, as to which more than thirty years have elapsed between their signature or execution and their production in court, and which are produced from proper custody, *i.e.*, from the keeping of some person who, on the supposition of their authenticity, would reasonably be expected to have them, are presumed, in the absence of circumstances of suspicion, to be what they purport to be, and to have been duly signed, sealed, attested, delivered, or published, according to their purport (c).

There is a general presumption in favour of the regularity and validity of such documents. No evidence need be given *primâ facie* that they were made on the date they bear (d). Upon proof of the signature of a deed, sealing and delivery are presumed; and so delivery, on proof of sealing and signature (e).

Presumption
of validity of
documents.

And acts and conduct (including therein words written or spoken) of husband, wife or paramour, tending indirectly to throw light upon the question of the legitimacy of the child, may be proved (*The Aylesford Peerage* (1885), 11 App. Cas. 1; *Burnaby v. Baillie* (1889), 42 Ch. D. 282).

(b) *Hetherington v. Hetherington* (1887), 12 P. D. 112; compare *Re R.'s Trusts* (1870), 39 L. J. (CH.) 192.

(c) *R. v. Farrington (Inhabitants)* (1788), 2 Term Rep. 466 (certificate over fifty years old, signed by overseers, churchwardens, and justices of the peace, presumed valid); *Marsh v. Collnett* (1798), 2 Esp. 665, *per* Lord KENYON, C.J., at p. 666 (no need to call attesting witness to deed of thirty years' standing, though he be actually in court); *Wynne v. Tyrwhitt* (1821), 4 B. & Ald. 376; *Doe d. Oldham v. Wolley* (1828), 8 B. & C. 22 (the thirty years are computed from date, whether of will or other instrument); *Doe d. Spilsbury v. Burdett (Sir Francis)* (1835), 4 Ad. & El. 1; *Mun v. Ricketts* (1844), 7 Beav. 93; *Doe d. Jenkins v. Davies* (1847), 10 Q. B. 314 (curate's signature to copy of marriage certificate); *Foster v. Plumbers' Co.* (1900), 44 Sol. Jo. 211 (accounts); *R. v. Bathwick (Inhabitants)* (1831), 2 B. & Ad. 639 (doubted whether the rule applies to the seal of a court or corporation). Pedigrees appear to be exceptional; their handwriting must be proved, even if they purport to be ninety years old; and if they are admitted, they are not proof that all the statements contained in them are true; "pedigrees are sometimes made to deceive, being for the most part true, except a link or two, the most material of all" (*The Fitzwalter Peerage* (1843), 10 Cl. & Fin. 193, 199, H. L.). Where a deed over thirty years old comes from an unsuspected repository and purports to be executed by one person on behalf of another, it will be presumed that it was so executed; but if the execution was discretionary, and not merely ministerial (in which case the question is open), it will not be presumed that the person executing was duly authorised so to do (*Re Airey, Airey v. Stapleton*, [1897] 1 Ch. 164). When the party tendering a document is himself a proper custodian of it, no evidence of custody is required (*R. v. Ryton (Inhabitants)* (1793), 5 Term Rep. 259; *R. v. Netherthong (Inhabitants)* (1814), 2 M. & S. 337; *Brett v. Beales* (1829), Mood. & M. 416; *Evans v. Rees* (1839), 10 Ad. & El. 151; *Doe d. Jacobs v. Phillips* (1845), 8 Q. B. 158; *Doe d. Shrewsbury (Earl) v. Keeling* (1848), 11 Q. B. 884). But otherwise, *primâ facie* evidence must be given, showing whence the document has been obtained (*Bidder v. Bridges* (No. 2) (1885), 34 W. R. 514; *Doe d. Jacobs v. Phillips, supra, per* Lord DENMAN, C.J.). A grant of property is not in proper custody for this purpose if in the keeping of a person who has no interest in the property (*Lygon v. Strutt* (1795), 2 Anst. 601; *Swinerton v. Stafford (Marquis)* (1810), 3 Taunt. 91; *Bidder v. Bridges* (No. 2), *supra*). See also p. 512, *post*.

(d) *In the Goods of Adamson* (1875), L. R. 3 P. & D. 253, 256 (a date attached to an alteration is not, in itself, sufficient to establish that the alteration was made at that time).

(e) *Hall v. Bainbridge* (1848), 12 Q. B. 699; *Re Sandilands* (1871), L. R. 6 C. P. 411.

SECT. 3.

Presump-
tions.

Alterations.

Where a document which needs a stamp has been lost, or is not produced after notice to produce, it is presumed to have been properly stamped (*f*).

Erasures or interlineations in a deed are presumed to have been made before, but in a will after, the execution of the instrument (*g*).

There is no presumption as to the period when an apparent alteration was made in a bill of exchange (*h*).

Lost grant.

696. A lawful origin will be presumed for proprietary rights that have been exercised for a long time, and whose exercise might have been interrupted or prevented by the person against whom the right is claimed (*i*).

Omnia
præsumuntur
rite esse acta.

Formal requisites to judicial, official, or public acts, or to titles to property which are good in substance, will be presumed (*k*).

(*f*) *Closmadeuc v. Carrel* (1856), 18 C. B. 36 (charterparty, when last seen, was unstamped. This might have justified a presumption of fact that it continued unstamped. But the party relying on the charterparty proved that he had taken steps to get the instrument stamped, but that it had been lost. This rebutted the inference of non-stamping, and restored the presumption of law); *Marine Investment Co. v. Haviside* (1872), L. R. 5 II. L. 624 (where it is proved that an instrument was unstamped when executed, and continued unstamped for a considerable time thereafter, the presumption of stamping is rebutted).

(*g*) *Cooper v. Bockett* (1846), 4 Moo. P. C. C. 419 (will); *Doe d. Tatum v. Catmore* (1851), 16 Q. B. 745. A deed cannot be altered, after execution, without fraud or wrong, which will not be presumed. A testator may alter his will after execution, without fraud or wrong, and therefore there is no ground for any presumption that the alteration was made before execution (*per* Lord CAMPBELL, C.J., at p. 747), but this reason for the rule does not explain why the same presumption is not applied to bills of exchange as well as to deeds; see cases cited in note (*h*), *infra*; *Doe d. Shallcross v. Palmer* (1851), 16 Q. B. 747. But alterations in a will, to be valid, must be executed substantially in the same way as the will itself (Wills Act, 1837 (7 Will. 4 & 1 Vict. c. 26), s. 21). Declarations of intention by testator, made before (not if after) execution of his will, can be received as evidence on the question whether alterations were made before or after execution.

(*h*) *Knight v. Clements* (1838), 8 Ad. & El. 215; *Clifford v. Parker* (1841), 2 Man. & G. 909.

(*i*) *Dalton v. Angus* (1881), 6 App. Cas. 740; *Goodtitle d. Parker v. Baldwin* (1809), 11 East, 488; *Doe d. Devine v. Wilson* (1855), 10 Moo. P. C. C. 502; *Chasemore v. Richards* (1859), 7 II. L. Cas. 349; *Webb v. Bird* (1863), 13 C. B. (N. S.) 841; *Leconfield v. Lonsdale* (1870), L. R. 5 C. P. 657; *Whitmore v. Edenbridge Ltd. v. Stanford*, [1909] 1 Ch. 427, following *Baily & Co. v. Clark, Son and Morlund*, [1902] 1 Ch. 649, C. A., and distinguishing *Burrows v. Lang*, [1901] 2 Ch. 502. There is no corresponding presumption of obligations (*Simpson v. A.-G.*, [1904] A. C. 476). There will not be presumed any right that could not have had a legal origin (*Chesterfield (Lord) v. Harris*, [1908] 2 Ch. 397, C. A.).

(*k*) *Monke v. Butler* (1614), 1 Roll. Rep. 83; *Doe d. Hammond v. Cooke* (1829), 6 Bing. 174; *Macdougall v. Purrier* (1830), 2 Dow & Cl. 135, II. L.; *Harrison v. Southampton Corporation* (1853), 4 Do G. M. & G. 137, C. A. (father's consent to his child's marriage presumed); *R. v. Cresswell* (1876), 1 Q. B. D. 446, C. C. R. Where a will appears to have been executed in due form it will be presumed to have been duly attested if the witnesses recognise their signatures, although they do not remember the circumstances (*Woodhouse v. Balfour* (1887), 13 P. D. 2; and see further as to wills under title WILLS). A certificate that a bill of sale has been registered is no evidence that an affidavit complying with the Act was filed with it (*Mason v. Wood* (1875), 1 C. P. D. 63); and see title CRIMINAL LAW AND PROCEDURE, Vol. IX., p. 389, note (*q*).

As between an innocent and a guilty party, unexplained circumstances are to be presumed unfavourably to the wrong-doer (*l*).

Many statutes establish particular presumptions, in order to facilitate proof of material facts (*m*).

SECT. 3.
Presump-
tions.

*Omnia
presumuntur
contra
spoliatores.*
Equitable
presumptions.

697. Many presumptions are dealt with elsewhere, such as the presumption that if property is conveyed to a child, it is a gift, but if to a stranger, it is subject to a resulting trust in favour of the donor (*n*), presumptions as to the boundaries of property (*o*), as to satisfaction of portion by legacy or of legacy by portion (*p*), or of debt by legacy (*q*), or of performance of covenants to purchase and settle lands by a purchase of suitable land (*r*), or as to payment being made by way of advancement (*s*), or presumptions in favour of or against merger (*a*), presumptions as to title to land (*b*), or as to rights of riparian owners (*c*), or as to easements (*d*).

SUB-SECT. 4.—Of Fact.

698. Presumptions of fact are merely logical inferences of the existence of one fact from the proved existence of other facts. They are the inferences, or presumptions, which render circumstantial evidence admissible, and have already been considered (*e*).

Presump-
tions
of fact.

SECT. 4.—Inspection.

699. Information as to the facts of a case may be gained by the court or jury, not only from the spoken words of witnesses, or the written words of documents (*f*), but also by means of their own observation of persons, places, or things (*g*); or of verified pictures,

Inspection.

(*l*) *Armory v. Delamirie* (1722), 1 Stra. 505; 1 Smith, L. C., 11th ed., 358; *Williamson v. Rover Cycle Co.*, [1901] 2 I. R. 615, C. A.).

(*m*) *E.g.*, any person who sends a circular containing an invitation to make bets to a person under age at a university is deemed to have known that such person was an infant, unless he proves that he had reasonable ground for believing him to be of full age (*Botting and Loans (Infants) Act*, 1892 (55 & 56 Vict. c. 4), s. 3; *Milton v. Studd*, [1910] 2 K. B. 118). There is a rebuttable presumption that a bill has been validly delivered by all parties (*Bills of Exchange Act*, 1882 (45 & 46 Vict. c. 61), s. 21 (3)).

(*n*) See title TRUSTS AND TRUSTEES.

(*o*) As to boundaries, see title BOUNDARIES, Vol. III., pp. 118—123.

(*p*) See title EQUITY, p. 129, *ante*.

(*q*) *Ibid.*, p. 136, *ante*.

(*r*) *Ibid.*, p. 139, *ante*.

(*s*) See title DESCENT AND DISTRIBUTION, Vol. XI., p. 20.

(*a*) See title EQUITY, p. 147, *ante*.

(*b*) See title REAL PROPERTY AND CHATTELS REAL.

(*c*) *Ecroyd v. Coulthard*, [1897] 2 Ch. 554; affirmed [1898] 2 Ch. 358, C. A.; and see title WATERS AND WATERCOURSES.

(*d*) See title EASEMENTS AND PROFITS A PRENDRE, Vol. XI., pp. 259, 265.

(*e*) See pp. 439—455, *ante*.

(*f*) As to inspection of documents, see title DISCOVERY, INSPECTION, AND INTERROGATORIES, Vol. XI., pp. 88—92; and as to inspection of privileged documents by the court, see *ibid.*, p. 64.

(*g*) In an action in respect of a dog's bite, the dog itself may be brought into the presence of the jury, in order that its temper may be judged by its demeanour (*Line v. Taylor* (1862), 3 F. & F. 731). In this case the plaintiff had given the defendant notice to produce the dog, but failing consent except in the case of documents, if a party desires inspection, by himself or agent, or the

SECT. 4. photographs, plans, or models; or of experiments made in the presence of the court (*h*).

Inspection. The commonest instance of this mode of proof is supplied by the demeanour and manner of a witness under examination. These constitute material elements in the consideration of the truthfulness of his statements (*i*).

Witness's demeanour.

The appearance of a person is, in some cases, *primâ facie* evidence as to his age (*j*).

Health.

With regard to health, there is, in certain cases, power to compel a person to submit himself to inspection (*k*), while in others refusal so to do may be evidence against him (*l*).

Handwriting.

Disputed handwriting may be compared in court by judge, jury, or a witness, with a specimen which is proved to be genuine (*m*).

jury, of anything which is under the control of the opposite party, he must apply to the court or judge for an order (see note (*q*), p. 509, *post*).

(*h*) *Bigsby v. Dickinson* (1876), 4 Ch. D. 24, C. A.; *Twentyman v. Barnes*, (1848), 2 De G. & Sm. 225.

(*i*) *Bigsby v. Dickinson*, *supra*.

(*j*) *R. v. Turner* (1909), 3 Cr. App. Rep. 103; *R. v. Viasani* (1866), 30 J. P. 758. This applies to cases under the Employment of Children Act, 1903 (3 Edw. 7, c. 45), and the Prevention of Cruelty to Children Act, 1904 (4 Edw. 7, c. 15), s. 17. See also *R. v. Cox*, [1898] 1 Q. B. 179, C. C. R. (on a similar provision in the repealed Prevention of Cruelty to Children Act, 1894 (57 & 58 Vict. c. 41), and the Children Act, 1908 (8 Edw. 7, c. 67), s. 123).

(*k*) The writ *de ventre inspiciendo* (see *Re Blakemore* (1845), 14 L. J. (CH.) 336, and *Ex parte Aiscough* (1731), 2 P. Wms. 591) seems practically obsolete. As to inspection by a jury of matrons of a defendant who alleges that she is quick with child, see title CRIMINAL LAW AND PROCEDURE, Vol. IX., p. 375. By the Regulation of Railways Act, 1868 (31 & 32 Vict. c. 119), s. 26, when a person injured in a railway accident is claiming compensation, the court may order him to submit to examination. *Agnew v. Jobson* (1877), 13 Cox, C. C. 625 (medical examination of female charged with concealment of birth is illegal, unless by consent); *Re Betts, Ex parte Board of Trade* (1887), 19 Q. B. D. 39, C. A.; affirmed *sub nom. Board of Trade v. Block* (1888), 13 App. Cas. 570 (bankrupt not compellable to submit to medical examination for the purpose of having an insurance on his life effected).

(*l*) *S. v. B. (falsely called S.)* (1905), 21 T. L. R. 219 (refusal to submit to medical examination is evidence against a party in nullity suits). The Workmen's Compensation Act, 1906 (6 Edw. 7, c. 58), Sched. I. (4) (refusal or obstruction of medical examination suspends proceedings for, and right to, compensation). *R. v. Gray* (1904), 68 J. P. 327, C. C. R. (refusal of a man to be examined as to his state of health is no evidence against him on a charge of indecent assault).

(*m*) Criminal Procedure Act, 1865 (28 & 29 Vict. c. 18), s. 8, which applies to both civil and criminal procedure (s. 1), extends s. 27 of the Common Law Procedure Act, 1854 (17 & 18 Vict. c. 125), which is repealed by the Statute Law Revision Act, 1892 (55 & 56 Vict. c. 19). Both the writings that are compared must be in court (*Arbon v. Fussell* (1862), 3 F. & F. 152); writings used for this purpose need not be in evidence for any other (*Birch v. Ridgway* (1858), 1 F. & F. 270); *Cresswell v. Jackson* (1860), 2 F. & F. 24 (witness denied that the document in question was in his handwriting. Other writings, admittedly his, were put before the jury for comparison with the one in dispute). As to the evidence required on a charge of forgery to show that the part of a document which is forged is in the handwriting of the accused, see title CRIMINAL LAW AND PROCEDURE, Vol. IX., p. 764. A police officer is not, as such, an expert in handwriting (*R. v. Wilbain and Ryan* (1863), 9 Cox, C. C. 448). Where the person whose handwriting is in question is in court, he may be required to write then and there, and such writing is genuine for the purpose of the comparison (*Doe d. Devine v. Wilson* (1855), 10 Moo. P. C. 502, 530; *Cobbett v. Kilminster* (1865), 4 F. & F. 490). The recurrence, in

Where a party complains that his exclusive right to a picture, design, mark, or name has been infringed, or where the question is whether a picture, design, mark, or name is so like another as to be calculated to deceive the public, the most satisfactory test is an appeal to the eyesight or hearing of the judge(n). No witness, indeed, should be asked whether the thing complained of is likely to deceive, inasmuch as that is the very question that the court has to decide(o). But an action for deceit, based on the resemblance between the defendant's article and the plaintiff's, cannot be decided merely by the judge's inspection (p).

SECT. 4.
Inspection.

Copyright;
trade mark;
design.

Passing off.

Not only may a judge himself inspect any property or thing in question, but he has wide powers of ordering inspection by the jury, a party, or other person (q).

Inspection by
jury.

A view by the jury of any place, if necessary to the understanding of the evidence, may be ordered by the court or a judge, whether in a civil or criminal case (r).

View by jury.

different writings, of an identical mis-spelling, tends to prove the identity of the writers (*Brookes v. Tichborne* (1850), 5 Ex. L. 329).

(n) *Holdsworth v. M'Crea* (1867), L. R. 2 H. L. 380; *Ilecla Foundry Co. v. Walker, Hunter & Co.* (1889), 14 App. Cas. 550; *Re Bourne's Trade-marks, Bourne v. Swan and Edgar, Ltd.*, [1903] 1 Ch. 211.

(o) *North Cheshire and Manchester Brewery Co. v. Manchester Brewery Co.*, [1899] A. C. 83, per Lord HALSBURY, L.C., at p. 85; *Payton & Co. v. Snelling, Lampard & Co.*, [1901] A. C. 308, per Lord MACNAGHTEN, at p. 311; *Edelsten v. Edelsten* (1863), 1 De G. J. & Sm. 185, per Lord WESTBURY, L.C., at p. 200. In an action for infringement of copyright in a picture, it is not necessary to produce the original picture. It is enough if a witness says that he knows the original, and that the work complained of is in his opinion an exact copy (*Lucas v. Williams & Sons*, [1892] 2 Q. B. 113, C. A.). But where the question is as to resemblance, not of appearance (shape, design, title), but in respect of musical or literary composition expressed in written signs, the alleged infringement or anticipation must itself be produced, or its absence accounted for before other evidence of its contents will be received (*Boosey v. Davidson* (1849), 13 Q. B. 257; this decision, however, appears to have been doubted, *Geralopulo v. Wieler* (1851), 10 C. B. 690, per JERVIS, C.J., at p. 696).

(p) *London General Omnibus Co., Ltd. v. Lavell*, [1901] 1 Ch. 135, C. A. (as explained by FARWELL, J., in *Re Bourne's Trade-marks, Bourne v. Swan and Edgar, Ltd.*, *supra*); *Mitchell v. Henry* (1880), 15 Ch. D. 181; *London General Omnibus Co. v. Felt'n* (1896), 12 T. L. R. 213.

(q) *East India Co. v. Kynaston* (1821), 3 Bli. 153, H. L.; *Lonsdale (Earl) v. Curwen* (1799), 3 Bli. 168, n.; *Walker v. Fletcher* (1804), 3 Bli. 172, n.; *Browne v. Moore* (1816), 3 Bli. 178, n.; *Bennett v. Whitehouse* (1860), 8 W. R. 251; *Ennor v. Barwell* (1860), 8 W. R. 300; *Whaley v. Brancher* (1864), 12 W. R. 570, 595; *Lumb v. Beaumont* (1884), 27 Ch. D. 356; *The Duke of Buccleuch* (1889), 15 P. D. 86, C. A. (inspection by Elder Brethren); R. S. C., Ord. 50, rr. 3, 4, 5, and see title PRACTICE; *Sidebottom v. Fielden* (1891), 8 R. P. C. 266 (limits to right to inspect the working of patents). County courts have similar powers under County Court Rules, 1903 and 1904, Ord. 12, r. 3; *Mitchell v. Stephens* (1894), 29 L. J. N. C. 389 (refusal to order inspection of patient's mouth, on application of dentist suing for professional charges). Pending an arbitration or reference, the order may be made either by referee, by arbitrator, or by the court (R. S. C., Ord. 36, rr. 48—50; *Macalpine & Co. v. Calder & Co.*, [1893] 1 Q. B. 545, C. A.; *Barnett v. Aldridge Colliery Co.* (1887), 4 T. L. R. 16). An award may be set aside if made after a view by arbitrator and one party, of which the other party had no notice (*Re Gregson and Armstrong* (1894), 70 L. T. 106).

(r) *R. v. Whalley* (1847), 2 Car. & Kir. 376; *R. v. Martin and Webb* (1872), 12 Cox, C. C. 204, C. C. R. (view after judge's summing-up). The jury should

SECT. 4.
Inspection.

**Material
evidence
of crime,**

When a person is lawfully arrested on a criminal charge, any property or thing in his possession which would be material may be seized and detained for the purpose of being produced in evidence (s), but may not be detained after the charge has been dismissed (t).

Part IV.—Documentary Evidence.

SECT. 1.—Proof of Execution of Documents.

SUB-SECT. 1.—Handwriting.

**Proof of
handwriting.**

700. The handwriting or signature of unattested documents may be proved in the following ways: (1) By calling the writer; or (2) a witness who saw the document written or signed; or (3) a witness who has a general knowledge of the writing, acquired in any of the ways already mentioned (u); or (4) by comparison of the disputed document with other documents proved to the satisfaction of the judge to be genuine (v); or (5) by the admissions of the party against whom the document is tendered.

SUB-SECT. 2.—Sealing, Delivery and Attestation (a).

Sealing.

701. As in the case of execution by a natural person, so in the case of sealing by a corporation (b) there is in general a presumption that a seal was affixed with due regard to all preliminary formalities required by the constitution (c); in general, a corporation seal may be proved by anyone familiar with it, without calling a witness who saw it affixed (d); but where attestation is required by law, the signature of an independent witness is probably necessary, since that of the directors and secretary when affixing the common

receive no communications during the view (*R. v. Martin and Webb, supra*); see title JURIES.

(s) *Dillon v. O'Brien and Davis* (1887), 16 Cox, C. C. 245; *R. v. Lushington, Ex parte Otto*, [1894] 1 Q. B. 420 (property produced by a witness detained as evidence); *Crozier v. Cundey* (1827), 6 B. & C. 232; *R. v. Burnett* (1829), 3 C. & P. 600, and see reporter's note; *R. v. Frost* (1839), 9 C. & P. 129 131; and see title CRIMINAL LAW AND PROCEDURE, Vol. IX., pp. 309, 310.

(t) *Gordon v. Metropolitan Police (Chief Commissioner)* (1910), 26 T. L. R. 645, C. A.

(u) See p. 508, *ante*.

(v) Criminal Procedure Act, 1865 (28 & 29 Vict. c. 18), s. 8.

(a) See titles CORPORATIONS, Vol. VIII., pp. 382 *et seq.*; DEEDS AND OTHER INSTRUMENTS, Vol. X., pp. 386 *et seq.* As to the conditional delivery of a document as an escrow, see title DEEDS AND OTHER INSTRUMENTS, Vol. X., pp. 387—390.

(b) As to how far affixing a seal is tantamount to delivery, see *Mowatt v. Castle Steel and Iron Works Co.* (1886), 34 Ch. D. 58, C. A.; and see title CORPORATIONS, Vol. VIII., p. 309. As to the question of how far the corporation, having affixed its seal, is bound by estoppel, see title ESTOPPEL, pp. 371, 381, *ante*.

(c) See title CORPORATIONS, Vol. VIII., p. 310, 382.

(d) *Moises v. Thornton* (1799), 8 Term Rep. 303, 307; this case is doubted by *Taylor, Law of Evidence*, 10th ed., s. 1852

seal of a company merely forms part of the execution of the document (*e*).

SECT. 1.

**Proof of
Execution of
Documents.**

Proof of
attestation.

702. When a document is required by law to be attested, it must, subject to the exceptions stated below, be proved by calling the attesting witnesses (*f*). And this rule applies even though the document is lost, cancelled, or destroyed, provided that the names of the witnesses are known, and that they are capable of being called (*g*). If there are several such witnesses, only one need be examined; but the absence of all must be explained before other evidence is receivable. When all the witnesses are incapable of being called, "secondary" evidence of attestation, i.e., by proof of the handwriting of any one of them, may be given, and is sufficient (*h*); and if this is not obtainable the execution may be proved by presumptive or other evidence (*i*). So, also, if the attesting witnesses deny the execution (*k*), or if the document is lost, and their names are unknown (*l*).

703. In general, anyone competent to testify is competent to attest, except the parties to a deed or bill of sale (*m*), or a proxy with regard to the instrument appointing him (*n*). Warrants of attorney and cognovits, however, must be attested by a solicitor (*o*).

Competency
of witness.

704. Even where attestation is required by law, and the witnesses are obtainable, they need not be called when, (1) The document is an ancient one (i.e., thirty years old) (*p*); or (2) its execution has been admitted for the purposes of the trial (*q*); or (3) it is in possession of the adversary, who refuses to produce it on notice (*r*); or (4) it is tendered against a public officer bound by law to have it executed, and who has dealt with it as such (*s*); or (5) under the Merchant Shipping Act, 1894 (*t*).

When proof
not required.

A document which, though in fact attested is not required by law to be so, may be proved by admission or otherwise as if unattested (*u*).

(*e*) *Doe d. Bank of England v. Chambers* (1836), 4 Ad. & El. 410; *Deffell v. White* (1866), L. R. 2 C. P. 144.

(*f*) As to attestation of wills, see p. 512, *post*, and title WILLS.

(*g*) *Keeling v. Bull* (1796), Peake, Add. Cas. 88; *Breton v. Cope* (1791), Peake, 43, 44.

(*h*) *Nelson v. Whittall* (1817), 1 B. & Ald. 19; *Adam v. Kerr* (1798), 1 Bos. & P. 360.

(*i*) *Clarke v. Clarke* (1879), 5 L. R. Ir. 47, C. A.; *Byles v. Cox* (1896), 74 L. T. 222.

(*k*) *Bowman v. Hodgson* (1867), L. R. 1 P. & D. 362; *In the Goods of Owens* (1892), 29 L. R. Ir. 451.

(*l*) *Keeling v. Bull*, *supra*.

(*m*) *Seal v. Claridge* (1881), 7 Q. B. D. 516, C. A.; *Peuce v. Brookes*, [1895] 2 Q. B. 451. See title BILLS OF SALE, Vol. III., p. 45.

(*n*) *Re Parrott, Ex parte Cullen*, [1891] 2 Q. B. 151.

(*o*) Taylor, Law of Evidence, 10th ed., ss. 1111—1118.

(*p*) *Doe d. Oldham v. Wolley* (1828), 8 B. & C. 22.

(*q*) *Whyman v. Garth* (1853), 8 Exch. 803.

(*r*) *Cooke v. Tanswell* (1818), 8 Taunt. 450.

(*s*) *Plumer v. Brisco* (1847), 11 Q. B. 46; *Bailey v. Bidwell* (1844), 13 M. & W. 73.

(*t*) 57 & 58 Vict. c. 60, s. 694. See title SHIPPING AND NAVIGATION.

(*u*) Criminal Procedure Act, 1865 (28 & 29 Vict. c. 18), ss. 1, 7. S. 7 applies to criminal proceedings and re-enacts s. 26 of the Common Law Procedure Act, 1854 (17 & 18 Vict. c. 125), which was repealed by the Statute Law Revision Act, 1892 (55 & 56 Vict. c. 19) (see *Worthington v. Moore* (1891), 64 L. T. 338).

SECT. 1. This provision, however, has been held not to apply to proceedings *ex parte* (x).

**Proof of
Execution of
Documents.**

Will.

705. If a will has been proved, the probate copy of the will or a copy stamped with the seal of the court that granted the probate is conclusive evidence of the validity and contents of the will in suits relating to personal estate, and attestation need not be proved. If the will is proved in solemn form, the probate is conclusive evidence even in matters relating to real estate (a), and if the will has not been proved in solemn form the probate is sufficient evidence in matters relating to real estate if ten days before action notice has been given of the intention to use it and a counter notice has not been given of intention to dispute the validity of the devise (b).

SUB-SECT. 3.—Ancient Documents.

**Documents
thirty years
old prove
themselves.**

706. Where a private document thirty years old is produced from its proper custody (c), no proof of the handwriting or signature of the writer, or of sealing, delivery, or attestation, need be given (d): in other words, the document is said to prove itself.

In the case of wills the period of thirty years runs from the date of execution, not from the death of the testator (e).

The rule applies to private documents of every kind (f), and the only difficulties that arise in any given case are connected with the question of custody.

**Proper
custody.**

707. The following are examples of what has been held to be the proper custody for certain classes of instruments:—For steward's books, the custody of the steward (g); for rate books, the union workhouse (h); for court rolls, the custody either of the lord of the manor or of the steward (i); for books relating to the estate of an ancient monastery, the custody of a person owning part of its estates (k); for the endowment of a vicarage, the registry of the diocese

(x) *Re Reay's Estate* (1855), 3 W. R. 312; *Re Rice, a Person of Unsound Mind* (1886), 32 Ch. D. 35, C. A.

(a) See Court of Probate Act, 1857 (20 & 21 Vict. c. 77), s. 62, and title EXECUTORS AND ADMINISTRATORS.

(b) *Ibid.*, s. 64.

(c) See p. 505, *ante*.

(d) "When a deed comes from an unsuspected repository, the court, in the absence of evidence to the contrary, is bound to presume that, so far as the deed appears to have been executed by the parties to it, it was in fact executed by them—that is to say, executed under seal and delivered by them so as to be a complete deed" (*Re Airey, Airey v. Stapleton*, [1897] 1 Ch. 164, 169). As regards handwriting, see *Wynne v. Tyrwhitt* (1821), 4 B. & Ald. 376; and as regards execution, see *Doe d. Oldham v. Wolley* (1828), 3 B. & C. 22; see, further, *R. v. Farrington (Inhabitants)* (1788), 2 Term Rep. 466; *Doe d. Jenkins v. Davies* (1847), 10 Q. B. 314; *Exeter Corporation v. Warren* (1844), 5 Q. B. 773; *Doe d. Ashburnham (Earl) v. Michael* (1861), 17 Q. B. 276; *A.-G. v. Stephens* (1855), 6 De G. M. & G. 111. The rule applies notwithstanding the fact that one of the subscribing witnesses is alive (*Doe d. Oldham v. Wolley, supra*); and in court (*Marsh v. Collnett* (1798), 2 Esp. 665); and, generally, see cases cited under this sub-section.

(e) *Doe d. Oldham v. Wolley, supra*; *Doe d. Spilsbury v. Burdett (Sir Francis)* (1835), 4 Ad. & El. 1, 19; *Man v. Ricketts* (1844), 7 Beav. 93, 101; compare *M'Kenire v. Fraser* (1803), 9 Ves. 5.

(f) *Wynne v. Tyrwhitt, supra*.

(g) *Ibid.*

(h) *Smith v. Andrews*, [1891] 2 Ch. 678, 680.

(i) *Re Jennings, a Solicitor*, [1903] 1 Ch. 906.

(k) *Bullen v. Michel* (1816), 2 Price, 399.

in which it is kept (*l*), or the augmentation office (*m*); for a deed creating a term to attend the inheritance, the custody of the attorney of the administrator of the trustee of the term (*n*); for a case for the opinion of counsel, the family papers of a descendant of the person who submitted it (*o*); for diocesan documents, the registry of the diocese (*p*), or the bishop's private papers (*q*); for a certificate of ordination, the clergyman's private papers (*r*); for a schedule setting out payments of tithes, the custody of the solicitor of the last purchaser of the tithes (*s*); for a parish certificate, the parish chest (*t*), or the custody of an overseer of the parish (*u*); for an expired lease, the custody of the lessor (*a*) or the lessee (*b*); for an expired indenture of apprenticeship, the custody of the apprentice or the master (*c*); for a receipt by a rector for money payments in lieu of tithes, the custody of the solicitor of the lord of the manor by whose predecessor in title the payments had been made (*d*); for ancient grants, the custody of some person connected with the estate to which they relate (*e*); for family Bibles, the custody of a member of the family (*f*); for documents, the custody of which is imposed on a certain person, the custody of such person (*g*); for a settlement, the custody of the trustees (*h*), or even the settlor himself (*i*); for a bond, the custody of the person in whose favour it is made (*j*).

SECT. 1.
Proof of
Execution of
Documents.

It will be seen that the custody required is not necessarily that which is most strictly proper; in fact, all that is necessary is that the custody be one in which the document may reasonably be expected to be found, and this must of course depend on the facts of each particular case (*k*). But in the case of documents the

Need not be
that most
strictly
proper.

(*l*) *Bullen v. Michel* (1816), 2 Price, 399, explained in *Meath (Bishop) v. Winchester (Marquis)* (1836), 3 Bing. (N. C.) 183, II. L.

(*m*) This is apparently the more regular mode; see *Meath (Bishop) v. Winchester (Marquis)*, *supra*.

(*n*) *Doe d. Jacobs v. Phillips* (1845), 8 Q. B. 158.

(*o*) *Meath (Bishop) v. Winchester (Marquis)*, *supra*.

(*p*) See *Doe d. Arundel (Lord) v. Fowler* (1850), 14 Q. B. 700, 701.

(*q*) *Meath (Bishop) v. Winchester (Marquis)*, *supra*; but *semble* this only applies where the document is dated prior to the establishment of the registry; see *Doe d. Arundel (Lord) v. Fowler*, *supra*.

(*r*) *R. v. Bathwick (Inhabitants)* (1831), 2 B. & Ad. 639, 648.

(*s*) *Foster v. Plumbers' Co.* (1900), 44 Sol. Jo. 211.

(*t*) *R. v. Ryton (Inhabitants)* (1793), 5 Term Rep. 259.

(*u*) *R. v. Netherthong (Inhabitants)* (1814), 2 M. & S. 337.

(*a*) *Paxton v. Dare* (1829), 10 B. & C. 17; *Rees v. Walters* (1838), 3 M. & W. 527; *Hall v. Ball* (1811), 3 Man. & G. 212, 247; *Doe d. Shrewsbury (Earl) v. Keele* (1848), 11 Q. B. 884.

(*b*) *Hall v. Ball*, *supra*, at p. 253.

(*c*) Compare *Hall v. Ball*, *supra*.

(*d*) *Bertie v. Beaumont* (1816), 2 Price, 303.

(*e*) *Swinmerton v. Stafford (Marquis)* (1810), 3 Taunt. 91.

(*f*) *Hubbard v. Lees and Purden* (1866), L. R. 1 Exch. 255.

(*g*) *Doe d. Arundel (Lord) v. Fowler*, *supra*.

(*h*) *Doe d. Neale v. Samples* (1838), 8 Ad. & El. 151.

(*i*) *Ibid.*

(*j*) *Chelsea Waterworks Co. v. Cowper* (1795), 1 Esp. 275.

(*k*) "Reasonable evidence of proper custody is all that can be required" (*Bertie v. Beaumont*, *supra*, per THOMSON, C.B., at p. 308). "It is enough if the person be so connected with the deed that he may reasonably be

SECT. 1.
Proof of
Execution of
Documents.

Parish books.
How custody
proved.

Improper
custody.

Documents
executed
under power
of attorney.

custody of which is by statute imposed on a particular person the rule is, perhaps, more strict, and any unusual custody must be properly accounted for (*l*).

The custody of parish books is provided for by statute (*m*).

The fact of custody must be properly established by evidence; it is not enough that the document be produced in court (*n*), but when the fact of proper custody is established there is no need to inquire what happened to the document between execution and production (*o*).

708. The following are examples of custody not regarded as proper for this purpose:—For private maps (*p*), ancient grants (*q*), notes of a case tried *temp.* Henry III. (*r*), or a priory register (*a*), the British Museum; for ancient grants, the Bodleian Library at Oxford (*b*); for a book containing an account of the possessions of a monastery, the Herald's Office (*c*); for an ancient grant, the custody of one of the parties to whom it had been given as a curiosity by a person not connected with the estate (*d*).

709. Although, as stated above, the rule applies to all documents thirty years old, yet where such a document purports to have been

supposed to be in possession of it without fraud, no such fraud being proved" (*Doe d. Neale v. Samples*, (1838), 8 Ad. & El. 151, *per* PATTESON, J., at p. 154). "It is not necessary to show the strictest legal custody" (*Doe d. Jacobs v. Phillips* (1845), 8 Q. B. 158, *per* DENMAN, C.J., at p. 160). "Most of the reported cases are decisions in favour of receiving documents on the ground that they have come from proper custody, and the courts ought, I think, to be liberal in this respect" (*Doe d. Shrewsbury (Earl) v. Keeling* (1818), 11 Q. B. 884, *per* DENMAN, C.J., at p. 889; and see *Bullen v. Michel* (1816), 2 Price, 399; *Meath (Bishop) v. Winchester (Marquis)* (1836), 3 Bing. (N. C.) 183, II. L.; *Doe d. Arundel (Lord) v. Fowler* (1850), 14 Q. B. 700). For a case very near the line, see *Croughton v. Blake* (1813), 12 M. & W. 205, 208. As to a map in the custody of bridge reeves, see *R. v. Norfolk County Council* (1910), 26 T. L. R. 269.

(*l*) See *Doe d. Arundel (Lord) v. Fowler*, *supra*, where the document in question was a parish register; by the Parochial Registers Act, 1812 (52 Geo. 3, c. 146), s. 5, "an important duty is cast upon the clergyman in respect to the due custody of the register. . . . The person who had the custody in this case was the parish clerk. But no explanation was offered to account for his custody, as that the parson was unwell or had sent the register to him for a special purpose. If any explanation had been offered, we might, perhaps, not scrutinise very closely; an excuse of some sort, although it might not show the custody to be proper, might satisfy us that it was reasonable" (*per* COLERIDGE, J., at p. 703).

(*m*) Local Government Act, 1894 (56 & 57 Vict. c. 73), s. 17 (8); see *Lewis v. Poole* (1897), 61 J. P. 776; *R. v. Powell, Ex parte Williams*, [1899] 1 Q. B. 396; and title LOCAL GOVERNMENT. As to parish registers, see p. 536, *post*.

(*n*) *Evans v. Rees* (1839), 10 Ad. & El. 151, *per* COLERIDGE, J., at p. 154: "If it be necessary to prove the custody of ancient documents someone must be sworn for that purpose. The person producing them may have had them from a grocer's shop."

(*o*) See *Doe d. Jacobs v. Phillips*, *supra*; *Slater v. Hodgson* (1846), 9 Q. B. 727.

(*p*) *Bidder v. Bridges* (No. 2) (1885), 34 W. R. 514; *Mercer v. Denne*, [1904] 2 Ch. 534, 545.

(*q*) *Swinerton v. Stafford (Marquis)* (1810), 3 Taunt. 91.

(*r*) *Bidder v. Bridges* (No. 2), *supra*.

(*a*) *Ibid.*

(*b*) *Michell v. Rabbetts* (1810), cited in *Swinerton v. Stafford (Marquis)*, *supra*

(*c*) *Lygon v. Strutt* (1795), 2 Anst. 601.

(*d*) *Swinerton v. Stafford (Marquis)*, *supra*.

executed under a power of attorney, although the actual execution is presumed to have been regular, yet it must be shown that the attorney was duly authorised (e), unless, perhaps, execution was a merely ministerial act (f).

SECT. 1.
Proof of
Execution of
Documents.

710. Ancient documents (such as a lease or licence) coming from proper custody, and purporting upon the face of them to show exercise of ownership, are admissible without proof of possession or payment of rent as being in themselves acts of ownership (g).

Ancient
documents.

Ancient leases are also admissible as evidence of reputation as to value (h).

SUB-SECT. 4.—*Stamps.*

711. No instrument requiring a stamp which is executed in the United Kingdom (i), or which relates to property situate in or to anything done or to be done in the United Kingdom, is admissible in evidence in any proceedings (except criminal proceedings (k)), unless it is properly stamped (l), or unless, if it may legally be stamped after execution (m), payment of the duty and penalty is made at the time (n), or an undertaking to pay given by the solicitor of the party producing it (o).

Documents
inadmissible
unless
properly
stamped.

(e) *Re Airey, Airey v. Stapleton*, [1897] 1 Ch. 161, where the deed produced purported to be an exercise by attorney of a special power of appointment.

(f) *Re Airey, Airey v. Stapleton*, *supra*, per KEKEWICH, J., at p. 170.

(g) *Malcolmson v. O'Dea* (1863), 10 Il. L. Cas. 593, per WILLES, J., at p. 614; see also *Rogers v. Allen* (1808), 1 Camp. 309; compare *Blandy-Jenkins v. Dunraven (Earl)*, [1899] 2 Ch. 121, C. A., where a document compromising an action for trespass was admitted on similar grounds.

(h) See *Bullen v. Michel* (1816), 2 Price, 399, 478.

(i) As regards the stamp required on instruments executed abroad, see title REVENUE.

(k) Stamp Act, 1891 (54 & 55 Vict. c. 39), s. 11 (h). For what are criminal proceedings, see *Mellor v. Denham* (1880), 5 Q. B. D. 467, C. A.; *R. v. Tyler and International Commercial Co.*, [1891] 2 Q. B. 588, C. A.

(l) See title REVENUE. As to the method, time etc. of taking the objection, see title PRACTICE AND PROCEDURE. Insufficiency or want of a stamp cannot be waived by consent (see *Nixon v. Albion Marine Insurance Co.* (1867), L. R. 2 Exch. 338; *Bowker v. Williamson* (1889), 5 T. L. R. 382). The ruling of a judge *ad nisi prius* as to the sufficiency of a stamp is not subject to appeal (*Siorret v. Kuczynski* (1855), 17 C. B. 251; *Blewitt v. Tritton*, [1892] 2 Q. B. 327, C. A.). The directors of a company may refuse to register a transfer where the stamp though sufficient for the consideration stated on the face is insufficient for the consideration in fact paid (*Maynard v. Consolidated Kent Collieries Corporation*, [1903] 2 K. B. 121, C. A.).

(m) Stamp Act, 1891 (54 & 55 Vict. c. 39), s. 14, partially re-enacting ss. 28 and 29 of the Common Law Procedure Act, 1854 (17 & 18 Vict. c. 125), which were repealed by the Inland Revenue Repeal Act, 1870 (33 & 34 Vict. c. 99), and re-enacted by the Stamp Act, 1870 (33 & 34 Vict. c. 97), s. 16 (repealed by the Stamp Act, 1891 (54 & 55 Vict. c. 39)).

(n) An undertaking by the party is not enough; it must be a personal undertaking by the solicitor to stamp the document and produce it so stamped before the order is drawn up (*Re Coolgardie Goldfields, Ltd., Re Cannon, Son and Morten (Solicitors)*, [1900] 1 Ch. 475; compare *Re Ward, Simmons v. Rose, Weeks v. Ward* (1862), 31 Beav. 18). The Inland Revenue authorities have no power to release the solicitor from his undertaking (*Re Coolgardie Goldfields, Ltd., Re Cannon, Son and Morten (Solicitors)*, *supra*).

(o) See last note and also *Rambert v. Cohen* (1802), 4 Esp. 213; *Jacob v. Lindsay* (1801), 1 East, 460; *Catt v. Howard* (1820), 3 Stark. 3; *Braythwaite v. Hitchcock* (1842), 10 M. & W. 494.

SECT. 1.
Proof of
Execution of
Documents.

But a document insufficiently stamped may always be shown to a witness for the purpose of refreshing his memory (*p*); and, where it does not amount to an agreement but, *e.g.*, merely contains an offer, it may be looked at though not stamped (*q*).

Lost
instruments.

712. Where an instrument has been lost there is a presumption that it was properly stamped (*r*). The burden of proving that it was in fact unstamped is on the party objecting (*s*), and this is discharged by showing that at some time at or after execution it was unstamped (*a*), although the burden may be shifted back again by showing facts from which a strong presumption arises that it was subsequently stamped (*b*).

The foregoing rules apply equally where the document is not produced after notice to produce (*c*).

But where it is shown that a lost instrument was in fact unstamped, secondary evidence of its contents is inadmissible (*d*).

Collateral
matters.

713. Where an instrument fulfils two objects, for one of which no stamp is required, it is admissible for the purposes of such object, although it may be inadmissible, by reason of the lack of a stamp, for the other of such objects (*e*), and, generally, an unstamped or insufficiently stamped instrument is admissible to prove collateral matters (*f*).

(*p*) *Birchall v. Bullough*, [1896] 1 Q. B. 325.

(*q*) *Carlill v. Carbolic Smoke Ball Co.*, [1892] 2 Q. B. 484, 490. In *Mason v. Motor Traction Co., Ltd.*, [1905] 1 Ch. 419, where an injunction was asked for to restrain the defendants from carrying an agreement into effect, and the agreement was unstamped, a copy was looked at, not as an agreement, but as a document evidencing the terms upon which the defendants proposed to sell their undertaking unless restrained.

(*r*) *R. v. Long Buckby (Inhabitants)* (1805), 7 East, 45; *Pooley v. Goodwin* (1835), 4 Ad. & El. 94; *Hart v. Hart* (1811), 1 Hare, 1.

(*s*) *Hart v. Hart*, *supra*; *Closmadeuc v. Carrel* (1856), 18 C. B. 36; *Marine Investment Co. v. Haviside* (1872), L. R. 5 H. L. 624.

(*a*) *Crowther v. Solomons* (1848), 6 C. B. 758; *Closmadeuc v. Carrel*, *supra*; *Marine Investment Co. v. Haviside*, *supra*.

(*b*) See *Closmadeuc v. Carrel*, *supra*, where it was shown that proper steps had been taken to stamp the instrument and that the duty had been paid.

(*c*) *Crisp v. Anderson* (1815), 1 Stark. 35; *Crowther v. Solomons*, *supra*; compare *Hart v. Hart* (1841), 1 Hare, 1; *Braythwaite v. Hitchcock* (1842), 10 M. & W. 494; *Arbor v. Fussell* (1862), 11 W. R. 26.

(*d*) Even where the instrument was destroyed by the wrongful act of the objecting party (*Rippiner v. Wright* (1819), 2 B. & Ald. 478; *Smith v. Henley* (1844), 1 Ph. 391). See *Rose v. Clarke* (1842), 1 Y. & C. Ch. Cas. 534; *Blair v. Ormond* (1847), 1 De G. & Sm. 428; and compare *Andrew v. Andrew* (1856), 8 De G. M. & G. 336, C. A.; *Arbor v. Fussell*, *supra*. *A fortiori*, secondary evidence of an unstamped existing document is inadmissible (*Hearne v. James* (1788), 2 Bro. C. C. 309; *Buxton v. Cornish* (1844), 12 M. & W. 426; *Yorke v. Smith* (1851), 21 L. J. (q. b.) 53; *Alcock v. Delany* (1855), 4 E. & B. 660; *Rajah Venkata Sveta v. Inuganti Bhavayyamm Garu* (1899), 15 T. L. R. 475, P. C.).

(*e*) *Matheson v. Ross* (1849), 2 H. L. Cas. 286, where an unstamped document purporting to be both a receipt and a statement of account was admitted as a statement of account, although inadmissible as a receipt (see also *Grey v. Smith* (1808), 1 Camp. 387; *Rutty v. Benthall* (1867), L. R. 2 C. P. 488).

(*f*) *Matheson v. Ross*, *supra*, in which case the question as to what matters are collateral was much discussed. Lord COTTENHAM, L.C., states as the principle (at p. 300), that "If you produce a receipt, not to shew the discharge of a debtor by his creditor from a particular demand, but for the purpose of establishing

714. Where the stamp on an instrument has been obliterated, the instrument is nevertheless receivable unless it be shown that the stamp was insufficient (g).

715. A party cannot be cross-examined on an instrument inadmissible for want or insufficiency of stamp (h).

SECT. 1.
Proof of
Execution of
Documents.

Stamps
obliterated.

Cross-
examination.

SECT. 2.—Proof of Contents of Documents.

SUB-SECT. 1.—Primary Evidence.

716. When the authenticity of a document which is in possession of one of the parties is not in dispute, it is usual to take steps to secure the production and admission of it, or evidence of its contents, at the trial by means of notices to produce (i) and admit (k), followed after inspection by an agreement between the parties to admit the originals (l) or copies for the purposes of the trial, saving all just exceptions, or by an application for such writ of *subpoena* (m) or order as may be necessary to secure the production of the document or the admission of a copy of its contents (n).

Securing
production.

Where a document is not in the possession of either of the parties, or because its authenticity is in dispute or for some other reason it is not possible to secure the admission of it or of an agreed

some other fact different from that of payment of the debt, you may be said to produce it for a collateral purpose, but if the matter to be proved is payment of money, and the payment is to be proved by the production of a written document, the Stamp Acts immediately apply to such document." Other examples are (a) admitted: unstamped note for amount of bribe to prove bribery (*Dover v. Maestrac* (1803), 5 Esp. 92); unstamped deed of assignment, to prove an act of bankruptcy (*Ponsford v. Walton* (1868), L. R. 3 C. P. 167; *Re Gouldwell, Ex parte Squire* (1868), 4 Ch. App. 47); unstamped instrument, to show that the transaction with which it was connected was a fraud (*Keable v. Payne* (1838), 8 Ad. & El. 555; *Holmes v. Sirsmith* (1852), 7 Exch. 802; *Clittenden v. Day* (1860), 2 F. & F. 77; compare *R. v. Gompertz* (1846), 9 Q. B. 824, 839 *et seq.*, or illegal (*Coppock v. Bower* (1838), 4 M. & W. 361); letter containing an agreement for making a gun, to prove that another gun had been lent to defendant by plaintiff (*Delaney v. Mitchell* (1816), 1 Stark. 439); unstamped note, to prove that at the time the money was lent the party giving it was intoxicated (*Gregory v. Fraser* (1813), 3 Camp. 454); unstamped receipt, to prove a contract (*Evans v. Prothero* (1832), 1 De G. M. & G. 572, *per* Lord ST. LEONARDS, L.C.; *contra*, *Same v. Same* (1850), 20 L. J. (CH.) 448, *per* Lord TRURO, L.C.); unstamped bill, to prove its own invalidity (*Smart v. Nokes* (1844), 6 Man. & G. 911); (b) rejected: unstamped note, as an acknowledgment taking a debt out of the Statute of Limitations (*Parmiter v. Parmiter* (1861), 3 De G. F. & J. 461; and see, further, title BILLS OF EXCHANGE AND PROMISSORY NOTES, Vol. II., p. 576); unstamped bill of sale, to prove that a subsequent bill of sale was given *bona fide* (*Williams v. Gerry* (1842), 10 M. & W. 296). See also *Hawkins v. Warre* (1825), 5 Dow. & Ry. (K. B.) 512, and cases cited in last note.

(g) *Doe d. Fryer v. Coombs* (1842), 3 Q. B. 687.

(h) *Baker v. Dale* (1858), 1 F. & F. 271; *Interleaf Publishing Co. v. Phillips* (1884), Cab. & El. 315.

(i) R. S. O., Ord. 31, r. 16.

(k) R. S. O., Ord. 32, rr. 2, 3; and see title PRACTICE AND PROCEDURE. Reference may also be made to title DISCOVERY ETC., Vol. XI., pp. 58 *et seq.*

(l) The mere admission of documents does not make them evidence. They must be formally put in at the trial, and in the Chancery Division must be marked by the registrar (*Watson v. Rodwell* (1878), 11 Ch. D. 150, C. A.).

(m) See p. 580, *post*.

(n) R. S. C., Ord. 30, r. 7.

SECT. 2.
Proof of
Contents of
Documents.

copy of it at the trial, it may become necessary not only to secure the production of it, but to give primary evidence that it is authentic, that is to say, to give the best evidence that the document is that which it purports to be or is tendered as being (o). The methods by which such evidence may in general be given have already been considered (p), but in respect of some classes of documents these methods may be replaced by some other method which, on grounds of public policy, is established either as the best and therefore the only method, or as an alternative method, of proving the contents (q), and where such method is so established as the best method no other can be used until the ground has been laid for giving secondary evidence.

SUB-SECT. 2.—*Secondary Evidence.*

General rule.

717. In pursuance of the rule that the best evidence obtainable must always be given (r), wherever a document has to be proved it must be produced, and secondary evidence of its contents is in general inadmissible. This rule is, however, subject to the following exceptions:—

Exceptions.
(1) Lost
documents.

(1) Where a document has been lost (s) or destroyed (t), secondary evidence of its contents is admissible (u). The court must first be satisfied that the document existed (a), and that the loss or destruction has in fact taken place (b), although reasonable evidence of this is all that is required (c). Thus, a *bonâ fide* and diligent search

(o) Where the document is a deed or record, this involves the production of the original document, excepting in cases where such production is dispensed with. The signature of a surveyor to an estimate under the Metropolis Management Acts is some evidence that the document is authentic and that the sum named in it has been duly determined (*Hobman v. Greenwich District Board* (1894), 58 J. P. 703, C. A.).

(p) See pp. 510, 512, *ante*.

(q) Thus, while the original of a will is regarded as primary evidence of the declarations of a testator contained in it relating to family history, and may be looked at for purposes of construing the will (*Re Harrison, Turner v. Hellard* (1885), 30 Ch. D. 390, C. A.), it has been said that the only evidence of a will of personal estate is the probate (*Pinney v. Hunt* (1877), 6 Ch. D. 98, 100), or the register containing an entry of the probate (see p. 553, *post*), as the probate is the only evidence of the title derived through it (*Pinney v. Pinney* (1828), 8 B. & C. 335). So where documents are enrolled pursuant to statute, or are entered in a notarial book, duplicates or copies may become equivalent to originals as evidence (see p. 525, *post*).

(r) See p. 420, *ante*; *Dupuy v. Truman* (1843), 2 Y. & C. Ch. Cas. 341.

(s) *Goodier v. Lake* (1737), 1 Atk. 446; *Saltern v. Melhuish* (1754), Amb. 247; *Bullen v. Michel* (1816), 2 Price, 399, 410; *Hall v. Dawson* (1862), 7 L. T. 519; *Sugden v. St. Leonards (Lord)* (No. 2) (1876), 24 W. R. 860. As to obtaining probate of a lost will, see title **WILLS**.

(t) *Delany v. Tenison* (1758), 3 Bro. Parl. Cas. 659; *Brandon v. Barlow* (1865), 13 L. T. G.

(u) Even though the contents are required by statute to have been in writing (*Rea v. Price*, [1909] 2 K. B. 724).

(a) *Whitfield v. Fausset* (1750), 1 Ves. Sen. 387, 389; *Askew v. Poulterers Co.* (1750), 2 Ves. Sen. 89.

(b) *Saltern v. Melhuish, supra*; *Doe d. Johnson v. Johnson* (1818), 2 Chit. 196; *Fitz v. Rabbits* (1837), 2 Mood. & R. 60; compare *Gilchrist v. Herbert* (1872), 20 W. R. 348.

(c) *Saltern v. Melhuish, supra*; *Gilchrist v. Herbert, supra*. Objections as to the sufficiency of the search must be taken at the trial, and cannot be raised afterwards (*Williams v. Wilcox* (1838), 8 Ad. & El. 314).

SECT. 2.

Proof of
Contents of
Documents.Sufficiency
of search.

must have been made in the place where the instrument would most properly be found (*d*), but not necessarily in every possible place (*e*); nor need the search have been made recently or for the purposes of the cause (*f*). The question of the sufficiency of the search is for the judge (*g*), and this must vary with the circumstances of each case. Thus, if the document is of considerable value (*h*), or is of recent date (*i*), or if the party who ought to produce it appears to have some interest in withholding it, greater diligence must have been shown before secondary evidence can be admitted, while if the document is valueless (*k*) very little search will suffice (*l*), and no search is required where direct proof of the destruction or irretrievable loss of the instrument is given (*m*).

(2) Secondary evidence is also admissible where it is impossible or highly inconvenient to produce the original. This occurs where the original is a fixed inscription, such as that on a tombstone (*n*),

(2) Where
production
impossible.

(*d*) *R. v. Denio (Inhabitants)* (1827), 7 B. & C. 620; *Hart v. Hart* (1841), 1 Haro. 1; *Green v. Bailey* (1847), 15 Sim. 542; *R. v. St. Mary's, Islington* (1852), 1 W. R. 34; *R. v. Hinckley Overseers* (1863), 3 B. & S. 885. This is defined as "the place in which, if all persons did their duty, the instrument, if extant, would be" (*R. v. Saffron Hill (Inhabitants)* (1852), 1 E. & B. 93, per Lord CAMPBELL, C.J., at p. 95; compare *Minshall v. Lloyd* (1837), 2 M. & W. 450). Where the document belonged to a deceased person, inquiry of his personal representatives is in general necessary (*R. v. Rawden (Inhabitants)* (1834), 2 Ad. & El. 156); but where the management of his affairs and the custody of his papers have been taken over by his attorney, inquiry of the latter is sufficient, and it is not necessary to inquire of the widow (*R. v. Piddlehinton (Inhabitants)* (1832), 3 B. & Ad. 460). Where the document is a settlement, inquiry should be made of all the trustees (*Doe d. Richards v. Lewis* (1852), 11 C. B. 1035). For further examples of what search is sufficient, which varies in each case, see *R. v. Stourbridge (Inhabitants)* (1828), 8 B. & C. 96; *Parloe v. Price* (1844), 13 M. & W. 267; *R. v. Kenilworth (Inhabitants)* (1845), 7 Q. B. 642; *Gathercole v. Miall* (1846), 15 M. & W. 319 (search in a public reading room for a newspaper which had been sent there held sufficient).

(*e*) "The court must be reasonably satisfied that due diligence has been used: it is not necessary to negative every possibility—it is enough to negative every reasonable probability—of anything being kept back" (*McGaley v. Alston and Sewell* (1836), 2 M. & W. 206, per ALDERSON, B., at p. 211; compare *Brewster v. Sewell* (1820), 3 B. & Ald. 296; *Hart v. Hart*, *supra*).

(*f*) *Fitz v. Rabbits* (1837), 2 Mood. & R. 60. In this case a search made three years before trial was held sufficient, but it was indicated that a recent search would have been more satisfactory.

(*g*) *Waddy v. Gray* (1875), L. R. 20 Eq. 238; compare *Fernley v. Worthington* (1840), 1 Man. & G. 491; *R. v. Braintree (Inhabitants)* (1858), 1 E. & E. 51.

(*h*) *Brewster v. Sewell*, *supra*, per BEST, J., at p. 303; compare *Freeman v. Arkell* (1824), 2 B. & C. 494; *Quilter v. Jorss* (1863), 14 C. B. (N. S.) 747; *Gully v. Exeter (Bishop)* (1827), 4 Bing. 290, 298.

(*i*) *R. v. Hinckley Overseers* (1863), 3 B. & S. 885.

(*k*) E.g., a policy of insurance on which a claim has been paid (*Brewster v. Sewell*, *supra*); depositions in a prosecution for assault where the grand jury has thrown out the bill (*Freeman v. Arkell*, *supra*).

(*l*) *Brewster v. Sewell*, *supra*; compare *Freeman v. Arkell*, *supra*.

(*m*) *Ex parte Raine* (1816), 19 Ves. 588, where the document was shown to have been stolen from the coach office; *Quilter v. Jorss*, *supra*, where the bearer of a document was arrested in New York and his papers taken from him, all of them (except the document in question) being returned to him; compare *Charnley v. Grundy* (1854), 14 C. B. 608; *Blackie v. Piddling* (1848), 6 C. B. 196; *Atkins v. Owen* (1834), 2 Ad. & El. 35.

(*n*) *The Tracy Peerage* (1843), 10 Cl. & Fin. 164, II. L.

SECT. 2.

**Proof of
Contents of
Documents.**Documents
abroad.

or an inscription or device on a banner or flag displayed at a public meeting (o), or a placard posted on a wall (p).

Where the document is abroad in the hands of a foreign functionary who is forbidden to produce it, secondary evidence may be given (q), but it seems that an application must first have been made to the person having the legal, even though he has not the actual, custody of the document, and must be shown to have been unsuccessful (r).

Similarly, where the document is abroad in private hands, application must be made to the person in possession of it and the purpose for which it is required disclosed (s).

Where, however, the document is filed in an English court, secondary evidence is inadmissible (t), except that in certain cases office copies are admissible to the same extent as the originals (a).

Documents
in hands of
third party.

Secondary evidence is also admissible where the document is in the possession of a person who, by virtue of privilege (b) or otherwise, is not compellable to produce it (c), provided that he has been served with a notice to produce or *subpoena duces tecum* and expressly claims his privilege (d).

(3) Where
documents
in hands of
adversary
who fails to
produce it
on notice
to produce.

(3) Secondary evidence is admissible in the case of documents in the hands of an adversary who fails to produce them after being served with a notice to produce (e).

Where a document is in the hands of an adversary he must in general be served with a notice to produce; if this is not done, secondary evidence of its contents is inadmissible (f). Moreover, where a document is proved to have come into the adversary's

(o) *R. v. Hunt* (1820), 3 B. & Ald. 566, 575, 576.

(p) *Bruce v. Nicolopulo* (1855), 11 Exch. 129, 131, 133.

(q) *In the Goods of Lemme*, [1892] P. 89; *In the Goods of Von Linden*, [1896] P. 148 (cases of wills deposited abroad); compare *Burnaby v. Baillie* (1889), 42 Ch. D. 282, 291, 292 (foreign registers of birth; for such registers, see p. 534, *post*).

(r) *Crespin v. Dogliani* (1863), 32 L. J. (P. M. & A.) 109. In this case the document was filed in a foreign court, but it is apprehended that the principle is of general application.

(s) *Boyle v. Wiseman* (1855), 10 Exch. 647; compare *Crespin v. Dogliani*, *supra*. In *Hunt v. Alewyn* (1828), 1 Moo. & P. 433, secondary evidence was admitted of a bill of exchange in possession of the acceptors (who had paid it) abroad, it being treated as lost.

(t) *Williams v. Muenings* (1824), Ry. & M. 18.

(a) *E.g.*, office copies are admissible of all documents filed in the High Court (R. S. C., Ord. 37, r. 4).

(b) See p. 570, *post*.

(c) *Hilberd v. Knight* (1848), 2 Exch. 11; *Newton v. Chaplin* (1850), 10 C. B. 336. Where the document is in the hands of the person's solicitor, who refuses to produce it, it is not necessary to serve the client with a *subpoena duces tecum* if he attends on ordinary *subpoena* and refuses production (*ibid.*); compare *Doe d. Loscombe v. Clifford* (1847), 2 Car. & Kir. 448. See also, for the rule stated in the text, *Marston v. Downes* (1834), 1 Ad. & El. 31; *R. v. Leatham* (1861), 3 E. & E. 658; and see *Cooke v. Maxwell* (1817), 2 Stark. 183 (document excluded on ground of public policy).

(d) *Lloyd v. Mostyn* (1842), 10 M. & W. 478.

(e) *R. v. Watson* (1788), 2 Term Rep. 199, 201; *Sharpe v. Lamb* (1840), 11 Ad. & El. 805.

(f) *R. v. Doran* (1791), 1 Esp. 127; *Dwyer v. Collins* (1852), 7 Exch. 639; *Goodered v. Armour* (1842), 3 Q. B. 956; *Bate v. Kinsey* (1834), 1 Cr. M. & R. 38.

hands, the opposite party cannot give evidence of its loss or destruction until he has served a notice to produce (*g*).

A party who has served a notice to produce a document will not be entitled to give secondary evidence of it, unless he establishes at the trial that it was at the time of the service of the notice in the possession of the person on whom the notice was served, or of some agent or other person on his behalf over whom the party served has some authority and from whom he could obtain the document (*h*).

But a notice to produce is not necessary where the document is itself a notice which has been served upon the adversary (*i*), such as a notice of dishonour in an action on the bill (*j*), a notice to quit in an action of ejectment (*k*), or a notice of assignment in an action by an assignee of a debt (*l*), or is an instrument in the nature of a notice (*m*), or where the possession of the document by the defendant forms the basis of the action so that the action itself acts as a notice (*n*), as when the action is in trover for the document (*o*), or in contract for non-delivery of the document (*p*), or in a prosecution for larceny of the document (*q*).

SECT. 2.
Proof of
Contents of
Documents.

Where notice
to produce is
unnecessary.

(*g*) *Doe d. Phillips v. Morris* (1835), 3 Ad. & El. 46.

(*h*) *Lloyd v. Mostyn* (1842), 10 M. & W. 478; *Partridge v. Coates* (1824), Ry. & M. 153, 156; *Burton v. Payne* (1827), 2 C. & P. 520; *Haldney v. Ritchie* (1816), 1 Stark. 338; *Sinclair v. Stevenson* (1824), 1 C. & P. 582; *Taplin v. Atty* (1825), 3 Bing. 164; *Suter v. Burrell* (1858), 2 Ll. & N. 867; *Martin v. Bell* (1816), 1 Stark. 413; *Parry v. May and Morret* (1833), 1 Mood. & R. 279; *Evans v. Sweet* (1824), Ry. & M. 92; *Knight v. Martin* (1819), Gow, 103. As to what is evidence of a document coming within the hands of a party, see *Henry v. Leigh* (1813), 3 Camp. 499.

(*i*) "On the ground that it is not necessary to give any other notice to the defendant than that which is given by the proceedings, the defendant being sufficiently warned by the issue that the plaintiff means to give secondary evidence of the contents of the notice unless the defendant produces it himself" (*Robinson v. Brown* (1846), 3 C. R. 754, per MAULE, J., at p. 762).

(*j*) *Kine v. Beaumont* (1822), 3 Brod. & Bing. 288; *Swain v. Lewis* (1835), 4 Ll. J. (Ex.) 249; *Lanuzze v. Palmer* (1827), Mood. & M. 31; *Robinson v. Brown*, *supra*; compare *Colling v. Treweek* (1827), 6 B. & C. 394. *Langdon v. Hulls* (1804), 5 Esp. 156, cannot now be upheld.

(*k*) *Doe d. Fleming v. Somerton* (1845), 7 Q. B. 58; compare *Philipson v. Chase* (1809), 2 Camp. 110; *Colling v. Treweek*, *supra*.

(*l*) *Surtees v. Hubbard* (1802), 4 Esp. 203.

(*m*) In *Colling v. Treweek*, *supra*, this rule was extended to the case of an attorney's bill, which was held to amount to a notice, and it was said by BAYLEY, J., at p. 400, that *Philipson v. Chase*, *supra*—a similar case—was to be supported on this ground, although not decided thereon; and see also *Anderson v. May* (1800), 2 Bos. & P. 237). It is submitted that *Gottlieb v. Danvers* (1796), 1 Esp. 455, where the document in question was a notice that certain work was unsatisfactory and requiring it to be taken down, really falls under this head. In *Grove v. Ware* (1817), 2 Stark. 174, which was an action against a surety, the document was a notice to pay, but it was held that a notice to produce was necessary, as the document was not a mere notice, but a statement of account between the plaintiff and the principal debtor.

(*n*) *Hov v. Hall* (1811), 14 East, 274, per LE BLANC, J., at p. 277; compare *R. v. Elworthy* (1867), 1 L. R. 1 C. C. R. 103, per KELLY, C.B., at p. 105.

(*o*) *Bucher v. Jarratt* (1802), 3 Bos. & P. 143; *Hov v. Hall*, *supra*; *Scott v. Jones* (1813), 4 Taunt. 865; *R. v. Elworthy*, *supra*; compare *R. v. Moors* (1801), cited 6 East, 419, n., 421, n.; *Colling v. Treweek*, *supra*; *Read v. Gamble* (1835), 5 Nev. & M. (K. B.) 433.

(*p*) *Jolley v. Taylor* (1807), 1 Camp. 143.

(*q*) *R. v. Elworthy*, *supra*. *Secus*, where a person is indicted for perjury in swearing that a document never existed (*ibid.*).

SECT. 2.

Proof of Contents of Documents.

Seamen.

In an action by a seaman for his wages no notice to produce the ship's articles is required (*r*), and a seaman need never give notice to produce his agreement (*s*).

Notice to produce the original is also unnecessary where the document sought to be put in is a counterpart original (*t*), or perhaps even a copy made contemporaneously (*a*).

Where a proper notice to produce has been served and a new trial is subsequently ordered, a fresh notice is unnecessary (*b*).

Form and service of notice.

A notice to produce must be in writing (*c*), and served between certain hours (*d*) within a reasonable time before trial (*e*) upon the party or his solicitor (*f*).

The notice must specify the documents required to be produced with reasonable particularity (*g*).

SUB-SECT. 3.—*Copies of Public Documents.*

Public documents.

718. The above-mentioned rules as to secondary evidence apply only to private documents. Wherever an original document is of

(*r*) *Bowman v. Manzelman* (1809), 2 Camp. 315.

(*s*) Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), s. 123; see, further, title SHIPPING AND NAVIGATION.

(*t*) "If there are two contemporary writings, the counterparts of each other, one of which is delivered to the opposite party and the other preserved, as they may both be considered as originals and they have equal claims to authenticity, the one which is preserved may be received in evidence without notice to produce the one which was delivered" (*Philpson v. Chase* (1809), 2 Camp. 119, *per* Lord ELLENBOROUGH, C.J., at p. 111; see, as to this case, note (*m*), p. 521, *ante*; *Surtees v. Hubbard* (1802), 4 Esp. 203; compare *Kine v. Beaumont* (1822), 3 Brod. & Bing. 288; *Colling v. Trewreck* (1827), 6 B. & C. 394, 398; *Houghton v. Koenig* (1846), 3 C. B. 754). There was formerly some confusion between cases of counterparts and cases of notices (see *Jory v. Orchard* (1799), 2 Bos. & P. 39), but the distinction is now well established.

(*a*) See *Kine v. Beaumont*, *supra*, *per* DALLAS, C.J., at p. 291; *Philpson v. Chase*, *supra*; *Gottlieb v. Danvers* (1796), 1 Esp. 455.

(*b*) *Hope v. Beadon* (1851), 17 Q. B. 509.

(*c*) R. S. C., Ord. 66, r. 1; for form, see *ibid.*, App. B, No. 14.

(*d*) For these, see R. S. C., Ord. 64, r. 11. For proof of service, see R. S. C., Ord. 32, r. 8.

(*e*) *Lloyd v. Mostyn* (1842), 10 M. & W. 478. This is a question for the judge (*ibid.*, at p. 484). In *Doe d. Wartney v. Grey* (1816), 1 Stark. 283, service on the wife of the defendant's attorney at his lodgings on the evening before trial was held insufficient.

(*f*) See *Lloyd v. Mostyn*, *supra*, where notice was served on a party's present solicitor to produce a document which was in possession of his former solicitor, and the notice was held good on the ground that the latter could be compelled by the party to produce it (see *Doe d. Wartney v. Grey*, *supra*).

(*g*) The proper course appears to be as far as possible in drawing the notice to refer to the descriptions of documents given in the affidavit of documents on which the notice is generally founded (see *Anon.* (1899), 44 Sol. Jo. 95). The following notices have been held too vague: "All the plaintiffs' books of account containing entries of dealings between them and the defendant for September, 1896, and also all letters written by the defendant or any other person to the plaintiffs relating to relevant matters" (*ibid.*); "Letters and copies of letters, also all books relating to this cause" (*Jones v. Edwards* (1825), M'Cle. & Yo. 139); "All letters, papers, and documents touching or concerning the bill of exchange mentioned in the declaration and the debt sought to be recovered" (*France v. Lucy* (1825), Ry. & M. 341).

SECT. 2.
Proof of
Contents of
Documents.

a public nature, and would of itself be evidence if produced from the proper custody, certain kinds of copies of the document are admissible in evidence (*h*). And by virtue of statutory provisions a number of documents can now be proved by means of copies of a prescribed kind. To be admissible in evidence such copies must fall under one or other of the five following heads:—
(i.) Exemplifications; (ii.) Office copies; (iii.) Examined copies; (iv.) Certified copies; (v.) Copies printed by the King's printers or under the superintendence or authority of His Majesty's Stationery Office or in the *Gazette* (*k*), or by the printer to either House of Parliament.

(i.) *Exemplifications.*

719. An exemplification is a copy of a record of a court either under the Great Seal or under the seal of the court where the record is (*l*). Exemplifications are rarely used in modern practice, as judgments of the High Court are generally now proved by office copies (*m*). Exemplifications.

(ii.) *Office Copies.*

720. Office copies are copies of documents in the custody of a superior court made and authenticated by an officer of the court, who is intrusted with the power of furnishing copies (*n*). Such copies were before the Judicature Acts evidence without proof that they had been actually examined, if they were tendered in evidence in the same court and in the same cause, and were in such cases regarded as equivalent to the record itself (*o*). And now office copies of all writs, records, pleadings and documents filed in the High Court of Justice are admissible in evidence in all causes and matters and between all persons or parties to the same extent as the original would be admissible (*p*). Office copies.

All copies, certificates, and other documents appearing to be sealed with a seal of the Central Office of the Supreme Court are to be presumed to be office copies or certificates or other documents issued from the Central Office and, if duly stamped, may be received in evidence, and no signature or other formality, except the sealing with a seal of the Central Office, is to be required for the authentication of any such copy etc. (*q*).

(*h*) This is a common law rule (*Lynch v. Clarke* (1697), 3 Salk. 154) enacted by statute; see Evidence Act, 1851 (14 & 15 Vict. c. 99), s. 14. As to what is a public document, see p. 525, *post*.

(*k*) *I.e.*, the London, the Edinburgh or the Dublin Gazette (Documentary Evidence Act, 1868 (31 & 32 Vict. c. 37), s. 5).

(*l*) Buller, *Nisi Prius*, 226. See Sidney Smith, *Chancery Practice*, 7th ed., 888; 1 Seton's *Judgments and Orders*, 195.

(*m*) R. S. C., Ord. 37, r. 4.

(*n*) Gilbert on Evidence, 6th ed., 19.

(*o*) See *Denn v. Lucas* v. *Fulford* (1761), 2 Burr. 1177, 1181; *Jack v. Boyle v. Kiernan* (1840), 2 Jobb & S. 231.

(*p*) R. S. C., Ord. 37, r. 4.

(*q*) R. S. C., Ord. 61, r. 7. There are also a number of statutes which make office copies of documents filed in the Supreme Court admissible in evidence,

SECT. 2.

(iii.) *Examined Copies.*Proof of
Contents of
Documents.Examined
copies.

721. An examined copy is a copy of a document which a witness swears he has compared with the original, or with what the officer of the court which has custody of the original or any other person read as the contents of the original, and which copy the witness swears is correct (*r*). Such copies are admissible in evidence in all cases where the original is a public document(s), and in many other cases where such copies are made admissible by statute (*t*). Before such a copy can be read in evidence it must be proved that the original came from the proper place of deposit or out of the hands of the officer in whose custody it was kept (*a*).

(iv.) *Certified Copies.*Certified
copies.

722. Copies of records in the Public Record Office in the custody of the Master of the Rolls may be made at the request and cost of any person desirous of procuring the same; any copy so made is to be examined and certified as a true and authentic copy by the deputy keeper of the records, or one of the assistant record keepers, and sealed and stamped with the seal of the Record Office; every copy so certified and purporting to be sealed or stamped with such seal is admissible in evidence without any further or other proof thereof in every case in which the original record could have been received in evidence (*b*).

A copy of a public document or an extract therefrom is admissible in evidence, provided it purports to be signed and certified as a true copy or extract by the officer to whose custody the original is intrusted (*c*). There are a great number of statutes making admissible in evidence copies of particular documents certified by officials who have the custody of the originals (*d*).

If by any statute a certified copy of any document is made admissible in evidence, the copy is to be admitted, provided it purports to be sealed or impressed with a stamp, or sealed and signed, or signed alone as required, or impressed with a stamp and signed as directed by any such statute, without any proof of the

see 2 Taylor on Evidence, 10th ed., p. 1153. As to office copies of documents in the probate registry, see Probate Rules (Non-Contentious), 1862, rr. 80, 81; Matrimonial Causes Rules, 1865, rr. 119, 120.

(*r*) *Reid v. Margison* (1808), 1 Camp. 469; *Gyles v. Hill* (1809), 1 Camp. 471, n.; *Rolf v. Dart* (1809), 2 Taunt. 52; *R. v. M'Donald* (1841), Arm. M. & O. 112; *R. v. Hughes* (1839), 1 Craw. & D. 13; but see as to peerage cases, *The Shute Peerage* (1835), 5 Cl. & Fin. 23, 42, H. L. An examined copy must not contain abbreviations which are not in the original (*R. v. Christian* (1842), Car. & M. 388).

(*a*) Evidence Act, 1851 (14 & 15 Vict. c. 99), s. 14.

(*t*) See p. 539, *post*.

(*a*) *Adamthwaite v. Synge* (1816), 1 Stark. 183; *Doe d. Arundel (Lord) v. Fowler* (1850), 14 Q. B. 700.

(*b*) Public Record Office Act, 1838 (1 & 2 Vict. c. 94), ss. 12, 13.

(*c*) Evidence Act, 1851 (14 & 15 Vict. c. 99), s. 14. If such a copy is not properly certified, it may be proved by *viva voce* evidence to be an examined copy (*R. v. Manwaring* (1856), Dears. & B. 132, O. C. R.).

(*d*) See 2 Taylor on Evidence, 10th ed., p. 1163, for a list of such statutes.

seal or stamp or official character of the person appearing to have signed the same (e).

SECT. 2.

Proof of
Contents of
Documents.

(v.) *Copies printed by Public Authority.*

723. Acts of Parliament and certain other official documents are proved by copies printed by public authority (f).

King's
printer's
copies.

SUB-SECT. 4.—*Proof of Particular Public or Official Documents.*

(i.) *Statutes, Parliamentary Proceedings, and Orders.*

724. Public statutes are judicially noticed and no proof of them is required (g).

Statutes
judicially
noticed.

The same is the case with local, personal, and private Acts which were passed since January 1st, 1851 (h), or which, though passed before that date, contained a declaration that they are to be treated as public (i).

Local, personal, and private Acts passed before January 1st, 1851, which do not contain a declaration that they are to be treated as public, are proved by a copy purporting to be printed by the King's printers (k), or under the superintendence or authority of His Majesty's Stationery Office (l).

725. Proclamations, orders, and regulations issued by the King, the Privy Council, the Lord Lieutenant of Ireland, or a Government department are most conveniently (m) proved by a copy of the *Gazette* (n) purporting to contain them (o), or by a copy purporting to be printed by the Government printer (o), or under the superintendence or authority of His Majesty's Stationery Office (p), or by a certified copy or extract (q).

Royal etc.,
proclama-
tions, how
proved.

(e) Evidence Act, 1845 (8 & 9 Vict. c. 113), s. 1; see *R. v. Parsons* (1866), L. R. 1 C. C. R. 24. As to the proof of a conviction or acquittal by a certified copy, see Evidence Act, 1851 (14 & 15 Vict. c. 99), s. 13; Criminal Procedure Act, 1865 (28 & 29 Vict. c. 18), ss. 1, 6 (re-enacting Common Law Procedure Act, 1854 (17 & 18 Vict. c. 125), s. 25); Prevention of Crimes Act, 1871 (34 & 35 Vict. c. 112), s. 18; *R. v. Parsons, supra*; *Richardson v. Willis* (1873), L. R. 8 Exch. 69.

(f) See *infra*.

(g) See p. 485, *ante*. The Parliament Roll may be inspected to test the accuracy of any print produced (see *R. v. Jefferies* (1721), 1 Stra. 446; *Price v. Hollis* (1813), 1 M. & S. 105).

(h) See stat. (1850) 13 & 14 Vict. c. 21, s. 7, which provides that such Acts are to be deemed public Acts in the absence of express provision to the contrary. Acts in which such provision to the contrary is inserted must of course be proved in the ordinary way by copy.

(i) *Beaumont v. Mountain* (1834), 10 Bing. 404; *Brett v. Beales* (1830), 10 B. & C. 508, is no longer law on this point.

(k) Lord Brougham's Evidence Act, 1845 (8 & 9 Vict. c. 113), s. 3.

(l) Documentary Evidence Act, 1882 (45 & 46 Vict. c. 9), s. 2; compare *Re Yarmouth and Ventnor Rail. Co.*, [1871] W. N. 236; examined copies are also admissible; as to these, see p. 524, *ante*.

(m) But this evidence is only *prima facie*, and, where necessary, examined copies should be produced.

(n) This includes the London, the Edinburgh, and the Dublin Gazettes (Documentary Evidence Act, 1868 (31 & 32 Vict. c. 37), s. 5).

(o) *Ibid.*, s. 2 (1), (2).

(p) Documentary Evidence Act, 1882 (45 & 46 Vict. c. 9), s. 2. These provisions apply to copies printed in the same way in Ireland (*ibid.*, s. 4).

(q) In cases of proclamations etc. issued by the King or the Privy Council,

SECT. 2.
Proof of
Contents of
Documents.
Bye-laws.

726. Bye-laws are generally made provable in some particular manner by the statute under which they are made (?). Where no such provision exists proof must be given of the fulfilment of the conditions precedent to the validity of the bye-laws, or such fulfilment may be presumed from sufficiently long use.

or the Lord Lieutenant of Ireland or his Privy Council, the copy or extracts must be certified by the clerk to the Privy Council or one of the lords thereof, and in the case of proclamations etc. by Government departments officers, by the various officers respectively mentioned in the schedule to the Documentary Evidence Act, 1868 (31 & 32 Vict. c. 37), as altered by subsequent legislation. This schedule now stands as follows:—

COLUMN I.	COLUMN II.
(Name of Department or Officer.)	(Name of Certifying Officers.)
The Commissioners of the Treasury.	Any Commissioner, Secretary, or Assistant Secretary of the Treasury.
The Commissioners for executing the office of Lord High Admiral.	Any of the Commissioners for executing the office of Lord High Admiral, or either of the Secretaries to the said Commissioners.
Secretaries of State	Any Secretary or Under-Secretary of State.
Committee of Privy Council for Board of Trade.	Any Member of the Committee of Privy Council for Trade or any Secretary or Assistant Secretary of the said Committee.
The late Poor-law Board (abolished by Local Government Board Act, 1871 (34 & 35 Vict. c. 70), s. 2).	Any Commissioner of the Poor-law Board, or any Secretary or Assistant Secretary of the said Board.
The Local Government Board (Local Government Board Act, 1871 (34 & 35 Vict. c. 70), s. 5. See, also, Public Health Act, 1875 (38 & 39 Vict. c. 55), ss. 130, 135, 297 (7); and Public Health (Ireland) Act, 1878 (41 & 42 Vict. c. 52), s. 265).	Any Member of the Local Government Board, or any Secretary or Assistant Secretary of that Board.
Board of Education (Board of Education Act, 1899 (62 & 63 Vict. c. 33)) (formerly the Education Department (Elementary Education Act, 1870 (33 & 34 Vict. c. 75), s. 83).	Any Member of the Education Department, or any Secretary or Assistant Secretary of that Department, or the Board, or a Secretary or person authorised by the President or some member of the Board to act on behalf of a Secretary.
The Postmaster-General (Post Office Act, 1908 (3 Edw. 7, c. 48)).	Any Secretary or Assistant Secretary of the Post Office.
A Secretary of State acting under "The Artillery and Rifle Ranges Act, 1885" (48 & 49 Vict. c. 36), s. 6; and Drill Grounds Act, 1886 (49 & 50 Vict. c. 5).	Any of His Majesty's Principal Secretaries of State.
The Board of Agriculture and Fisheries (Documentary Evidence Act, 1895 (58 Vict. c. 9), s. 1).	The President, Secretary, or any member of the Board, or any person authorised by the President to act on behalf of the Secretary.

No proof of the handwriting or official position of the certifying officer is required (Documentary Evidence Act, 1868 (31 & 32 Vict. c. 37), s. 2 (3)).

(r) As to bye-laws made by companies and railways, see titles COMPANIES, Vol. V.; RAILWAYS AND CANALS. As to bye-laws made by municipal corporations, see *Robinson v. Gregory*, [1905] 1 K. B. 534, and title LOCAL GOVERNMENT; or by other public health authorities, see title PUBLIC HEALTH. As to bye-laws for open spaces, see title OPEN SPACES. Bye-laws of a county council must be proved by a copy sealed with the council's seal, see *Timothy v. Fenn* (1910), 102 L. T. 283.

727. The journals of either House of Parliament are proved by copies purporting to be printed by the printer to either House (a), and are admissible as evidence of the facts relating to parliamentary procedure therein recorded (b).

SECT. 2.
**Proof of
Contents of
Documents.**

(ii.) *Foreign Judgments and Acts of State.*

Journals of
Houses of
Parliament.

728. Proclamations, treaties, and other acts of state of a foreign state or British colony, and judgments, and other judicial proceedings of foreign (c) or colonial (d) courts, and affidavits, pleadings, and other legal documents filed or deposited in such courts, may be proved by examined (e) or authenticated (f) copies (g).

Foreign
judicial
documents.

For the purposes of the Extradition Act, 1870 (h), foreign warrants, depositions, convictions etc. are provable by authenticated copies (i). Under this provision, the depositions are admissible even though neither taken in the presence of the accused nor in relation to the particular charge upon which extradition is demanded (k).

Various statutory provisions have been made as to the admissibility and proof of depositions etc. taken abroad (l).

Depositions
etc. taken
abroad.

(iii.) *Ancient Public Surveys, Inquisitions, and Assessments.*

729. A public document embodying the results of a public inquiry or public act made or done by a public officer is evidence

Public
documents
evidence of
the facts
stated in
them.

(a) Evidence Act, 1845 (8 & 9 Vict. c. 113), s. 3. No proof is necessary that such copies were in fact so printed (*ibid.*).

(b) *A.-G. v. Bradlaugh* (1885), 14 Q. B. D. 667, C. A.

(c) For the effect in England of judgments given by foreign courts, see title CONFLICT OF LAWS, Vol. II., pp. 281 *et seq.*

(d) This extends to all British possessions but not to Scotland. As to proof of colonial statutes, see *R. v. Brixton Prison (Governor), Ex parte Percival* (1907), 71 J. P. 148, and p. 492, *ante*.

(e) As to examined copies, see *Moltram v. Eastern Counties Rail. Co.* (1859), 7 C. B. (N. S.) 58.

(f) The authenticated copy of an act of state must purport to be sealed with the seal of the state or colony to which the original document belongs; the authenticated copy of a judgment etc. or affidavit etc. in the court of any foreign state or British colony must purport either to be sealed with the seal of the court to which the original document belongs, or if the court has no seal, to be signed by the judge or one of the judges of the court, who must attach to his signature a statement in writing on the copy that the court has no seal (Evidence Act, 1851 (14 & 15 Vict. c. 99), s. 7; see *Re Betts' Patent* (1862), 1 Moo. P. C. C. (N. S.) 49, 52; *Leishman v. Cochrane* (1863), 1 Moo. P. C. C. (N. S.) 315; *Loibl v. Strampfer* (1867), 16 L. T. 720; *Cavan v. Stewart* (1816), 1 Stark. 525.

(g) The Evidence Act, 1851 (14 & 15 Vict. c. 99), s. 7. This Act contains (a 10) provisions as to proof of Irish documents in England (see *Re Mahon's Trust* (1852), 9 Hare, 459).

(h) 33 & 34 Vict. c. 52. See also the Extradition Act, 1873 (36 & 37 Vict. c. 60), s. 4.

(i) Extradition Act, 1870 (33 & 34 Vict. c. 52), s. 14; and see *R. v. Gunz* (1882), 9 Q. B. D. 93. The provisions as to authentication are contained in s. 15. See title EXTRADITION AND FUGITIVE OFFENDERS.

(k) *Re Counhaye* (1873), L. R. 8 Q. B. 410.

(l) The statutes deal mostly with the method of taking evidence on commission in certain cases, and are dealt with elsewhere (see p. 609, *post*). In proceedings under the Fugitive Offenders Act, 1881 (44 & 45 Vict. c. 69), s. 29,

SECT. 2.

Proof of
Contents of
Documents.

Documents
made on
behalf of
the Crown.

of the truth of such facts therein stated as are within the scope of the inquiry (*m*).

Thus, records or conveyances relating to Crown property (*n*), records directly affecting the revenues of the Crown (*n*), and surveys of Crown property made for public purposes (*o*), are public documents in this sense, and the same applies to records in the Exchequer of acts done by officers of the Crown in assertion or derogation of the King's title (*p*), returns to a commission directing an inquiry as to Crown lands (*q*), an ancient extent of Crown lands (*r*), accounts

duly authenticated copies of depositions are admissible. See title EXTRADITION AND FUGITIVE OFFENDERS.

(*m*) The limits within which the documents dealt with in this sub-section are admissible are laid down by Lord BLACKBURN in *Sturla v. Freccia* (1880), 5 App. Cas. 623, at p. 643: "It should be a public inquiry, a public document, and made by a public officer. I do not think that 'public' there is to be taken in the sense of meaning the whole world. I think an entry in the books of a manor is public in the sense that it concerns all the people interested in the manor. And an entry probably in a corporation book concerning a corporate matter, or something in which all the corporation is concerned, would be public within that sense. But it must be a public document, and it must be made by a public officer. I understand a public document there to mean a document that is made for the purpose of the public making use of it, and being able to refer to it. It is meant to be where there is a judicial, or quasi-judicial, duty to inquire, as might be said to be the case with the bishop acting under the writs issued by the Crown. That may be said to be quasi-judicial. He is acting for the public when that is done; but I think the very object of it must be that it should be made for the purpose of being kept public, so that the persons concerned in it may have access to it afterwards." See this case explained in *Mercer v. Denne*, [1905] 2 Ch. 538, C. A.; and compare *North Staffordshire Rail. Co. v. Hanley Corporation* (1909), 73 J. P. 477, C. A.; and see, further, *Daniel v. Wilkin* (1852), 7 Exch. 429, per PARKE, B., at p. 437. Note that cases falling under this head must not be confused with cases of entries by deceased persons made in course of private duty: the latter are private, not public documents. As to them, see p. 461, *ante*; *Short v. Lee* (1821), 2 Jac. & W. 461, seems to be a case of that kind.

(*n*) *Mercer v. Denne*, *supra*, per VAUGHAN WILLIAMS, L.J., at p. 556; compare *Sturla v. Freccia*, *supra*; *Beaufort (Duke) v. Smith* (1849), 4 Exch. 450; *Daniel v. Wilkin*, *supra*; *Rowe v. Brenton* (1828), 8 B. & C. 737, cited in note (*o*), *infra*; *Newcastle (Duke) v. Broxtowe Hundred* (1832), 4 B. & Ad. 273.

(*o*) See *Smith v. Brownlow (Earl)* (1870), L. R. 9 Eq. 241, survey of manor belonging to the Duchy of Cornwall held admissible as evidence of the boundaries and customs of the manor; compare *Beaufort (Duke) v. Smith*, *supra*; *Daniel v. Wilkin*, *supra*; *Manchester Corporation v. Lyons* (1882), 22 Ch. D. 287, 299, C. A. Generally, all documents coming under this head which relate to the possessions or revenues of the Duchies of Cornwall and Lancaster are admissible as public documents owing to the special interest which the Crown has in the duchies; see *Rowe v. Brenton*, *supra*, in which case (1) a grant by Edward II. to Piers de Gaveston of the County of Cornwall, and the confirmation thereof; (2) accounts relating to the Duchy of Cornwall produced from the King's Remembrancer's office; (3) a roll called an Assession Roll containing accounts of acts done by commissioners appointed in 7 Edward III. (1333) by the Earl of Cornwall; and (4) ancient leases and grants of duchy lands by the Duke of Cornwall, were admitted (compare *Brisco v. Lomax* (1838), 8 Ad. & El. 198; *Blandy-Jenkins v. Dumraven (Earl)* (1898), 62 J. P. 661).

(*p*) *Mercer v. Denne*, *supra*, per VAUGHAN WILLIAMS, L.J., at p. 558.

(*q*) *Rowe v. Brenton*, *supra*.

(*r*) *Rowe v. Brenton*, *supra*. This document was found in the proper office, and purported to have been taken by a steward of the King's lands. The commission under which it was taken could not be found, but it was presumed to

SECT. 2.

Proof of
Contents of
Documents.

of receivers-general and other Crown officers (*s*), but not to documents made on behalf of the Crown for merely temporary or private (*t*) purposes, such as a survey of Walmer Castle taken by direction of the Lord Warden of the Cinque Ports, or an estimate made by the King's engineer for the repair of Walmer Castle (*a*), or depositions taken in an information by the Attorney-General against persons claiming to be entitled to the manor of Walmer for suffering the destruction of a sea wall between the sea and Walmer Castle (*b*).

These cases must be distinguished from those of documents operating merely as admissions by the Crown, which are evidence only as against the Crown or persons claiming under it (*c*).

730. The following are further instances of documents held to fall within the rule above stated:—Documents drawn up by public commissioners (*d*), surveyors (*e*), valuers (*f*), customs house

Other
examples
of public
documents.

have been taken under a proper authority. "Considering that this document was found in the proper office, and that it would have been a breach of duty in the person having the custody of that office to admit any extent not duly taken, I think we must, at this distance of time, presume that it was taken under competent authority. The stat. 4 Edw. 1 says that extents are to be taken, not by whom. I therefore think it was the duty of each steward under the Crown to take extents from time to time of the lands under his care" (*ibid.*, per BAYLEY, J., at p. 749). For another example, see *Doe d. William IV. v. Roberts* (1844), 13 M. & W. 520, 533.

(*s*) *Doe d. William IV. v. Roberts*, *supra*; *A.-G. v. Hotham* (Lord) (1823), Turn. & R. 209.

(*t*) See, for example, *Beaufort (Duke) v. Smith* (1849), 4 Exch. 450; and see *Phillips v. Hudson* (1867), 2 Ch. App. 243, where a survey of a Crown manor made under order of the Crown was held to have been "a survey made for the purposes of the Crown and just the same as if it had been a survey made by a private owner," and therefore inadmissible in an action by copyholders against the lord. See also *Evans v. Taylor* (1838), 7 Ad. & El. 617, where a survey of a manor belonging to the Duchy of Lancaster produced from the duchy office was held inadmissible, it not being shown to have been made for any public purpose. *Sed quare*, whether on the facts this objection is correct; the document was in any event inadmissible, as the scope of the inquiry does not appear to have been regarded.

(*a*) *Mercer v. Denne*, [1905] 2 Ch. 538, C. A.; such documents, if not otherwise admissible, are not admissible as entries by a deceased person (as to which see p. 463, *ante*) (*ibid.*).

(*b*) *Mercer v. Denne*, *supra*.

(*c*) *E.g.*, *Irish Society (Governors etc.) v. Derry (Bishop)* (1846), 12 Cl. & Fin. 641, H. L. (surrender made by a former bishop to the Crown of all livings in Londonderry, followed by a grant of such livings by the Crown and two letters from the Crown, recognising this grant, admitted). And as to admissions generally, see p. 456, *ante*.

(*d*) *E.g.*, under the Tithe Commutation Acts (*Giffard v. Williams* (1869), 38 L. J. (Ct.) 597, 604); *A.-G. v. Antrobus*, [1905] 2 Ch. 188, 193, 194 (tithe maps and awards); distinguish *Wilberforce v. Hearfield* (1877), 5 Ch. D. 709, note (*i*), p. 531, *post*; the Statute of Sewers, 23 Hen. 8, c. 5 (1531-2) (*R. v. Leigh* (1840), 10 Ad. & El. 398; *New Romney Corporation v. New Romney (Commissioners of Sewers)*, [1892] 1 Q. B. 840); the Charitable Trusts (Recovery) Act, 1891 (54 & 55 Vict. c. 17), s. 5; the Merchant Shipping Act, 1854 (17 & 18 Vict. c. 104), s. 18 (see *The Little Lizzie* (1870), L. R. 3 A. & E. 56); in *Doe d. Chatham, Strode v. Seaton* (1834), 2 Ad. & El. 171, assessments by Commissioners of Land Tax showing that at a certain date property was assessed in a certain name, were admitted to show that the property at that date belonged to a person of

(*e*), (*f*) For notes (*e*) and (*f*) see next page.

SECT. 2.
Proof of
Contents of
Documents.

searchors (*g*) appointed under statute or otherwise; Domesday Book (*h*); returns made by a bishop in obedience to Exchequer writs (*i*); entries made by a bishop on his visitation, if he had a right to make them (*k*); collations from the bishop's registry (*l*); inquisitions taken under a commission of lunacy (*m*), and recitals in orders drawn up by a master in lunacy (*n*); public surveys taken under an order of the Crown (*o*) or the Commonwealth (*p*); the taxation of Pope Nicholas made in 1291 (*q*); an inquisition on the writ of *ad quod damnum* made in 37 Edward III. (*r*); extracts from hundred rolls taken by special commissioners in 3 Edward I. (*s*); presentments in a manor court setting forth the bounds of the manor (*t*).

In the case of a return to a royal commission, the document is not admissible unless signed and sealed by the Commissioners (*u*).

that name; compare *Newcastle (Duke) v. Broxtowe Hundred* (1832), 4 B. & Ad. 273, and *Doe d. Smith v. Cartwright* (1824), 1 C. & P. 218; *Johnson v. Thompson* (1850), 15 L. T. (o. s.) 437. For allowances of poor rate by justices, see Poor Rate Assessment and Collection Act, 1869 (32 & 33 Vict. c. 41), s. 18, and p. 541, *post*. Other examples are an inquisition under an order of the House of Commons as to fees payable in certain offices (*Green v. Hewett* (1793), Peake, 213, [182]); inquisition under the Exchequer seal as to seisin of lands (*Tooker v. Beaufort (Duke)* (1757), 1 Burr. 146).

(*e*) *Evans v. Merthyr Tydfil Urban Council*, [1899] 1 Ch. 241, C. A., distinguishing *Phillips v. Hudson* (1867), 2 Ch. App. 243; compare *R. v. Norfolk County Council* (1910), 26 T. L. R. 269, cited note (*n*), p. 532, *post*.

(*f*) Under the Valuation (Metropolis) Act, 1869 (32 & 33 Vict. c. 67), s. 45, valuation lists made under this Act are conclusive evidence for the purpose of certain rates, taxes, and qualifications.

(*g*) *Johnson v. Ward* (1806), 6 Esp. 47.

(*h*) *Roue v. Brenton* (1828), 8 B. & C. 737; *Newcastle (Duke) v. Broxtowe Hundred*, *supra*.

(*i*) *Irish Society (Governors etc.) v. Derry (Bishop)* (1846), 12 Cl. & Fin. 641, 11. L.

(*k*) *Sturla v. Freccia* (1880), 5 App. Cas. 623. *per* Lord BLACKBURN, at p. 646.

(*l*) *Irish Society (Governors etc.) v. Derry (Bishop)*, *supra*; *Graves (Lord) v. Fisher* (1834), 3 Cl. & Fin. 1, H. L.

(*m*) *Faulder v. Silk* (1811), 3 Camp. 126; *Prinsep and East India Co. v. Dyce Sombre* (1856), 10 Moo. P. C. C. 232.

(*n*) *Harvey v. R.*, [1901] A. C. 601, P. C.

(*o*) *E.g.*, the survey of 26 Hen. 8, 1534-5; *Bullen v. Michel* (1816), 2 Price, 399; *Graves (Lord) v. Fisher*, *supra*. In *Armstrong v. Hewitt* (1817), 4 Price, 216, a statement in this survey that the vicar was entitled to tithes was generally held not to supply the absence of proof of perception from the lands in question; compare *Drake v. Smyth* (1818), 5 Price, 369.

(*p*) *Freeman v. Read* (1863), 4 B. & S. 174, where the *de facto* authority of the Commonwealth Parliament appears to have been the ground on which the document was received; distinguish *Beaufort (Duke) v. Smith* (1849), 4 Exch. 430, where the document was rejected not because it was made under order of the Commonwealth Parliament, but because it was a private document being a survey of a manor and seignory granted by Parliament to Oliver Cromwell, see *per* PARKE, B., at p. 470.

(*q*) *Bullen v. Michel*, *supra*, where this survey was held admissible as to the rate and value at which the persons employed on it thought fit to estimate the living; compare *Drake v. Smyth*, *supra*.

(*r*) *Bullen v. Michel*, *supra*; this was only held admissible to prove contemporary reputation as to the value of the land in question.

(*s*) *Newcastle (Duke) v. Broxtowe Hundred*, *supra*.

(*t*) *Evans v. Rice* (1839), 10 Ad. & El. 151.

(*u*) *The Slane Peccage* (1835), 5 Cl. & Fin. 23, H. L.

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Other examples are provided by statements and reports made by persons in a public position (*a*) as to matters in which the public are interested, such as memoranda entered by a former vicar in an ancient parochial register (*b*), papers handed over to an incumbent by the representatives of his predecessor as papers belonging to the parish (*c*), answers by a clergyman to questions addressed by the bishop on the occasion of an augmentation by the Governors of Queen Anne's Bounty (*d*), ecclesiastical terriers (*e*), entries in books kept at the First Fruits Office (*f*), plans deposited by a railway company with a local authority in connection with a proposal to make a light railway (*g*).

But although the document may be properly of a public nature, it is not admissible to prove any facts therein stated which do not fall within the scope of the writer's authority (*h*).

Not evidence
of facts
outside the
scope of the
writer's
authority.

Moreover, documents falling under the present head are not necessarily admissible to prove the facts therein stated against all the world and for every purpose; whether or not this is so, must depend upon the nature of the document and the objects for which it was drawn up (*i*).

(*a*) Or having competent means of knowledge in the matter (*Wyner v. Wirrall Rural District Council* (1909), 73 J. P. 242).

(*b*) *Drake v. Smyth* (1818), 5 Price, 369.

(*c*) *Earl v. Lewis* (1801), 4 Esp. 1, where the boundary of the parish was the question in issue.

(*d*) *Curr v. Mostyn* (1850), 5 Exch. 69.

(*e*) *Drake v. Smyth*, *supra*; *R. v. Hall* (1866), L. R. 1 Q. B. 632. The terrier must be signed by parishioners or parish officers (*Earl v. Lewis*, *supra*).

(*f*) *Irish Society (Governor etc.) v. Derry (Bishop)* (1846), 12 Cl. & Fin. 641, H. L., where the entries were held admissible to show the fact of a collation to a living by the bishop at a particular time.

(*g*) *A.-G. v. Antrobus*, [1905] 2 Ch. 188, 192, where the question was whether a certain track was a public way; and plans were admitted to show that the company proposed to carry their line upon an embankment across it without making provision for continuing the alleged way.

(*h*) See *Nothard v. Pepper* (1864), 17 C. B. (N. S.) 39, in an action for damages by collision, examination of the master of the plaintiff's ship taken by the Receiver of Wrecks held not admissible for the purpose of proving that the damage done to the plaintiff's ship was on her port bow, the question which ship caused the damage not being one into which the receiver had authority to inquire. See also *A.-G. v. Antrobus*, *supra*, at p. 194. In *Jones v. White* (1717), 1 Stra. 68, it was left open whether a finding on a coroner's inquest that a suicide was insane is admissible (compare *R. v. Gregory* (1846), 15 L. J. (M. C.) 38); *Glossop v. Pole* (1814), 3 M. & S. 175 (action against a sheriff for a false return of *nulla bona*; inquisition as to goods taken under a *fi. fa.* and finding that they were property of a third person rejected as outside the scope of the sheriff's duty); compare *Leighton v. Leighton* (1720), 1 Stra. 308; *Lutkow v. Exner* (1795), 2 Hy. Bl. 437.

(*i*) *Wilberforce v. Hearfield* (1877), 5 Ch. D. 709, tithe commutation map rejected in a case of disputed ownership, *non obst.* s. 64 of the Tithe Act, 1836 (6 & 7 Will. 4, c. 71). "Tithe commutation maps were never intended by the legislature to be evidence as between two parties of their title to land," *per* JESSEL, M.R., at p. 710; distinguish *Giffard v. Williams* (1869), 38 L. J. (CH.) 597. See also *The Little Lizzie* (1870), L. R. 3 A. & B. 56 (Board of Trade inquiry as to negligence of a master under the Merchant Shipping Acts not admissible against the owners); *The Solway* (1885), 10 P. D. 137 (letter of master admissible against owners as evidence of facts stated but not of opinion); compare *Admiralty (Lords Commissioners) v. Aberdeen Steam Trawling and Fishing Co., Ltd.*, [1909] S. C. 335; *Coleman v. Kirkaldy*, [1882] W. N. 103 (ordnance

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Private documents not admissible under this head.

Ancient maps.

731. Where the document is of a private nature it is not admissible under this head (*k*). Some examples of documents which have been held to be private have already been given. The following may be added:—Books, pedigrees etc. drawn up by the College of Heralds otherwise than in the discharge of an official duty (*l*), a certificate by a customs house officer certifying the measurement and tonnage of a vessel (*m*), a report by the master of a foreign vessel made to customs house officers as to the burthen of his ship and the number of the crew (*n*), maps and plans prepared in the seventeenth century by direction of the Board of Ordnance (*o*), an old chart in possession of the Admiralty not shown to be an Admiralty chart (*o*), ancient private maps (*p*), a confidential report by a magistrate or other public person made under the direction of the Crown or the Executive (*q*), a report by a foreign Government on a question submitted to it as to the fitness of a person to be appointed as its diplomatic agent (*r*), a private survey of land (*s*), an old “collection of monumental inscriptions in country churches” (*t*).

The report of a public analyst is not admissible to prove the facts therein stated (*a*), nor are the returns of the Meteorological Office (*b*).

map inadmissible in case of disputed title); and compare *Hammond v. Bradstreet* (1851), 10 Exch. 390; *Frost v. Richardson* (1910), 103 L. T. 22 (title maps are not evidence, but a map annexed to an inclosure award may be evidence against an owner of land comprised in the award).

(*k*) It may be admissible under some other head, e.g., as a statement by a deceased person (see p. 463, *ante*), or as an admission (see p. 456, *ante*).

(*l*) *The Shrewsbury Peerage* (1858), 7 H. L. Cas. 1 (the documents rejected on this ground were (a) a book called “Arms and Descents of the Nobility 1516,” produced from the Heralds’ Office, and (b) a pedigree “touching the name and families of Talbots” in the handwriting of a former Garter King of Arms); see p. 533, *post*, for the special rules applicable in peerage cases.

(*m*) *Huntley v. Donovan* (1850), 15 Q. B. 96 (in neither case was there any public duty).

(*n*) *Mercer v. Denne*, [1904] 2 Ch. 534, 541; affirmed [1905] 2 Ch. 538, C. A. In *R. v. Norfolk County Council* (1910), 26 T. L. R. 269, JELF, J., admitted ancient maps purporting to have been made by “The King’s Geographer.”

(*o*) *Mercer v. Denne*, *supra*.

(*p*) *Hammond v. Bradstreet* (1854), 10 Exch. 390; and see p. 563, *post*, as to private maps.

(*q*) *Sturla v. Freccia* (1880), 5 App. Cas. 623, 644; compare *Polini v. Grey*, *Sturla v. Freccia* (1879), 12 Ch. D. 411, 428, C. A.

(*r*) *Sturla v. Freccia*, *supra*. *Quere* whether reports made by or by the direction of a foreign Government could in any event be admitted under this rule.

(*s*) *Daniel v. Wilkin* (1852), 7 Exch. 429 (document purporting to be a presentment by a jury of survey, but with no jurors’ signatures nor anything to show under what authority the survey was made). “The ground on which a survey made by officers of the Crown under a commission is received is, that it is presumed that they acted in accordance with their public duty, and have stated nothing in their inquisition or survey which is contrary to the fact. But no such presumption of truth attaches to a survey belonging to a private individual, although the presentment of a jury might be evidence of reputation” (*ibid.*, per PARKE, B., at p. 437).

(*t*) Held inadmissible to show what had been the inscription on a partly defaced tomb (*The Shrewsbury Peerage*, *supra*). For inscriptions, see, further, p. 564, *post*.

(*a*) *Shortt v. Robinson* (1899), 63 J. P. 295.

(*b*) *Burrows v. Bedford School Board* (1902), 18 T. L. R. 292.

In peerage cases special principles apply (c), and numerous documents have been admitted which are not strictly of a public nature (d), and would not be admitted in other cases (e).

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Documents.

Peerage cases

(iv.) Birth, Marriage, and Death Certificates.

(a) Of the Registrar-General of England.

732. A certified copy, purporting to be sealed or stamped with the seal of "The General Register Officer" for keeping a register of births, deaths, and marriages in England is to be received as evidence of the birth, death, or marriage to which the same relates, without any further or other proof of such entry (f). Every entry of a birth or a death must be signed by the informant (g); and in the case of a birth or death since 1874, must be signed by the superintendent registrar if the registration took place more than three but not more than twelve months after such birth or death, or must be made on the authority of the Registrar-General if the registration took place more than twelve months after such birth or death (h).

Certified copy of entry in register book admissible to prove facts therein stated.

A birth certificate of the Registrar-General proves the fact and date of birth (i), christian name and sex of person born, names of parents and rank or profession of father (k), and, where the Registrar-General thinks fit so to direct, the place of birth (l).

What a birth certificate proves.

A death certificate of the Registrar-General proves the fact (m) and date of death, the sex, age, rank or profession of the dead

What a death certificate proves.

(c) See *Polini v. Grey, Sturla v. Freccia* (1879), 12 Ch. D. 411, C. A., per JAMES, L.J., at p. 428.

(d) E.g., *The Shrewsbury Peerage* (1858), 7 H. L. Cas. 1, where a visitation was admitted purporting to have been taken by deputation from Clarenceux King of Arms, and also a record of a Royal Warrant of Precedence produced from the Herald's Office. In *The Slane Peerage* (1835), 5 Cl. & Fin. 23, 11 L. J., an old MS. book, purporting to be copied from contemporaneous Lords' Journals (which were not in existence) by an officer whose duty it was to prepare lists of peers present and absent was held admissible to prove that a peer had taken his seat.

(e) *Polini v. Grey, Sturla v. Freccia, supra*.

(f) Marriage Act, 1836 (6 & 7 Will. 4, c. 85); Births and Deaths Registration Act, 1836 (6 & 7 Will. 4, c. 86), s. 38; Births and Deaths Registration Act, 1874 (37 & 38 Vict. c. 88); Marriage Act, 1898 (61 & 62 Vict. c. 58), ss. 4, 7, 11; *R. v. Weaver* (1873), 1 L. R. 2 C. C. R. 85; *Hubbard v. Lees and Purden* (1866), 1 L. R. 1 Exch. 255; see also titles BURIAL AND CREMATION, Vol. III., p. 555; ECCLESIASTICAL LAW, Vol. XI., pp. 686, *et passim*; REGISTRATION OF BIRTHS, DEATHS, AND MARRIAGES.

(g) I.e., the person who, under the Acts, must give the information to the registrar; see the Births and Deaths Registration Act, 1836 (6 & 7 Will. 4, c. 86), ss. 20, 21, 25, 26; and as to the duty to notify in places where the Notification of Births Act, 1907 (7 Edw. 7, c. 40), is adopted, see that Act.

(h) Births and Deaths Registration Act, 1836 (6 & 7 Will. 4, c. 86), s. 27; Births and Deaths Registration Act, 1874 (37 & 38 Vict. c. 88), s. 38.

(i) *Wilton & Co. v. Phillips* (1903), 19 T. L. R. 390; *In the Estate of Goodrich, Payne v. Bennett*, [1904] P. 138, disapproving *Re Wintle* (1870), 1 L. R. 9 Eq. 373.

(k) Births and Deaths Registration Act, 1836 (6 & 7 Will. 4), c. 86, Sched. A.

(l) Births and Deaths Registration Act, 1837 (7 Will. 4 & 1 Vict. c. 22), s. 8.

(m) *Parkinson v. Francis* (1846), 15 Sim. 160; *Trail v. Kibblewhite* (1846), 10 Jur. 107; *Riseley v. Shepherd* (1873), 21 W. R. 782; *Re Valter's Trust*, [1887] W. N. 128.

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Documents.

What a
marriage
certificate
proves.

person and the cause of death (*n*), and, where the Registrar-General thinks fit so to direct, the place of death (*o*).

A marriage certificate of the Registrar-General proves the fact (*p*) and date of the celebration of the marriage, the name, age or non-age, condition, rank or profession, and residence of the parties, and the name and rank or profession of the father of each party (*q*).

An extract from a register of births, deaths, or marriages, if purporting to be signed by the officer to whose custody the original is intrusted, is evidence on its mere production (*r*).

(b) *Foreign Registers.*

Foreign and
colonial
registers.

May be
proved by
copy.

733. At common law, foreign registers (including in that term those of Scotland, Ireland, and the Channel Islands) and colonial registers, are admissible in English courts to prove the facts stated therein, provided they are required to be kept by the law of the country to which they belong or by English law. When the registers are themselves admissible in evidence, certified and examined copies (*s*) of entries therein are also admissible (*t*).

(*n*) Births and Deaths Registration Act, 1836 (6 & 7 Will. 4, c. 86), Sched. B.

(*o*) Births and Deaths Registration Act, 1837 (7 Will. 4 & 1 Vict. c. 22), s. 8. For cases in which an entry or certified copy of an entry of a birth or death in a register of such birth or death is admissible in evidence, see Births and Deaths Registration Act, 1874 (37 & 38 Vict. c. 88), s. 38.

(*p*) *R. v. Hawes* (1847), 1 Den. 270.

(*q*) Births and Deaths Registration Act, 1836 (6 & 7 Will. 4, c. 86), Sched. C.

(*r*) Evidence Act, 1851 (14 & 15 Vict. c. 99), s. 14; *R. v. Weaver* (1873), L. R. 2 C. C. R. 85.

(*s*) As to examined copies, see p. 524, *ante*. A certified copy must be certified by the officer to whose custody the original is intrusted.

(*t*) *Lyell v. Kennedy, Kennedy v. Lyell* (1889), 14 App. Cas. 437, *per* Lord SELBORNE, at p. 448: "Foreign registers, or certified extracts from them, are receivable in evidence as to those matters which are properly and regularly recorded in them when it sufficiently appears that they have been kept under the sanction of public authority and are recognised by the tribunals of the country where they are kept as authentic records." In the following cases foreign or colonial registers, or extracts from them duly certified by the officials to whose custody the originals were intrusted, were admitted in evidence:—*Alsop v. Bowtell* (1619), Cro. Jac. 541 (certificate of marriage under seal of minister at Utrecht); *Roscommon's (Earl) Claim* (1828), 6 Cl. & Fin. 97, 105, H. L. (copies of registers kept at churches in Ireland); *The Vaux Peerage* (1837), 5 Cl. & Fin. 526, H. L. (funeral certificate contained in book entitled "Funeral Certificates of the Nobility," preserved in the Herald's College); *Mulligan v. Mitchell* (1837), 3 My. & Cr. 72 (extract from minute book of a Scotch chapel); *Cood (otherwise Cooce) v. Cood (otherwise Cooce)* (1838), 1 Curt. 755 (copy of entry in marriage register at Barbados); *O'Connor v. Malone* (1839), 6 Cl. & Fin. 572, 576, H. L.; *Malone v. L'Estrange* (1839), 2 I. Eq. R. 16 (entries of marriages in books kept at Roman Catholic chapels in Dublin); *The Perth Earldom* (1848), 2 H. L. Cas. 865 (copies of French registers); *Re Forbes* (1852), 1 W. R. 32 (extract from register kept at consulate of Madeira); *Ratcliff v. Ratcliff and Anderson* (1859), 1 Sw. & Tr. 467 (authenticated copy of entry in marriage register in India); *Abbott v. Abbott and Godoy* (1860), 29 L. J. (P. M. & A.) 57 (extract from marriage register in Chili); *Evans v. Ball* (1878), 38 L. T. 141 (copy of register in Nova Scotia); *The Lauderdale Peerage* (1886), 10 App. Cas. 692, 698 (marriage register kept at church in New York); *Burnaby v. Baillie* (1889), 42 Ch. D. 282 (examined copy of entry in French register of births); *Wallace v. Wallace* (1896), 74 L. T. 253 (certified copy of entry in marriage register kept at a church in Dublin).

In the following cases foreign or colonial registers or extracts from them duly certified by the officials to whose custody the originals were intrusted were not

Various Acts have, however, been passed by the legislature with provisions similar to those of the Births and Deaths Registration Acts, 1836 and 1874, to provide for the better registration of births, marriages and deaths, and to enable foreign and colonial registers and copies thereof to be admissible in evidence. In the case of births, marriages and deaths in Scotland, certified copies, stamped with the seal of the General Register Office in Edinburgh, of entries in certified copy register-books, kept in that office, are admissible in evidence, to prove the facts stated in such entries (*u*). Similar provisions have been made with regard to the registration of births, deaths and marriages in Ireland (*w*), and of births and deaths on board His Majesty's ships (*x*), British ships (*a*), and foreign ships carrying passengers to or from any port in the United Kingdom (*b*), and of any records made in regimental books in pursuance of military duty (*c*). Provisions have also been made for admitting in evidence certified copies of the transcripts delivered to the General Register Office in London of registers of marriages of Christians in India (*d*), and in the Ionian Islands (*e*). Lastly,

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Scotland.

Ireland.

British ships.

India and
abroad.

admitted in evidence:—*Huet v. Le Mesurier* (1786), 1 Cox, Eq. Cas. 275 (copy of register of baptism from Guernsey); *Leader v. Barry* (1795), 1 Esp. 353 (examined copy of entry in marriage register kept at chapel of Swedish ambassador in Paris); *Conway* (otherwise *Beazley*) *v. Beazley* (1831), 3 Hag. Ecc. 639, 651 (copies of entries in marriage register kept at episcopal chapel in Edinburgh); *Athlone's (Earl) Claim* (1841), 8 Cl. & Fin. 262, 11 L. (attested copy of entry in marriage register kept at hotel of British ambassador in Paris); *Dufferin and Clanboye's (Lord) Claim* (1848), 2 H. L. Cas. 47 (certificate of baptism from the chaplain of the British ambassador at Florence); *Ennis v. Carroll* (1868), 17 W. R. 341 (entries in register kept at Roman Catholic chapel in Ireland). These registers of course only prove the fact of marriage, not its validity. As to the validity of marriage celebrated abroad, see title CONFLICT OF LAWS, Vol. VI., pp. 252 *et seq.*

(*u*) Registration of Births, Deaths and Marriages (Scotland) Acts, 1854 (17 & 18 Vict. c. 80), 1855 (18 & 19 Vict. c. 29), and 1860 (23 & 24 Vict. c. 85); Marriage (Scotland) Act, 1856 (19 & 20 Vict. c. 96), s. 2; and see *Wigley v. Treasury Solicitor*, [1902] P. 233; *Lyell v. Kennedy*, *Kennedy v. Lyell* (1889), 14 App. Cas. 437. As the Evidence Act, 1845 (8 & 9 Vict. c. 113), does not extend to Scotland (*ibid.*, s. 5), it is apparently still necessary to prove the signature and official character of the person signing the extract.

(*w*) Marriages (Ireland) Act, 1844 (7 & 8 Vict. c. 81); Marriage Law (Ireland) Amendment Acts, 1863 (26 & 27 Vict. c. 27), and 1873 (36 & 37 Vict. c. 16); Matrimonial Causes and Marriage Law (Ireland) Amendment Act, 1870 (33 & 34 Vict. c. 110); and see *Whitton v. Whitton* (1900), 69 L. J. (P.) 126.

(*x*) Births and Death Registration Act, 1874 (37 & 38 Vict. c. 88), s. 37.

(*a*) Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), s. 254.

(*b*) *Ibid.*, ss. 254, 339.

(*c*) A record purporting to be signed by the commanding officer is evidence of the facts stated, and a copy certified by the person having the custody is evidence of the record (Army Act, 1881 (44 & 45 Vict. c. 58), s. 163 (1) (g), (h)); and see *Adams v. Adams*, [1900] W. N. 32, and *Gleen v. Gleen* (1900), 17 T. L. R. 62.

(*d*) Indian Christian Marriage Act, 1872 (Indian Act XV. of 1872). And see *Queen's Proctor v. Fry* (1879), 48 L. J. (P.) 68; *Regan v. Regan* (1892), 67 L. T. 720; *Westmacott v. Westmacott*, [1899] P. 183; *De Gruyther v. De Gruyther* (1900), *Times*, 2nd November. The copies are certified by the person intrusted under the Indian Christian Marriage Act, 1872 (Act XV. of 1872), with the custody of any marriage or certificate in duplicate required to be kept or delivered under that Act (Indian Christian Marriage Act, 1872 (Act XV. of 1872), s. 80).

(*e*) Ionian Isles Marriage Act, 1860 (23 & 24 Vict. c. 86), s. 4. The copies were

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provision has been made for the registration of marriages of British subjects, celebrated anywhere abroad by marriage officers (*f*). Duplicate registers are kept, and one of them when filled up must be forwarded to the General Register Office in London (*g*). The provisions of the Births and Deaths Registration Acts, 1836 and 1874, with regard to certified copies are made applicable to this Act (*h*).

(*v.*) *Parish and other Registers and Records of Baptisms, Marriages, and Burials.*

Parish
registers.

734. Parish registers (*i*), being public documents, are admissible in evidence to prove the facts stated therein, on their mere production from proper custody (*k*). Even at common law, duly certified copies of entries therein were receivable in evidence without the production of the registers themselves (*l*); and it has been enacted by statute that where any document is of such a public nature as to be admissible in evidence on its mere production from proper custody, any copy or extract therefrom, either proved to be an examined copy or extract or purporting to be signed and certified as a true copy or extract by the officer having the custody of the original, is admissible in proof of the contents of such document (*m*).

to be certified under the hand of the Lord High Commissioner of the Ionian Islands; but see stat. (1864) 27 & 28 Vict. c. 77, ss. 7, 8, by which the copies were to be certified under the signature and official seal of the Secretary of the Lord High Commissioner.

(*f*) Foreign Marriage Act, 1892 (55 & 56 Vict. c. 23), which repeals the Consular Marriage Acts, 1849 (12 & 13 Vict. c. 68) and 1868 (31 & 32 Vict. c. 61); Marriage Act, 1890 (53 & 54 Vict. c. 47). For definition of marriage officer, see Foreign Marriage Act, 1892 (55 & 56 Vict. c. 23), s. 11.

(*g*) *Ibid.*, ss. 9, 10.

(*h*) *Ibid.*, s. 17.

(*i*) On the subject of parish registers in general, see Burn's History of Parish Registers.

(*k*) 70th Canon of 1603; Parochial Registers Act, 1812 (52 Geo. 3, c. 146); *Sturla v. Freccia* (1880), 5 App. Cas. 623, *per* Lord BLACKBURN, at p. 644: "In many cases entries in the parish register of births, marriages, and deaths, and other entries of that kind, before there were any statutes relating to them, were admissible, and they were 'public' then, because the Common Law of England making it an express duty to keep the register, made it a public document in that sense kept by a public officer for the purpose of a register, and so made it admissible." The principle appears to be the same as that governing documents falling under Sub-Sect. (iii.), *ante*.

(*l*) *Lynch v. Clerke* (1696), 3 Salk. 154; *Birt v. Farlow* (1779), 1 Doug. (κ. B.) 171, 174; Philipps and Amos on Evidence, 8th ed., p. 638. It would seem that in English peerage claims, and apparently in Scotch peerage claims also (see *Marchmont Peerage Case*, 1822), the House of Lords would not receive copies of registers, but required the original registers themselves to be produced (*Roscommon's (Earl) Claim* (1828), 6 Cl. & Fin. 97, 105, H. L. As to examined copies, see p. 524, *ante*.

(*m*) Evidence Act, 1851 (14 & 15 Vict. c. 99), s. 14; and see *Re Hall's Estate* (1832), 22 L. J. (CH.) 177, C. A. (wrongly reported in 2 De G. M. & G. 748); *Re Porter's Trusts* (1856), 25 L. J. (CH.) 688. It is not clear whether the official copy of the parish register, deposited in the registry of the diocese, under the 70th Canon, is to be deemed an original public document so as to render it, or copies of it, admissible without proof of the loss or destruction of the original parish register (*Walker v. Beauchamp (Countess)* (1834), 6 C. & P. 552, *per* ALDERSON, B., at p. 558). In *Doe d. Wood v. Wilkins* (1846), 2 Car. & Kir. 328, on proof

The registers must be kept in proper custody (n), and an examined copy of an entry in a register-book, which is in the custody of an unauthorised person, will not be receivable in evidence unless such custody is reasonably accounted for (o). Facts stated in such registers must have been properly and regularly recorded therein by the person whose duty it is to make such entries (p).

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735. A register of baptism proves the baptism according to the rites of the Church of England, the date thereof, the Christian name of the child (q) and the names of the parents (r); and in the case of baptisms since 1812, is evidence of the abode and quality, trade or profession, of the parents (s).

What a
register of
baptism
proves.

It is not *per se* evidence of the date of birth (t) nor of the place of birth (a).

It may, however, be presumptive evidence of the place of birth, to be taken in conjunction with other facts—where, for example, it is shown by evidence *dehors* that the child was extremely young when baptised (b).

736. A register of marriage proves the fact and date of the celebration of the marriage in a parish or chapel according to the rites of the Church of England before March 2nd, 1837, and the names of the parties married (c).

What a
register of
marriage
proves.

that there were no parish registers in existence earlier than a certain date, transcripts filed pursuant to Canon 70 in the diocesan registry were admitted in evidence.

(n) Parochial Registers Act, 1812 (52 Geo. 3, c. 146), s. 5.

(o) *Doe d. Arundel (Lord) v. Fowler* (1850), 14 Q. B. 700. As to "proper custody," see pp. 505, 512, *ante*.

(p) *Walker v. Wingfield* (1812), 18 Ves. 443; *Doe d. Warren v. Bray* (1828), 8 B. & C. 813; *Lyell v. Kennedy* (1887), 56 L. T. 647, C. A. But see *Bidder v. Bridges* (1885), 54 L. T. 529, where an entry made 438 years after the happening of the fact recorded was admitted in evidence, *quantum valeat*, in proof of such fact.

(q) *Webb v. Haycock* (1854), 19 Boav. 342.

(r) 70th Canon of 1603.

(s) Parochial Registers Act, 1812 (52 Geo. 3, c. 146), Sched. A.

(t) *Robinson v. Buccleuch and Queensberry (Duke)* (1887), 3 T. L. R. 472, C. A.; *Wißen v. Law* (1821), 3 Stark. 63; *R. v. Clapham* (1829), 4 C. & P. 29; *Burghart v. Angerstein* (1834), 6 C. & P. 690. In *Morris v. Davies* (1828), 1 Mood. & R. 271, n. (b); *Cope v. Cope* (1833), 1 Mood. & R. 269; and *Thruswell v. Barker* (1868), 17 L. T. 665, entries describing the party as legitimate or illegitimate were admitted as evidence of reputation in the village; and in *Re Turner, Glenister v. Harding* (1885), 29 Ch. D. 985, CHITTY, J., considering himself bound by the two former decisions, admitted an entry of the date of birth of a child as evidence, *quantum valeat*, upon an inquiry as to the legitimacy of the child in question. In view of the decision in *Robinson v. Buccleuch and Queensberry (Duke)*, *supra* in the Court of Appeal, this view can no longer be sustained; see also the Irish case of *Ryan v. Ring* (1889), 25 L. R. Ir. 184; a baptismal certificate verified by a person interested in settled funds has been admitted as evidence that he had attained twenty-one years (*Re Bulley's Settlement*, [1886] W. N. 80).

(a) *R. v. North Petherton* (1826), 5 B. & C. 508.

(b) *R. v. North Petherton*, *supra*; *R. v. Birmingham (Inhabitants)*, called also *R. v. Aston (Inhabitants)* (1829), 8 L. J. (o. s.) (M. C.) 41; *R. v. St. Katherine (Parish or Precinct)* (1831), 5 B. & Ad. 970, n. (a); *R. v. Lubbenham (Inhabitants)* (1834), 5 B. & Ad. 968; *R. v. Crediton (Inhabitants)* (1858), E. B. & E. 231.

(c) 70th Canon of 1603. *Doe d. Wollaston v. Barnes* (1834), 1 Mood. & R. 386;

SECT. 2.

Proof of
Contents of
Documents.

An entry of marriage is receivable as evidence of the marriage, although such entry is only attested by one witness (*d*); and an extract from a register of marriages, which states that a certain marriage has been celebrated by special licence from the Archbishop, is admissible as evidence of such marriage, though the licence itself is not produced (*e*).

What a
register
of burials
proves.

Non-
parochial
registers.

737. A register of burials proves the fact and date of burial, and the name, address, and age of the person buried (*f*).

738. At common law, non-parochial registers, or duly certified extracts from them, are admissible in evidence, if they come under the heading of public documents (*g*). For example, a bishop's register or a duly certified extract from it, when produced from proper custody, is admissible as evidence of the facts properly and regularly recorded therein (*h*).

What
registers are
inadmissible.

Where, however, a register is not one which the law requires to be kept for the public benefit, neither the original nor extracts from it are admissible in evidence—for example, registers kept at dissenting chapels (*i*) or the registers of marriage kept at the Fleet and King's Bench prisons and at the May-Fair, Mint, and Savoy chapels (*k*).

Doe d. Jenkins v. Davies (1847), 10 Q. B. 314. In an old case, *Draycott v. Taihot* (1718), 3 Bro. Parl. Cas. 564, it was held that the entries of the names and titles of the persons married is not positive evidence of the marriage if there is other evidence showing the improbability of the correctness of such entries. As to proof of identity, see *Sayer v. Glossop* (1848), 2 Exch. 409; *Bain v. Mason* (1824), 1 C. & P. 202.

(*d*) *Doe d. Blayney v. Savage* (1814), 1 Car. & Kir. 487. Stat. (1753) 26 Geo. 2, c. 33, s. 15, since repealed by the Marriage Act, 1823 (4 Geo. 4, c. 76), s. 1, enacted that entries in the registers of marriages shall be attested by two witnesses.

(*e*) *Doe d. Egremont (Earl) v. Grazebrook* (1843), 3 Gal. & Dav. 334.

(*f*) 70th Canon of 1603; Parochial Registers Act, 1812 (52 Geo. 3, c. 146); Cemeteries Clauses Act, 1847 (10 & 11 Vict. c. 65), ss. 32, 33; Burial Act, 1853 (16 & 17 Vict. c. 134); Burial Act, 1854 (17 & 18 Vict. c. 87); Burial Act, 1857 (20 & 21 Vict. c. 81); Registration of Burials Act, 1864 (27 & 28 Vict. c. 97); and see *Doe d. France v. Andrews* (1850), 15 Q. B. 756.

(*g*) *Lynch v. Clerke* (1696), 3 Salk. 154; *Birt v. Barlow* (1779), 1 Doug. (K. B.) 171, 174.

(*h*) *Humble v. Hunt* (1817), Holt (N. P.), 601; *Arnold v. Bath and Wells (Bishop)* (1829), 5 Bing. 316; *Hartley v. Cook* (1832), 5 C. & P. 441. And see *Bullen v. Michel* (1816), 2 Price, 399, II. L., where ancient entries made by the monks in a register-book kept at the abbey were admitted as evidence of the facts stated therein. As to proper custody see pp. 505, 512, *ante*.

(*i*) *Newham v. Ruithby* (1811), 1 Phillim. 315; *Ex parte Taylor* (1820), 1 Jac. & W. 483; *Whittuck v. Waters* (1830), 4 C. & P. 375; and see *Davis v. Lloyd* (1844), 1 Car. & Kir. 275 (entry, in the handwriting of the chief rabbi, in a register of circumcision); *D'Aglié v. Fryer* (1844), 13 L. J. (Ct.) 398 (certified copy of register of baptism kept at the chapel of the Sardinian ambassador in London).

(*k*) See Burn's History of Fleet Marriages, pp. 127–36; *Morris v. Miller* (1767), 4 Burr. 2057; *Reed v. Passer* (1795), Peake, 303 [231]; *Lloyd v. Passingham* (1809), 16 Ves. 59; *Doe d. Davies v. Gatacre* (1838), 8 C. & P. 578. In *Laurance v. Dixon* (1792), Peake, 185, and *Doe d. Orrel v. Madox* (1794), 1 Esp. 197, although Lord KENYON admitted Fleet registers to prove certain marriages, he declared that he did so only because other judges had admitted them; and in the later cases of *Reed v. Passer*, *supra*, and *Doe d. Davies v. Gatacre*

Certain non-parochial registers, inadmissible at common law, have, however, been made admissible by statute, to prove the facts stated therein (*l*). Only those registers actually deposited with the Registrar-General in accordance with the statutes are admissible (*m*), and it is expressly enacted that those registers which were deposited in the registry of the Bishop of London in 1821—for example, those of the Fleet and King's Bench prisons—although transferred to the custody of the Registrar-General, shall not be made evidence (*n*).

Extracts sealed or stamped with the seal of the General Registry Office are receivable in evidence in all civil cases (*o*), but in criminal cases the original registers themselves must be produced (*p*).

SECT. 2.
Proof of
Contents of
Documents.

Non-
parochial
registers
made
admissible
by statute.

(vi.) *Other Registers.*

739. Such registers as are kept pursuant to statute for the purpose of registering facts relating to different descriptions of property or rights are dealt with under their appropriate titles, such as the registers relating to companies (*q*), copyright (*r*), designs (*s*), patents (*t*), money-lenders (*u*), ships (*a*), land (*b*), trade marks (*c*) etc.

Other
registers.

(vii.) *Court Rolls.*

740. Court rolls are in general only admissible in evidence for or against the lord or tenants of the manor (*d*), but they may also be admissible for or against the whole world when they form declarations by deceased persons as to public rights (*e*) or against interest (*f*).

Court rolls
admissible
as between
lord and
tenant.

(1838), 8 C. & P. 578, he refused to receive them in evidence for any purpose whatsoever, because they came from tainted quarters (*Reed v. Passer* (1795), Peake, 303 [231], 305).

(*l*) Non-parochial Registers Act, 1840 (3 & 4 Vict. c. 92); Births and Deaths Registration Act, 1858 (21 & 22 Vict. c. 25), ss. 1—3. A full account of these registers will be found in the reports made in 1837 and 1858 by commissioners appointed to inquire into non-parochial registers. For a list of registers made evidence under the former Act, see 9 C. & P. 793.

(*m*) Non-parochial Registers Act, 1840 (3 & 4 Vict. c. 92), ss. 2, 6.

(*n*) *Ibid.*, s. 20.

(*o*) *Ibid.*, s. 9.

(*p*) *Ibid.*, s. 17.

(*q*) See title COMPANIES, Vol. V., pp. 151, 695.

(*r*) See title COPYRIGHT AND LITERARY PROPERTY, Vol. VIII., pp. 152—157.

(*s*) See title PATENTS AND DESIGNS.

(*t*) *Ibid.*

(*u*) See title MONEY AND MONEY-LENDING.

(*a*) See title SHIPPING AND NAVIGATION.

(*b*) See title REAL PROPERTY AND CHATELS REAL.

(*c*) See title TRADE MARKS.

(*d*) *A.-G. v. Hotham (Lord)* (1823), Turn. & R. 209; *Portland (Duke) v. Hill* (1866), L. R. 2 Eq. 765; *Heath v. Deane*, [1905] 2 Ch. 86, 91; compare *Rowe v. Brenton* (1828), 8 B. & C. 737.

(*e*) *Evans v. Rees* (1839), 10 Ad. & El. 151; compare *Richards v. Bassett* (1830), 10 B. & C. 657 (presentment of manor jury produced from court rolls). But the presentment must be of a matter which the jurors are entitled to determine, and not, e.g., as to a claim made by an individual to the freehold (*ibid.*).

(*f*) *Crease v. Barrett* (1835), 1 Cr. M. & R. 919. As to declarations by deceased persons, see p. 463, *ante*.

SECT. 2.

Proof of
Contents of
Documents.Entries of
customs.

Court rolls are also in some circumstances (but not where the entry was made *post litem motam* (g)) admissible as evidence of reputation (h), and also as acts of ownership (i).

An entry of a custom on the court rolls is admissible without proof that the custom has been acted upon except so far as may be necessary to explain the particular application of the custom when it is stated in general terms (k), while the existence of a customary of the manor compiled since the beginning of legal memory is conclusive evidence against the existence of any custom not mentioned therein (l).

Court rolls containing descriptions of the tenant's holding and the amount of rent paid are evidence of those facts in an action between the lord and his tenant (m).

Other
manorial
documents

741. On the same principle as court rolls the following documents have been admitted:—"Call books" of a manor (n), ancient customaries of a manor delivered together with the court rolls from steward to steward (o), parchment writings preserved among the manor muniments purporting to be signed by copyholders agreeing to restrict their commonable rights (p), and the draft of an entry produced from the manor muniments, no entry having been made on the court rolls (q).

But a book in which the steward had entered the fines assessed was rejected, although it had been handed down from steward to steward and was accessible to all the tenants (r); and an ancient document produced from the lord's muniments, and purporting to be a survey of the manor lands by certain tenants who stated that

(g) *Richards v. Bassett* (1830), 10 B. & C. 657.

(h) *Chapman v. Cowlan* (1810), 13 East, 10; *Coote v. Ford* (1900), 17 T. L. R. 68; compare *Johnstone v. Spencer (Earl)* (1885), 30 Ch. D. 581, 589; *Re Walton-Trimley Manor, Ex parte Tomline* (1873), 21 W. R. 475.

(i) *A.-G. v. Emerson*, [1891] A. C. 649, 658 (*semble*, they must be coupled with evidence of user within legal memory (*ibid.*)); and compare *Woolway v. Rowe* (1834), 1 Ad. & El. 114, where a perambulation of the manor by the lord was admitted as an act of ownership by the lord over lands comprised therein, and *Rogers v. Allen* (1808), 1 Camp. 309, where to prove a prescriptive right of fishing entries on the court rolls of old licences granted by the lord of the manor were admitted as acts of ownership by the lord.

(k) *Roe d. Breebe v. Parker* (1792), 5 Term Rep. 26; compare *Doe d. Goodwin v. Spray* (1786), 1 Term Rep. 466; *Doe d. Askeu v. Askeu* (1809), 10 East, 520. The true view, apparently, is that the absence of such proof goes to the weight and not to the admissibility of the evidence (compare *Rogers v. Allen*, *supra*).

(l) *Portland (Duke) v. Hill* (1866), L. R. 2 Eq. 765.

(m) *Folyambe v. John Smith's Tadcaster Brewery Co.* (1904), 91 L. T. 312.

(n) *Ibid.*

(o) *Denn d. Goodwin v. Spray* (1786), 1 Term Rep. 466. The same instrument was admitted in *Portland (Duke) v. Hill*, *supra*, at p. 767; compare *Johnstone v. Spencer (Earl)* (1885), 30 Ch. D. 581.

(p) *Chapman v. Cowlan* (1810), 13 East, 10.

(q) *Doe d. Priestley v. Calloway* (1827), 6 B. & C. 484.

(r) *Ely (Dean and Chapter) v. Caldecott* (1831), 7 Bing. 433. In *Hill v. Wiggitt* (1706), 2 Vern. 547, an entry in the steward's book was admitted to contradict an entry on the rolls.

the lord was entitled to wreck, was not admitted as evidence of such right (*s*).

SECT. 2.

Proof of
Contents of
Documents.

How court
rolls are
proved.

742. Court rolls are proved by production of the original or of an examined copy (*t*); and copies of court roll authenticated by the steward are admissible although they are not the copies delivered to the tenant (*a*).

Where the admittance of a copyholder is of thirty years' standing, a copy of such admittance may be read although it is not signed by the steward (*h*).

A surrender duly made and presented, of which no entry was made upon the court rolls, may be proved by the draft of an entry produced from the muniments of the manor (*c*).

(viii.) *Rate Books, Revenue Books, Log Books, Lighthouse Journals.*

743. Books purporting to contain poor rates, with the allowance of the rate by the justices, are *prima facie* evidence of the due making and publication of such rates (*d*).

Rate books.

Entries of the names of tenants in parish rate books are admissible, if the books are brought from the proper custody, to prove who was the owner or occupier of the property rated at the time when the assessment was made (*e*).

As evidence
of ownership.

The gross estimated rental fixed by the assessment committee cannot be altered at their instance on an appeal to quarter sessions (*f*).

Revenue books are documents of a public nature (*g*), and, as such, are admissible in proof of the facts therein stated (*h*), if such facts are within the scope of the object for which the books are kept (*i*).

Revenue
books.

The log book of a man-of-war is admissible to prove the facts therein stated (*k*).

Log book
of man-of-
war.

(*s*) *Talbot v. Lewis* (1834), 4 L. J. (EX.) 9. This document could not be admitted as a public survey, as it was eminently of a private nature; as to public surveys, see p. 527, *ante*.

(*t*) *Doe d. Croydon (Churchwardens) v. Cook* (1805), 5 Esp. 221; *Doe d. Burrows v. Freeman* (1814), 12 M. & W. 844. As to stamps, see Stamp Act, 1891 (54 & 55 Vict. c. 39), s. 65, and title REVENUE.

(*a*) *Breeze v. Hawker* (1844), 14 Sim. 350.

(*b*) *Ely (Dean and Chapter) v. Stewart* (1740), 2 Atk. 44.

(*c*) *Doe d. Priestley v. Calloway* (1827), 6 B. & C. 484.

(*d*) Poor Rate Assessment and Collection Act, 1869 (32 & 33 Vict. c. 41), s. 18. The rates must be made in the proper form; see title RATES AND RATING.

(*e*) *Smith v. Andrews*, [1891] 2 Ch. 678; *Blount v. Layard* (1888), [1891] 2 Ch. 681, n., O. A. As to proper custody, see pp. 505, 512, *ante*.

(*f*) *Horton & Son v. Walsall Assessment Committee*, [1898] 2 Q. B. 237.

(*g*) See title REVENUE.

(*h*) *R. v. Grimwood* (1815), 1 Price, 369 (excise books); *Dunbar v. Harvie* (1820), 2 Bli. 351, H. L. (excise books); compare *Ellis v. Watson* (1818), 2 Stark. 453 (customs house books); *Harrison v. Dorwell* (1839), 10 Sim. 380 (stamp office books).

(*i*) *Strother v. Willan* (1814), 4 Camp. 24, where the entry in the office at Somerset House for licensing stage coaches was not admitted to prove the ownership of a coach. Compare *Weaver v. Prentice and Pratt* (1795), 1 Esp. 369.

(*k*) *D'Israeli v. Jowett* (1795), 1 Esp. 427, where the log book of a man-of-war was admitted to prove the time of sailing of a ship convoyed by her. See also

SECT. 2.

Proof of
Contents of
Documents.Log books
of merchant-
men.Lighthouse
journals.

The log books of merchant vessels are in general inadmissible (*l*), except as admissions (*m*), or as containing entries by a deceased person made in the course of duty (*n*), but a witness may look at a log book to refresh his memory, although it was not written by himself, provided that he was in the habit of regularly examining it (*o*).

In the Admiralty Court, lighthouse journals are admissible as public records in evidence of the facts therein stated (*p*).

(ix.) *Judicial Proceedings.*(a) *When and how admissible (q).*

Judgments.

Judgments
in rem in
general
conclusive
against the
whole world.

744. Every judgment (*r*) is conclusive proof as against all the world of the existence of such judgment, its date, and legal consequences (*s*); and, where an action is brought against a person for acts done in a judicial capacity, is conclusive proof in favour of such person of the truth of the facts therein stated (*t*). A judgment in rem (*a*) is conclusive proof not only as against parties and privies, but also as against strangers, of the truth of the facts actually decided (*b*), unless (1) the judgment is founded on evidence which would be inadmissible in the action in which such judgment is intended to be proved (*c*); (2) the judgment has been obtained by fraud, collusion, or forgery (*d*); or (3) the court which gave it had no jurisdiction (*e*).

Judgments
in personam
in general

A judgment in personam (*f*) is conclusive proof as against parties

Watson v. King (1815), 4 Camp. 272, where, besides the log book, the captain's official letter to the Admiralty at the end of the ship's voyage was admitted.

(*l*) *Rundle v. Beaumont* (1828), 4 Bing. 537; *The Singapore and the Hebe* (1866), L. R. 1 P. C. 378, 382; compare *The Sociedade Feliz* (1842), 1 Wm. Rob. 303, 311.

(*m*) *The Singapore and the Hebe*, *supra*; *The Earl of Dumfries* (1885), 10 P. D. 31; and see p. 456, *ante*, as to admissions.

(*n*) See, as to such entries, p. 464, *ante*; *The Henry Coron* (1878), 3 P. D. 156.

(*o*) *Watson v. King* (1815), 4 Camp. 272; *The Singapore and the Hebe*, *supra*; and see title SHIPPING AND NAVIGATION.

(*p*) *The Maria das Dórias* (1863), 32 L. J. (P. M. & A.) 163. *Scemle*, they are not so admissible in other courts (*ibid.*). In any event, it is conceived, they are only admissible to prove such facts as it was the duty of the person keeping them to record.

(*q*) See pp. 325 *et seq.*, *ante*. The question of estoppel by record will be found fully dealt with under title ESTOPPEL, p. 325, *ante*.

(*r*) *I.e.*, every final judgment. A judgment is final though an appeal is pending (*Scott v. Pilkington* (1862), 2 B. & S. 11; and see title ESTOPPEL, p. 326, *ante*). As to the effect of judgments of foreign courts, see title CONFLICT OF LAWS, Vol. VI., pp. 281 *et seq.*

(*s*) *Green v. New River Co.* (1792), 4 Term Rep. 589; *Parcell v. Macnamara* (1808), 9 East, 361; *Legatt v. Tollervey* (1811), 14 East, 302.

(*t*) *Brittain v. Kinnaird* (1819), 1 Brod. & Bing. 432.

(*a*) See title ESTOPPEL, p. 327, *ante*.

(*b*) *R. v. Kenilworth (Inhabitants)* (1788), 2 Term Rep. 598; *Geyer v. Aguilar* (1798), 7 Term Rep. 681; *Simpson v. Fogo* (1860), 1 John. & H. 18, 24; *Castrique v. Imrie* (1860), 8 W. R. 344, 347.

(*c*) *Stoate v. Stoate* (1861), 30 L. J. (P. M. & A.) 102.

(*d*) *Priestman v. Thomas* (1884), 9 P. D. 210, C. A.; *Wyatt v. Palmer*, [1899] 2 Q. B. 106, C. A.

(*e*) *R. v. Hutchings* (1881), 6 Q. B. D. 300, C. A.; *Wakefield Corporation v. Cooke*, [1904] A. C. 31; and see title ESTOPPEL, p. 353, *ante*.

(*f*) See title ESTOPPEL, p. 330, *ante*.

and privies of the truth of the facts upon which such judgment is based (*g*), but, excepting as above stated to prove its existence, date, and consequences, it is inadmissible in evidence as against strangers, except (1) where it determines a question of public right and is admissible as evidence of reputation (*h*); (2) in bankruptcy or administration proceedings (*i*); (3) in divorce cases (*k*); and (4) to some extent in patent actions (*l*).

SECT. 2.
Proof of
Contents of
Documents.

admissible
only between
parties and
privies.

Pleadings.

745. Pleadings recorded in one cause are admissible in evidence in subsequent proceedings to prove the institution and subject-matter of such cause (*m*), but are generally inadmissible, even as against parties or privies, as proof of the truth of the facts stated therein (*n*).

But answers and decrees in Chancery are admitted in peerage cases as evidence of matters of pedigree only incidentally stated therein, and statements made in the course of proceedings by a party upon oath may be admissible in other proceedings as admissions by the party making them (*o*).

746. The statement on a writ of the time of issue is conclusive proof of the time of issuing of such writ (*p*), and in certain cases a writ may be *primâ facie* evidence of other statements indorsed on

Writs.

(*g*) *Kingston's (Duchess) Case* (1776), 20 State Tr. 355, 538, II. 1.

(*h*) See title ESTOPPEL, p. 343, *ante*; *Hemphill v. M'Kenna* (1845), 8 I. L. R. 43; *Mulholland v. Killen* (1874), 9 I. R. Eq. 471; *R. v. Lordsmere District (Inhabitants)* (1886), 16 Cox, C. C. 65, C. C. R. In *Petrie v. Nuttall* (1856), 11 Exch. 569, it was suggested that judgment might possibly be conclusive in such cases, *sed quere*.

(*i*) *Harvey v. Wilde* (1872), L. R. 14 Eq. 438; *Re Tollemache, Ex parte Anderson* (1885), 14 Q. B. D. 606, C. A.

(*k*) *Ruck v. Ruck*, [1896] P. 152; *Swan v. Swan* (1903), *Times*, 21th March.

(*l*) *Edison and Swan Electric Light Co. v. Holland* (1889), 6 R. P. C. 243, C. A.; *Pneumatic Tyre Co., Ltd. v. Leicester Pneumatic Tyre Co.* (1899), 16 R. P. C. 531, H. L.

(*m*) *Roe d. Trimblestown (Lord) v. Kemmis* (1843), 9 Cl. & Fin. 749, 777, H. L.; *Boileau v. Rutlin* (1848), 2 Exch. 665; *Malcomson v. O'Dea* (1863), 10 H. L. Cas. 593.

(*n*) *Woollet v. Roberts* (1665), 1 Cas. in Ch. 64; *Eccleston v. Petty, alias Speke* (1689), Carth. 79; *Ferrers (Lord) v. Shirley* (1731), Fitz-G. 195, 197; *Doe d. Bowerman v. Sybourn* (1796), 7 Term Rep. 2; *Miller v. Johnson* (1797), 2 Esp. 602; *Tomkins v. Ashby* (1827), Mood. & M. 32; *Kilbee v. Sneyd* (1828), 2 Mol. 186, 208; *R. v. Walker* (1844), 1 Cox, C. C. 99; *Burkitt v. Blanshard* (1848), 3 Exch. 89; *Boileau v. Rutlin, supra*; *R. v. Simmonds* (1850), 4 Cox, C. C. 277; *Re Foster, Ex parte Basan* (1885), 2 Morr. 29, C. A.; *Re Walters, Nelson v. Walters* (1889), 61 L. T. 872. Formerly, it would seem, the law was different (Buller's *Nisi Prius*, 7th ed., p. 235); see *Ives v. Medcalfe* (1737), 1 Atk. 63, 65; and *Lorton (Viscount) v. Kingston (Earl)* (1838), 5 Cl. & Fin. 269, H. L.

(*o*) *Snow d. Crawley v. Phillips* (1664), 1 Sid. 220, 221; *Mildmay v. Mildmay* (1682), 1 Vern. 53; *Grant v. Jackson (Bart.)* (1794), Peake, 203; *Beasley v. Magrath* (1804), 2 Sch. & Lef. 31, 34; *Doe d. Digby v. Steel* (1811), 3 Camp. 115; *The Wharton Peerage* (1845), 12 Cl. & Fin. 295, H. L.; *Marianski v. Cairns* (1862), 1 Macq. 212, H. L.; *The Shrewsbury Peerage* (1858), 7 H. L. Cas. 1, 32; *Fleet v. Perrins* (1868), L. R. 3 Q. B. 536; and see *Taylor v. Cole* (1799), 7 Term Rep. 3, n. (a); *Lyell v. Kennedy* (1889), 14 App. Cas. 437.

(*p*) *Whipple v. Manley* (1830), 1 M. & W. 432.

SECT. 2. it (*g*), but is not admissible in evidence at all until returned and filed in court (*r*). A writ of execution is *prima facie* evidence of the contents of documents as between parties and privies (*s*), but not as against strangers (*t*).

Affidavits.

747. At common law an affidavit made in one proceeding is admissible in evidence in a subsequent proceeding, as proof of the facts stated therein, against the party who made such affidavit (*a*), or on whose behalf it was made, on it being shown that he knowingly made use of it (*b*). An affidavit filed in court on a motion is admissible in evidence at the trial without proof of its having been sworn (*c*), but is inadmissible without proof of the handwriting (*d*). At the trial of any action (*e*) the court or a judge may order the affidavit of any witness to be read in court on such conditions as the court or judge may think reasonable, unless the opposite party *bona fide* desires to cross-examine the deponent and the deponent can be produced (*f*). The party intending to use such affidavit must give notice in writing of such intention to the opposite party (*g*).

Verdicts.

748. A verdict followed by judgment is conclusive proof of the facts found as between parties and privies (*h*), but is inadmissible as between strangers (*i*), except where it is admissible as evidence in the nature of reputation on a matter of public interest (*k*). A

(*g*) *Gervis v. Grand Western Canal Co.* (1816), 5 M. & S. 76; *Brown v. Dean* (1833), 5 B. & Ad. 848.

(*r*) *Whitmore v. Rooke* (1756), Say. 299.

(*s*) *Doe d. Batten v. Murless* (1817), 6 M. & S. 110; but see *Doe d. Blund v. Smith* (1817), 2 Stark. 199.

(*t*) *White v. Morris* (1852) 11 C. B. 1015, disapproving *Bessy v. Windham* (1844), 6 Q. B. 166; and see *Lake v. Billers* (1698) 1 Id. Raym. 733; *Martyn v. Podger* (1770), 5 Burr. 2631; *Ackworth v. Kempe* (1778), 1 Doug. (K. B.) 40.

(*a*) *R. v. Jolliffe* (1791), 4 Term Rep. 285, 290; *Brickell v. Hulse* (1837), 7 Ad. & El. 454; *Pritchard v. Dayshawe* (1851), 11 C. B. 459.

(*b*) *Johnson v. Ward* (1806), 6 Esp. 47; *Gardner v. Moulton* (1839), 10 Ad. & El. 461; *White v. Dowling* (1845), 8 L. L. R. 128; *Richards v. Morgan* (1863), 4 B. & S. 641; *Campbell v. Rothwell* (1877), 38 L. T. 33; *Simmons v. London Joint Stock Bank* (1890), 62 L. T. 427.

(*c*) *Cameron v. Lightfoot* (1778), 2 Wm. Bl. 1190.

(*d*) *Barnes v. Parker* (1866), 15 L. T. 218.

(*e*) *I.e.*, a civil proceeding commenced by writ, or in such other manner as may be prescribed by rules of court, but not including a criminal proceeding by the Crown. See Judicature Act, 1873 (36 & 37 Vict. c. 66), s. 100.

(*f*) R. S. C., Ord. 37, r. 1; and see *Macdonald v. Antelme Patterson & Co.*, [1884] W. N. 72; *Drewitt v. Drewitt* (1888), 58 L. T. 684; *Gornall v. Mason* (1887), 12 P. D. 142. As to admissibility of evidence by affidavit on motion, petition, or summons, see R. S. C., Ord. 38, r. 1; *Ellis v. Robins* (1881), 60 L. J. (Civ.) 512, and generally title PRACTICE AND PROCEDURE.

(*g*) R. S. C., Ord. 37, r. 24.

(*h*) *Clarges v. Sherwin* (1699), 12 Mod. Rep. 343; *Outram v. Morewood* (1803), 3 East. 346; see title STOPPEL, p. 326, ante.

(*i*) *Pyke v. Crouch* (1696), 1 Id. Raym. 730; *Kinnersley v. Orpe* (1780), 2 Doug. (K. B.) 517; *R. v. Knaptoft (Inhabitants)* (1824), 4 Dow. & Ry. (K. B.) 469.

(*k*) *London Corporation v. Clerke* (1691), Carth. 181; *Cort v. Birkbeck* (1779), 1 Doug. (K. B.) 218; *R. v. St. Pancras (Inhabitants)* (1794), Peake 286 [220]; *Reed v. Jackson* (1801), 1 East. 355; *Brisco v. Lomax* (1838), 8 Ad. & El. 198; *Pim v. Curell* (1840), 6 M. & W. 234, 266; *Brune v. Thompson* (1841), Car. & M. 34; *Petrie v. Nuttall* (1856), 11 Exch. 569; *Neill v. Devonshire (Duke)* (1882),

verdict is inadmissible in evidence unless the judgment, which is founded upon it, is also proved (*l*), and is also inadmissible if it is founded on evidence which would be inadmissible in the action in which such verdict is intended to be proved (*m*).

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749. An award, until set aside, is conclusive proof of the facts found therein as between parties and privies (*n*), but is inadmissible, even as evidence of reputation, as between strangers (*o*), except as proving acts of ownership (*p*). It is also inadmissible where the arbitrators have exceeded their jurisdiction (*q*), or been guilty of misconduct (*r*). An award by an arbitrator under the Lands Clauses Consolidation Act, 1845 (*s*), is conclusive proof of the amount of, but not of the right to, compensation (*t*).

Awards.

750. In certain cases a report is made admissible as evidence of the facts stated therein when it is a public document made by a public officer on an inquiry of a judicial or quasi-judicial nature (*a*).

Reports.

8 App. Cas. 135, 147, 184; *Pim v. Curell* (1840), 6 M. & W. 231, per Lord ABINGER, at p. 266: "In cases where reputation is evidence, *i.e.*, cases involving a general right in which all the Queen's subjects are concerned, a verdict or a judgment upon the matters directly in issue between the parties, although between other parties, is also evidence; not of any specific fact existing at the time, but evidence of the most solemn kind, of an adjudication of a competent tribunal, upon the state of facts and the question of usage at that time."

(*l*) See title ESTOPPEL, p. 326, *ante*, and cases cited there in note (*b*); and *Pitton v. Walter* (1719), 1 Stra. 162; *Fisher v. Kitchingham* (1742), Willes, 367; *Fitch v. Smallbrook* (1661), T. Raym. 32; *Holt v. Miers* (1839), 9 C. & P. 191; *Gillespie v. Cumming* (1841), Long. & T. 181; *Jameson v. Leitch* (1842), Milw. 683, 688; *Nedham v. Bremner* (1866), L. R. 1 C. P. 583. *Garland v. Scoones* (1798), 2 Esp. 648, and *Foster v. Compton* (1818), 2 Stark. 364, in which verdicts were admitted without the judgments being proved, can no longer be considered good law. A verdict of the Divorce Court may, however, be admitted in evidence as proof of cruelty and adultery, although the decree has been set aside on the ground of collusion (*Butler v. Butler*, [1894] P. 25, C. A.).

(*m*) *Stoate v. Stoate* (1861), 30 L. J. (P. M. & A.) 102; *Sopwith v. Sopwith* (1861), 30 L. J. (P. M. & A.) 131; *Bancroft v. Bancroft and Rumney* (1864), 3 Sw. & Tr. 610.

(*n*) *Doe d. Morris v. Rosser* (1802), 3 East, 15; *Thorpe v. Eyre* (1834), 1 Ad. & El. 926; *Comings v. Heard* (1869), L. R. 4 Q. B. 669; *Gueret v. Audouy* (1893), 62 L. J. (Q. B.) 633, 637, C. A.; but see *Newall v. Elliot* (1863), 32 L. J. (EX.) 120; and see title ESTOPPEL, p. 364, *ante*. An award on a reference by the court is equivalent to the verdict of a jury, see title ARBITRATION, Vol. I., p. 490.

(*o*) *R. v. Cotton* (1813), 3 Camp. 444; *Doe d. Smith and Payne v. Webber* (1834), 1 Ad. & El. 119; *Evans v. Rees* (1839), 10 Ad. & El. 151; *Wenman (Lady) v. Mackenzie* (1855), 5 E. & B. 447. In *Shelling v. Furmer* (1725), 1 Stra. 646, and *Doe d. Chauver v. Boulter* (1837), 6 Ad. & El. 675, awards were admitted in evidence against persons whom the court regarded as privies, although they appear to have been in fact strangers.

(*p*) *Brett v. Beales* (1829), Mood. & M. 416; *Brew v. Haren* (1874), 9 I. R. C. L. 29.

(*q*) *Hutcheson v. Eaton* (1884), 13 Q. B. D. 861, C. A.; *Falkingham v. Victorian Railways Commissioner*, [1900] A. C. 452, P. C.

(*r*) Arbitration Act, 1889 (52 & 53 Vict. c. 49), s. 11 (2); *Re Palmer & Co. and Hosken & Co.*, [1898] 1 Q. B. 131, C. A.

(*s*) 8 & 9 Vict. c. 18.

(*t*) *Beckett v. Midland Rail. Co.* (1866), L. R. 1 C. P. 241; *Re Newbold and The Metropolitan Rail. Co.* (1863), 14 C. B. (N. S.) 405; *R. v. Cambrian Rail. Co.* (1869), L. R. 4 Q. B. 320; *Rhodes v. Airedale Drainage Commissioners* (1876), 1 C. P. D. 402, C. A.; *Re East London Rail. Co., Oliver's Claim* (1890), 24 Q. B. D. 507, C. A. And see title COMPULSORY PURCHASE OF LAND AND COMPENSATION, Vol. VI., p. 83.

(*a*) Thus a report by the chief gas examiner in the metropolis is virtually a

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For example, reports of the Committee of the Law Society (*b*), reports of Charity Commissioners (*c*), and reports of the official receiver in bankruptcy (*d*) are admissible; but reports of Chancery visitors (*e*) and reports of inspectors appointed by the Board of Trade under the Companies Act, 1862 (*f*), are inadmissible in proof of the facts reported therein.

Depositions.

751. At common law depositions taken in a judicial proceeding are admissible in evidence in a subsequent judicial proceeding in proof of the facts stated therein (*g*), provided (1) the proceedings are between the same parties or their privies (*h*); (2) the issues involved are the same, or substantially the same, in both proceedings (*i*);

judgment, and, as it is final and a basis for future proceedings, must not be based on *ex parte* statements (*R. v. London County Council, Ex parte Commercial Gas Co.* (1895), 11 T. L. R. 337). For the principles governing the admissibility of public documents see p. 472, *supra*.

(*b*) Solicitors Act, 1888 (51 & 52 Vict. c. 65), s. 13. And see *R. v. A Solicitor* (1891), 36 Sol. Jo. 94.

(*c*) Charitable Trusts (Recovery) Act, 1891 (54 & 55 Vict. c. 17), s. 5 (1).

(*d*) Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), ss. 18 (9), 28 (4); Bankruptcy Act, 1890 (53 & 54 Vict. c. 71), s. 8 (5). And see *Re Wallace, Ex parte Campbell* (1885), 15 Q. B. D. 213, C. A.; *Re Hornblow, Ex parte Official Receiver* (1885), 53 L. T. 155; *Re Sharp, Ex parte Sharp* (1893), 10 Morr. 114.

(*e*) *Roe v. Nix*, [1893] P. 55. See Lunacy Act, 1890 (53 & 54 Vict. c. 5), s. 185. (*f*) 25 & 26 Vict. c. 89, s. 56; *Re Grosvenor and West End Terminus Hotel Co.* (1897), 13 T. L. R. 309, C. A. A report of the inspector is admissible as evidence of the opinion of such inspector (*ibid.*).

(*g*) Although a deposition is admissible as secondary evidence, any statement in such deposition which ought not to have been received in evidence in the former proceeding is inadmissible (*Roe d. Pellatt v. Ferrars* (1801), 2 Bos. & P. 542, 548; *Steinkeller v. Newton* (1838), 9 C. & P. 313; *Tufton v. Whitmore* (1840), 12 Ad. & El. 370; *Small v. Nairne* (1849), 13 Q. B. 840). As to depositions, see generally title PRACTICE AND PROCEDURE, and as to the use of depositions in criminal cases, see title CRIMINAL LAW AND PROCEDURE, Vol. IX., p. 365.

(*h*) *Humphreys v. Pensam* (1836), 1 My. & Cr. 550, per Lord COTTENHAM, at p. 586: "Depositions can only be read for or against those who are parties or privies to the suit in which the deposition was taken; and they cannot be read for a party unless they can also be read against him." See also *Smith v. Veale* (1699), 1 Ld. Raym. 735; *Anon.* (1703), cited in *Smith v. Veale, supra*, *Coker v. Farewell* (1729), 2 P. Wms. 563; *Doe d. Foster v. Derby (Earl)* (1834), 1 Ad. & El. 783; *Gray v. Haig* (1852), 21 L. J. (CH.) 542. They are inadmissible against strangers (*Rushworth v. Penbrooke (Countess)* (1668), Hard. 472; *Coke v. Fountain* (1686), 1 Vern. 413; *Peterborough (Earl) v. Norfolk (Duchess)* (1702), Prec. Ch. 212; affirmed *sub nom. Peterborough (Earl) v. Germaine* (1703), 3 Bro. Parl. Cas. 539; *Mackworth v. Penrose* (1728), 1 Dick. 50; *Niblett v. Daniel* (1731), Bunb. 310; *Quantock v. Bullen* (1820), 5 Madd. 81; *Goodenough v. Alway* (1826), 2 Sim. & St. 481; *Melen v. Andrews* (1829), Mood. & M. 336; *Atkins v. Humphreys* (1836), 1 Mood. & R. 523; *Hope v. Liddell* (No. 2) (1855), 21 Beav. 180; *Morgan v. Nicholl* (1866), L. R. 2 C. P. 117; *Evans v. Merthyr Tydfil Urban District Council*, [1899] 1 Ch. 241, C. A.; but where such stranger, although not actually on the record, was substantially a party to the former proceedings, the depositions are admissible against him (*Wright v. Doe d. Tatham* (1834), 1 Ad. & El. 3, 18, Ex. Ch.; *Doe d. Hulin v. Powell* (1852), 3 Car. & Kir. 323; and see *Byrne v. Erere* (1828), 2 Mol. 157; *Williams v. Broadhead* (1827), 1 Sim. 151).

(*i*) *Derby (Earl) v. Foster* (1835), 1 Ad. & El. 791, n. (b); *Llanover v. Homfray Phillips v. Llanover* (1881), 19 Ch. D. 224, C. A. In criminal cases where the party is charged in the first proceedings with one offence, and in the second proceedings with a different offence, the depositions taken in the first are admissible in the second proceeding, provided the issues are substantially the same (*R. v. Smith* (1817), Russ. & Ry. 339, C. C. R.; *R. v. Lee* (1864), 4 F. & F. 63; *R. v. Williams* (1871), 12 Cox, C. O. 101; *R. v. Buckley* (1873), 13 Cox, C. C. 293; but see *R. v. Ledbetter* (1850), 3 Car. & Kir. 108; *R. v. Dilmore* (1852), 6 Cox, C. O. 52).

(3) the party against whom the depositions are tendered had full opportunity of cross-examining the deponent when the deposition was being taken (*k*); and (4) the deponent is either dead (*l*), insane (*m*), kept out of the way by the opposite party (*n*), too ill to travel (*o*), or (in civil cases) beyond the jurisdiction (*p*).

If any one of these conditions is not fulfilled, the deposition is generally inadmissible, although it may be admissible (where the deponent is dead) even against strangers, if it relates to pedigree (*q*), or to matters of public or general interest, where reputation would be evidence (*r*). A deposition may always be used as an admission

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(*k*) *A.-G. v. Davison* (1825), M'Cle. & Yo. 160, Ex. Ch.; *Steinkeller v. Newton* (1840), 9 C. & P. 313; *Scott v. Van Sandau* (1845), 8 Jur. 1114; *R. v. Day* (1852), 6 Cox, C. C. 55; *Fitzgerald v. Fitzgerald* (1863), 33 L. J. (P. M. & A.) 39. Actual cross-examination is not necessary if full opportunity was provided and the person against whom the deposition is being used did not choose to avail himself of such opportunity (*Howard v. Tremaine* (1692), 1 Salk. 278; *Cazenove v. Vaughan* (1813), 1 M. & S. 4; *M'Combie v. Anton* (1843), 6 Man. & G. 27; *Whyte v. Hallett* (1859), 28 L. J. (Ex.) 208). As to depositions taken by a coroner at an inquest, see title CORONERS, Vol. VIII., p. 291.

(*l*) *Morely's (Lord) Case* (1666), Kol. 53, 55, H. L.; *Pyke v. Crouch* (1696), 1 Id. Raym. 730; *Strutt v. Bovingdon* (1803), 5 Esp. 56; *Doncaster Corporation v. Day* (1810), 3 Taunt. 262; *Wright v. Doe d. Tatham* (1834), 1 Ad. & El. 3, Ex. Ch. The death must be proved. It is not sufficient to show that the deposition was taken fifty years before (*Benson v. Olive* (1731), 2 Str. 920). In the old cases, *Nevil v. Johnson* (1703), 2 Vern. 417; *Barstow v. Palmes* (1704), Prec. Ch. 233; *London Corporation v. Perkins* (1734), 3 Bro. Parl. Cas. 602, although, apparently, the deaths of the deponents were not proved, the depositions were admitted; but see *Carrington v. Cornock* (1829), 2 Sim. 567; *Blagrove v. Blagrove* (1817), 16 L. J. (Ch.) 316.

(*m*) *R. v. Kriswell (Inhabitants)* (1790), 3 Term Rep. 707, 721. In *R. v. Marshall* (1841), Car. & M. 147, the deposition was admitted, although the insanity was only of a temporary character, *sed quære*.

(*n*) *Morely's (Lord) Case*, *supra*; *Green v. Gatewick* (1672), Buller, Nisi Prius, 239; *R. v. Guttridge* (1840), 9 C. & P. 471.

(*o*) In civil cases this fact will usually enable the deposition to be admitted in evidence (*Lutterell v. Requeil* (1670), 1 Mod. Rep. 282, 284; *Bradley v. Crackenthorp* (1752), 1 Dick. 182; *Jones v. Jones* (1785), 1 Cox, Eq. Cas. 184; *Jones v. Brewer* (1811), 4 Taunt. 46; *Andrews v. Palmer* (1812), 1 Ves. & B. 21; *Corbett v. Corbett* (1813), 1 Ves. & B. 335; but see *Harrison v. Blades* (1813), 3 Camp. 457; *Doe d. Lloyd v. Evans* (1827), 3 C. & P. 219). In criminal cases, however, the sickness of a deponent, although it may be a good ground for the postponement of a trial (*R. v. Savage* (1831), 5 C. & P. 143), is not sufficient to allow the deposition to be given in evidence, unless it is shown that he will probably never be able to attend the trial (*R. v. Hogg* (1833), 6 C. & P. 176; *R. v. Wilshaw* (1841), Car. & M. 145).

(*p*) *Fry v. Wood* (1737), 1 Atk. 445; *Fonsick v. Agar* (1806), 6 Esp. 92; *Falconer v. Hanson* (1808), 1 Camp. 171; *Proctor v. Lainson* (1836), 7 C. & P. 629; *Sills v. Brown* (1840), 9 C. & P. 601, 603; *Robinson v. Markis* (1841), 2 Mood. & R. 375; *Carruthers v. Graham* (1841), 10 L. J. (Q. B.) 364; *Varicas v. French* (1849), 2 Car. & Kir. 1008. In criminal cases, this fact will not enable the deposition to be given in evidence (*Morely's (Lord) Case*, *supra*; *R. v. Hagan* (1837), 8 C. & P. 167; *R. v. Scaife* (1851), 20 L. J. (M. C.) 229; *R. v. Austin* (1856), 25 L. J. (M. C.) 48, C. C. R.). On proof that diligent but ineffectual search has been made for the deponent, the deposition is probably admissible in evidence in civil cases (*Falconer v. Hanson*, *supra*; *Wiedemann v. Walpole* (1891), *Times*, 15th June), but not in criminal cases (*Morely's (Lord) Case*, *supra*).

(*q*) *Gee v. Ward* (1857), 7 E. & B. 509; see further p. 469, *ante*.

(*r*) Buller, Nisi Prius, pp. 239—242; *Terwit v. Gresham* (1666), 1 Cas. in Ch. 73; *Freeman v. Phillipps* (1816) 4 M. & S. 486; see, further, p. 467, *ante*. As to admitting a deposition as a dying declaration see *R. v. Jones* (1885), 49 J. P. 728.

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Depositions
 made admis-
 sible by
 statute in
 certain cases.

against the deponent, whenever he is a party (*s*), or to contradict or corroborate him (*t*), or to refresh the memory of the official who took down the deposition (*a*).

By statute depositions have been made admissible in evidence in various proceedings, although the conditions which would have been necessary for their admissibility at common law have not been fulfilled; for example, those taken under the Indictable Offences Act, 1848 (*b*), the Bankruptcy Act, 1883 (*c*), and the Matrimonial Causes Act, 1857 (*d*); and, finally, in any cause (*e*) or matter (*f*), where it shall appear necessary for the purposes of justice, the judge may order the deposition of any person to be taken (*g*), but in the absence of any direction by the judge such deposition is not admissible in evidence without the consent of the other party unless the judge is satisfied that the deponent is dead, beyond the jurisdiction, or unable to attend from sickness or other infirmity (*h*). The party intending to use such deposition must give notice in writing to the opposite party of such intention (*i*).

All evidence taken on the hearing or trial of any cause or matter may be used in any subsequent proceedings in the same cause or matter (*j*).

(*b*) *In High Court.*

Judicial
 proceedings
 in High
 Court.

752. Judicial proceedings in the High Court may be proved by production of the original record (*k*) or by verified copies (*l*), but

(*a*) *Re Cooper, Ex parte Hall* (1882), 19 Ch. D. 580, C. A., per JESSEL, M.R., at p. 583: "Any statement made by a man upon oath, may be used against him as an admission." And see *Cole v. Hadley* (1840), 11 Ad. & El. 807.

(*t*) *Anon.* (1729), Mos. 118; and see Criminal Procedure Act, 1865 (28 & 29 Vict. c. 18), ss. 4, 5.

(*a*) *R. v. Mann* (1885), 49 J. P. 743.

(*b*) 11 & 12 Vict. c. 42, s. 17; see title CRIMINAL LAW AND PROCEDURE, Vol. IX., p. 315.

(*c*) 46 & 47 Vict. c. 52, s. 136; Bankruptcy Rules, r. 66; see also title BANKRUPTCY AND INSOLVENCY, Vol. II., p. 318.

(*d*) 20 & 21 Vict. c. 85; see title HUSBAND AND WIFE.

(*e*) See Judicature Act, 1873 (36 & 37 Vict. c. 66), s. 100.

(*f*) *Ibid.*

(*g*) R. S. C., Ord. 37, r. 5.

(*h*) R. S. C., Ord. 37, r. 18; and see *Nadin v. Bassett* (1883), 25 Ch. D. 21, C. A.; *Concha v. Concha* (1886), 11 App. Cas. 541. R. S. C., Ord. 37, r. 3, which says that an order to read evidence taken in another cause or matter shall not be necessary, does not alter the admissibility of the evidence in the cause in which it is sought to be read (*Printing, Telegraph and Construction Co. of the Agency Havas v. Drucker*, [1894] 2 Q. B. 801, C. A.).

(*i*) R. S. C., Ord. 37, r. 24.

(*j*) *Ibid.*, r. 25.

(*k*) The order of a judge or master is required before affidavits or records of the High Court can be taken from the Central Office (R. S. C. Ord. 61, r. 28). In the case of a judgment, the complete record or a copy, not merely the minutes, must be produced (*Godefroy v. Jay* (1827), 3 C. & P. 192). Compare *King v. Birch* (1842), 3 Q. B. 425, 431; *R. v. Smith* (1828), 8 B. & C. 341. A decree which, having been consented to by all parties, was held, in an action, to be a confirmation of a settlement relating to the same property was allowed to be proved by an affidavit verifying the bill, answer, and decree, and the identity of one of the parties with the plaintiff in the action (*White v. Cox* (1876), 2 Ch. D. 387, 397).

(*l*) See p. 523, *post*.

the original must be produced if issue has been joined on an allegation of *nul tiel record* (*m*).

Copies are of four¹ kinds: examined copies, office copies, exemplifications under the Great Seal, and exemplifications under the seal of the court (*n*).

The accuracy of examined copies must be proved by the evidence of a witness who has compared the copy with the original or with what the officer of the court read as the contents of the original (*o*), but it is not necessary for the persons examining to exchange papers and read them alternately (*p*). An examined copy will not be admitted if it contains abbreviations not in the original (*q*).

Where the document in question is an ancient one, the witness proving an examined copy must have been able to read and understand the original when he compared the copy with it (*r*).

Another recognised form of copy is an office copy. Office copies of all writs, records, proceedings, and documents filed in the High Court are admissible in the same way as the original (*s*); their authenticity is shown by the seal of the Central Office (*t*).

Office copies of certain documents of a judicial nature are also made admissible by statute (*a*).

Other recognised forms of copies are exemplifications under the Great Seal (*b*), and exemplifications under the seal of the court where the record remains (*c*). Judicial notice is taken of the seals attached to these copies (*d*).

To prove that an action was pending and was tried as alleged in an indictment for perjury, the production by the officer of the court of a copy of the writ and pleadings properly filed and the original order dismissing the action have been admitted (*e*).

(c) *In County Court.*

753. The proceedings of a county court are proved either by the registrar by the note thereof entered in his book or by a copy of such entry sealed with the court seal and purporting to be signed

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May be proved by copy.

Examined copies.

Ancient document.

Office copies.

Exemplifications.

Judicial proceedings in county court.

(m) 2 Taylor, Law of Evidence, 10th ed., s. 1535.

(n) See pp. 522 to 524, *ante*.

(o) *Rolf v. Dart* (1809) 2 Taunt. 52; and see p. 524, *ante*, and cases cited in next note.

(p) *Reid v. Margison* (1808), 1 Camp. 469; *Rolf v. Dart*, *supra*; *M'Neil v. Perchard* (1795) 1 Esp. 263; *Gyles v. Hill* (1809), 1 Camp. 471, n.; *Fyson v. Kemp* (1833), 6 C. & P. 71.

(q) *R. v. Christian* (1842), Car. & M. 388.

(r) *The Crawford and Lindsay Peerages* (1848), 2 H. L. Cas. 534.

(s) R. S. C., Ord. 37, r. 4; and see p. 523, *ante*.

(t) R. S. C., Ord. 61, r. 7.

(a) See the Bills of Sale Act, 1878 (41 & 42 Vict. c. 31), s. 16 (bills of sale etc.); Conveyancing Act, 1882 (45 & 46 Vict. c. 39), s. 2 (1), (2) (certificates of searches), s. 7 (7) (8) (certificates of acknowledgments by married women).

(b) In *Beverley Corporation v. Craven* (1838), 2 Mood. & R. 140, a document was admitted, although the Great Seal was missing from it, on the ground that it was ancient and produced from the proper custody. Exemplifications under the Great Seal must now be considered obsolete as a method of proving records.

(c) These are also obsolete.

(d) See pp. 495, 496, *ante*.

(e) *R. v. Scott* (1877), 2 Q. B. D. 415, C. O. R.

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and sealed by the registrar (*f*). Such entry or copy is binding even against the evidence of the judge who proves from a private memorandum that he intended to make a different order (*g*), and cannot be varied by the judge's indorsement of the summons (*h*), nor by an informal letter from the registrar to one of the parties (*i*).

Judge's note
conclusive
on appeal.

On appeal to a Divisional Court, the judge's note cannot be impeached by affidavit, shorthand note, or otherwise (*k*), but the court may, it seems, use extraneous evidence to explain any ambiguity (*l*).

(d) *In Criminal Court.*

Judicial
proceedings
in criminal
court.

754. The trial, conviction, or acquittal of any person charged with an indictable offence may be proved by certified copy of the record purporting to be under the hand of the clerk of the court or other officer (*m*) having custody of the records of the court where the conviction or acquittal took place (*n*).

Previous
convictions.

Any previous conviction may further be proved by producing a record or extract thereof (*o*), together with proof of identity (*p*).

Summary
proceedings.

As regards summary proceedings in particular, the register of the court (or a certified extract) is *primâ facie* evidence of the matters entered therein in a court acting for the same place as the court whose proceedings are entered in the register (*q*), while

(*f*) County Courts Act, 1888 (51 & 52 Vict. c. 43), s. 28. Such entry or copy is also proof of the regularity of the proceedings (*ibid.*; and see *R. v. Roberts* (1878), 14 Cox, C. C. 101, C. C. R.).

(*g*) *Dens v. Ryley* (1851), 20 L. J. (o. p.) 264.

(*h*) *Stonor v. Fowle* (1887), 13 App. Cas. 20.

(*i*) *Ibid.*

(*k*) *Huddleston v. Furness Rail. Co.* (1899), 15 T. L. R. 238, C. A.

(*l*) *Ibid.*; and see title COUNTY COURTS, Vol. VIII., p. 608.

(*m*) Or the deputy of such clerk or officer.

(*n*) Evidence Act, 1851 (14 & 15 Vict. c. 99), s. 13; compare Criminal Procedure Act, 1865 (28 & 29 Vict. c. 18), s. 6. This evidence is admissible in all civil and criminal proceedings; see *Richardson v. Willis* (1873), L. R. 8 Exch. 69. At common law it was necessary to produce the record or an examined copy (*R. v. Smith* (1828), 8 B. & C. 341; *Hartley v. Hindmarsh* (1866), L. R. 1 C. P. 553). This method of proof is, of course, still available; see p. 524, *supra*.

(*o*) In the case of an indictable offence this is a certificate by the clerk or other officer; in the case of summary convictions, a copy thereof signed by a justice of the peace or by the proper officer of the court.

(*p*) Prevention of Crimes Act, 1871 (34 & 35 Vict. c. 112), s. 18. This Act leaves untouched older methods of proving convictions in certain cases; these are under the Transportation Act, 1824 (5 Geo. 4, c. 84), s. 24 (sentences of transportation or banishment); see *R. v. Parsons* (1866), L. R. 1 C. C. R. 24; Criminal Law Act, 1827 (7 & 8 Geo. 4, c. 28), s. 11 (previous conviction for felony); Criminal Procedure Act, 1851 (14 & 15 Vict. c. 100), s. 22 (previous convictions in a trial for perjury); Larceny Act, 1861 (24 & 25 Vict. c. 96), s. 116 (proof of previous convictions in an indictment under the Act); Coinage Offences Act, 1861 (24 & 25 Vict. c. 99), s. 37 (proof of previous convictions in an indictment under the Act).

(*q*) Summary Jurisdiction Act, 1879 (42 & 43 Vict. c. 49), s. 22. This does not affect the necessity of proving previous convictions when required to be proved against a person charged with another offence (*ibid.*), except where the court is the same in both cases (*London School Board v. Harvey* (1879), 4 Q. B. D. 451; *Police Commissioner v. Donovan*, [1903] 1 K. B. 895).

a certificate of dismissal given by justices is evidence of such dismissal (r).

The sessions book of a court of quarter sessions made up and recorded by the clerk of the peace from minutes taken by him in court is admissible in a similar court in the same county to prove the proceedings of the court (s).

SECT. 2.
Proof of
Contents of
Documents.

Quarter
sessions.

(e) *Other Judicial Proceedings.*

755. Records and other judicial documents (t) of the old superior courts of law and equity are proved in the same way as records etc. of the High Court (a).

Bankruptcy proceedings may be proved by production of the original document, or by a copy sealed or signed by the judge or certified by a registrar (b).

Adjudications in bankruptcy may be proved by the production of the adjudication under the seal of the court or by a copy of the *Gazette* containing a notice thereof (c).

Judgments of the House of Lords are proved by an examined copy of the minutes (d) or by printed copy of the Lords' journals (e).

Judicial
proceedings
in old
superior
courts.
Bankruptcy
proceedings.

Judgments
of House
of Lords.

(r) Summary Jurisdiction Act, 1879 (42 & 43 Vict. c. 49), s. 27 (4) (indictable offences); s. 44 (assaults). Dismissal may still be proved otherwise than by such certificate (see *R. v. Hutchins* (1880), 5 Q. B. D. 353; reversed *sub nom. R. v. Hutchings* (1881), 6 Q. B. D. 300, C. A.).

(s) *R. v. Yeoveley (Inhabitants)* (1838), 8 Ad. & El. 806.

(t) This includes answers in Chancery (*Ewer v. Ambrose* (1825), 4 B. & C. 25; *Highfield v. Peake* (1827), Mood. & M. 109); depositions (*Dunvan v. Scott* (1807), 1 Camp. 100); rules of court (*Selby v. Harris* (1698), 1 Id. Raym. 745). In some cases ancient judicial proceedings have been admitted without being strictly proved; see *Beverley Corporation v. Craven* (1838), 2 Mood. & R. 140, cited note (b), p. 549, *ante*; *Byam v. Booth* (1816), 2 Price, 231, 234, n.; *Bayley v. Wylie* (1807), 6 Esp. 85.

(a) See p. 548, *ante*. In the case of other old courts, such as the old Court of Admiralty, the Ecclesiastical Courts, and the Court of Stannaries, judicial documents may, it seems, be proved by exemplifications or by examined copies, but not now by office copies. See *R. v. Hains* (1695), Comb. 337. Many of these documents are placed under the custody of the Master of the Rolls by the Public Record Office Act, 1838 (1 & 2 Vict. c. 94). For proof of documents in that custody, see ss. 12 and 13 of the Act and p. 524, *ante*. Where the record is lost a certified copy of the entry in the judgment book will be admitted (*Re Tollemache, Ex parte Anderson* (1885), 14 Q. B. D. 606, C. A.).

(b) Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 134. This Act also contains provisions for proving the appointment of a trustee (by certificate of the Board of Trade, s. 138), facts stated in notices (by a copy of the *London Gazette* containing such notices, s. 132 (1); this is conclusive in certain cases, s. 132 (2)), and proceedings of meetings (by minutes signed by chairman, s. 133 (1)). The validity of a composition or scheme is proved by certificate of the official receiver (see Bankruptcy Act, 1890 (53 & 54 Vict. c. 71), s. 3 (13)). As to the admissibility of orders and certificates by the Board of Trade, see Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 140. The provision in s. 17 of that Act, that the answers of the debtor read over and signed by him may thereafter be used in evidence against him, is not limited to proceedings in bankruptcy (*Re A Solicitor* (1890), 25 Q. B. D. 17, C. A.). See also title BANKRUPTCY AND INSOLVENCY, Vol. II., p. 110.

(c) *R. v. Thomas* (1870), 11 Cox, C. O. 535; Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 132 (1), (2).

(d) *Jones v. Randall* (1774), 1 Cowp. 17.

(e) See p. 527, *ante*.

SECT. 2.

Proof of
Contents of
Documents.Judgments
of inferior
courts.

Awards.

Awards
under statute
by public
officer.

Orders of justices forming a highway district are proved by certified copy (*f*).

Judgments in inferior courts (*g*) are proved by the production of the minute book containing an entry of the judgment (*h*), or by the notes or parol evidence of the officer of the court where no such entry exists (*i*).

An award is proved by the production and proof of execution of the award (which must be signed by all the arbitrators (*k*) in the presence of each other (*l*)), the submission itself (*m*), and, where the award is made by an umpire, the appointment of the umpire (*n*).

But where the award is made in a reference under an order of court, production of the award and the order is *prima facie* evidence of the validity of the award (*o*).

In the case of an award made under statute by a public officer, the validity of the award is presumed (*p*), unless it be proved that subsequent usage has not been in accordance with the award (*q*), or that the award was made without jurisdiction. In the latter case, even though the statute enacts that the award is to be conclusive evidence that all the directions of the Act in relation to the matter set forth which ought to have been obeyed have been obeyed, yet it

(*f*) Highway Act, 1864 (27 & 28 Vict. c. 101), s. 12. See title HIGHWAYS, STREETS AND BRIDGES.

(*g*) Such as a sheriff's court (*Arundell v. White* (1811), 14 East, 216); a court of summary jurisdiction (*London School Board v. Harvey* (1879), 4 Q. B. D. 451); a court baron (*Dyson v. Wood* (1824), 3 B. & C. 449); the mayor's court (*Fisher v. Lane* (1772), 2 Wm. Bl. 831); a manor court (*Dawson v. Gregory* (1845), 7 Q. B. 756).

(*h*) See cases cited in last note.

(*i*) See *Dyson v. Wood*, *supra*; *Manning v. Eastern Counties Rail. Co.* (1843), 12 M. & W. 237. On an appeal from a registrar or master the court will only recognise the note of its officer, and will not hear other evidence as to what took place before him (*Sykes v. Sykes*, [1897] P. 306, C. A.). An order of a master in lunacy made under s. 116 of the Lunacy Act, 1890 (53 & 54 Vict. c. 5), reciting that a person was of unsound mind, though not so found by inquisition, is admissible as *prima facie* evidence that the person was prevented from appearing in a suit by reason of accident or misfortune, or not having received due notice (*Harvey v. R.*, [1901] A. C. 601, P. C.).

(*k*) If the submission empowers less than the full number to make the award, execution by all is unnecessary, provided that all were given the opportunity of executing (*White v. Sharp* (1844), 12 M. & W. 712; *Wright v. Graham* (1848), 3 Exch. 131; *Re Beck and Jackson* (1857), 1 O. B. (N. S.) 695).

(*l*) *Stalworth v. Ians* (1844), 13 M. & W. 466; *Wright v. Graham*, *supra*; *Eads v. Williams* (1854), 4 De G. M. & G. 874, 688, 689; *Lord v. Lord* (1855), 5 E. & B. 404; *Berney v. Read* (1845), 7 Q. B. 79, where the submission had been made a rule of court, but the principle above stated was held to apply; compare *Re Beck and Jackson*, *supra*. Evidence may be given by an arbitrator on points of fact in explanation of his award (*Re Dare Valley Rail. Co.* (1868), 1 L. R. 6 Eq. 429); see title ARBITRATION, Vol. I., p. 477.

(*m*) This must be shown to have been executed by all parties (*Ferrer v. Owen* (1827), 7 B. & C. 427), including the party relying on it (*Brazier v. Jones* (1828), 8 B. & C. 124); see also *Antram v. Chace* (1812), 15 East, 209.

(*n*) *Stall v. Halford* (1814), 4 Camp. 17. As to enlargement of time, which must also be proved, see *Davis v. Vass* (1812), 15 East, 97.

(*o*) *Gisborne v. Hayt* (1839), 5 M. & W. 50; see *Dresser v. Stunsfield* (1845), 14 M. & W. 822, *per PARKE, B.*, at p. 828.

(*p*) *Doe d. Roberts v. Mostyn* (1852), 12 O. B. 268; *Williams v. Eytou* (1859), 4 L. & N. 357, Ex. Ch.; compare *Doe d. Nanney v. Gore* (1837), 2 M. & W. 320.

(*q*) *R. v. Haslingfield (Inhabitants)* (1814), 2 M. & S. 558; compare *Manning v. Eastern Counties Rail. Co.*, *supra*.

will not be conclusive as to matters which the public officer had no jurisdiction to determine (r).

SECT. 2.

**Proof of
Contents of
Documents.**

(x.) *Probate and Letters of Administration.*

756. Probates and letters of administration, and copies thereof respectively, purporting to be sealed with a seal of the Court of Probate (s), are evidence in all parts of the United Kingdom without further proof (t). In cases where this provision is inapplicable, probate and letters of administration may be proved by the Probate Act-book of the Prerogative Court containing an entry that the will has been proved or letters of administration granted (a), or by an examined or certified copy of such book (b), or by minutes and proof of the will and sealing of probate indorsed on the will by the surrogate and registrar of the ecclesiastical court (c).

Probate and
letters of
administra-
tion.

Probates and letters of administration (whether the grant be general or limited (d)) granted by the courts of certain British possessions or by British courts in a foreign country may be made admissible in England (e).

Colonial
probates.

757. The production of probate or letters of administration, or their equivalent (f), is, if the testator be in fact dead (g), the sole (h) and conclusive (i) proof of the title of the personal representative, but not of the identity of the person obtaining it (k). It makes no difference that the will proved was obtained by fraud (l) or forged (n). Probate is, moreover, until annulled, conclusive proof

What is
proved by
probate.

(r) *Jacomb v. Turner*, [1892] 1 Q. B. 47.

(s) Court of Probate Act, 1857 (20 & 21 Vict. c. 77), s. 69. This includes the seals of district registries.

(t) *Ibid.*, s. 22. As to using the probate as evidence in an action relating to real estate and notice of the intention so to do, see p. 512, *ante*.

(a) *Cox v. Allingham* (1822), Jac. 514. There is no necessity to account for the non-production of the probate itself (*ibid.*). See also *Elden v. Keddell* (1807), 8 East, 187; *Davis v. Williams* (1811), 13 East, 232.

(b) Evidence Act, 1851 (14 & 15 Vict. c. 99), s. 14. In *Dorrett v. Meux* (1854), 15 Q. B. 142, an unstamped copy of the Act-book was admitted under this section to prove that a certain person was named executor in the will.

(c) *Doe d. Bassett v. Mew* (1837), 7 Ad. & El. 240; compare *Gorton v. Dyson* (1819), 1 Brod. & Bing. 219.

(d) *In the Goods of Smith* (1903), 20 T. L. R. 119.

(e) Colonial Probates Act, 1892 (55 Vict. c. 6), ss. 2, 3; see title DEPENDENCIES AND COLONIES, Vol. X., p. 559.

(f) See *supra*.

(g) *Allen v. Dundas* (1789), 3 Term Rep. 125.

(h) *Pinney v. Pinney* (1828), 8 B. & C. 335; *Pinney v. Hunt* (1877), 6 Ch. D. 98; compare *Cox v. Allingham* (1822), Jac. 514; *Re Ivory*, *Hankin v. Turner* (1878), 10 Ch. D. 372, C. A.; and see p. 518, note (g), *ante*.

(i) *Allen v. Dundas*, *supra*; compare *Marriot v. Marriot*, (1725), 1 Stra. 666.

(k) *Ex parte Jolliffe* (1845), 8 Beav. 168.

(l) *Meluish v. Milton* (1876), 3 Ch. D. 27, C. A.

(m) *Allen v. Dundas*, *supra*. *Semble*, the Court of Probate alone can revoke probate, although another court may, if necessary, decide that a will is a forgery (*Priestman v. Thomas* (1834), 9 P. D. 210, *per* COTTON, L.J., at p. 214); *Meluish v. Milton*, *supra*, *per* JAMES, L.J., at p. 33: "No other court" (than the Court of Probate) "can listen to the allegation that the will was obtained by fraud." Compare *Allen v. McPherson* (1847), 1 H. L. Cas. 191.

SECT. 2.
Proof of
Contents of
Documents.

that the will is the testator's will (*n*) and valid by the law of his domicile (*o*), but neither probate nor letters of administration are conclusive as to what the domicile of the deceased was (*p*), or as to who is entitled by the *lex domicilii* (*q*); the probate is also conclusive that two papers proved as will and codicil are indeed such (*r*), while letters of administration are conclusive that the grantee was one of the deceased's next of kin if the grant was made on that ground. But where a codicil is executed in duplicate and probate is granted of both writings, evidence is admissible to show that they were one and not two instruments (*a*).

Probate is also conclusive as to the wording of the will (*b*), and the Probate Court alone can rectify any error in the probate (*c*).

SUB-SECT. 5.—Proof of Particular Private Documents.

(i.) Bankers' Books.

Bank in
general not
bound to
produce its
books.

758. A bank (*d*) cannot in general, without an order of the court (*e*), be compelled to produce its books in any case to which it is not a party, but may instead allow examined copies of entries in such books to be made (*f*). Such copies are in every case, and as against the whole world, *prima facie* evidence of the matters recorded if it be shown that the book from which the entry was copied is one of the ordinary books of the bank and in its custody, and that the entry was made in due course of business.

On the application of any party to the proceedings, the court (*g*)

Inspection
of bankers'
books.

(*n*) If its validity depends on domicile (see, as to this, title **CONFLICT OF LAWS**, Vol. VI., p. 182; *Whicker v. Hume* (1858), 7 II. L. Cas. 124), probate is *prima facie* evidence of domicile (*Feames v. Hacon* (1881), 18 Ch. D. 347, 352, C. A.).

(*o*) *Concha v. Concha* (1886), 11 App. Cas. 541; compare *Whicker v. Hume*, *supra*; and see, further, title **CONFLICT OF LAWS**, Vol. VI., pp. 185 *et al.*

(*p*) *Whicker v. Hume*, *supra*.

(*q*) *Baillie v. Butterfield* (1787), 1 Cox, Eq. Cas. 392, where the question was whether two legacies were cumulative or not.

(*r*) *Re Ivory, Hawkin v. Turner* (1878), 10 Ch. D. 372, C. A.; compare *Barrs v. Jackson* (1845), 1 Ph. 582.

(*a*) *Hubbard v. Alexander* (1876), 3 Ch. D. 738; compare *Whyte v. Whyte* (1873), 1 L. R. 17 Eq. 50.

(*b*) *Re Bywater, Bywater v. Clarke* (1881), 18 Ch. D. 17, 22, C. A.

(*c*) *Ibid.*; and see, further, title **WILLS**. When a certified copy of a French will is deposited in the probate registry as well as an English translation which was admitted to probate but is incorrect, the court construing the will may look at the French copy if none of the parties insist on an application to the Court of Probate to correct the translation (*Re Cliff's Trusts*, [1892] 2 Ch. 229, cited in title **CONFLICT OF LAWS**, Vol. VI., p. 230, note (*d*), where the question of translations of wills in a foreign language is referred to).

(*d*) For the meaning of bank, bankers etc., see **Bankers' Books Evidence Act**, 1879 (42 & 43 Vict. c. 11), s. 9; and title **BANKERS AND BANKING**, Vol. I., p. 568.

(*e*) See title **BANKERS AND BANKING**, Vol. I., pp. 644—647. Special cause must be shown before such an order can be made (**Bankers' Books Evidence Act**, 1879 (42 & 43 Vict. c. 11), s. 6). For a case in which an order was refused, see *Parnell v. Wood*, [1892] p. 137.

(*f*) A banker who does not avail himself of this advantage is left with the old liability to a *subpoena duces tecum* (*Emmott v. Star Newspaper Co.* (1892), 62 L. J. (Q. B.) 77). For the law prior to the Act, see *Cooper v. Marsden* (1793), 1 Esp. 1.

(*g*) This includes a magistrate (*R. v. Kinghorn*, [1908] 2 K. B. 949).

may allow such party to inspect and copy any entries in the books of any bank in England, Scotland, or Ireland unless the person whose account it is sought to inspect states on affidavit that the entries therein are irrelevant (*h*). The order may, however, be made although such person has made an affidavit of documents disclosing his pass-books (*i*).

SECT. 2.
Proof of
Contents of
Documents.

(ii.) *Books of Companies and Corporations.*

759. The register of members of a company directed to be kept by the Companies (Consolidation) Act, 1908 (*k*), is *prima facie* evidence of any matters directed or authorised by the Act to be inserted therein (*l*).

Company
registers.

Similarly, minute books of proceedings at general meetings, or of directors or managers, are, if purporting to be duly signed, evidence of such proceedings (*m*), and *prima facie* evidence that the meeting was held and its proceedings valid (*n*).

Minute books.

Where a company is being wound up, all books and papers of the company and of the liquidators are *prima facie* evidence of the facts therein stated as between contributories (*o*), but not as against strangers (*p*).

Company in
liquidation.

Minutes of the proceedings of certain other bodies have been made by statute evidence of the facts therein properly recorded (*q*).

Other bodies.

(*h*) The order must be served on the bank three clear days before it is to be obeyed, unless the court otherwise directs. No notice is necessary either to the bank or to any other person before the application is made (Bankers' Books Evidence Act, 1879 (42 & 43 Vict. c. 11), s. 7). In *Arnott v. Hayes* (1887), 36 Ch. D. 731, C. A., it is said that the jurisdiction extends to civil cases, and that evidence in support of the application is not essential, although the court may require to be satisfied that the application is *bona fide*, and that inspection is material. As to whether the order can be made in the case of third parties, see title BANKERS AND BANKING, Vol. I., p. 646.

(*i*) *Perry v. Phosphor Bronze Co.* (1894), 71 L. T. 854.

(*k*) 8 Edw. 7, c. 69, s. 25; and see title COMPANIES, Vol. V., p. 148.

(*l*) *Ibid.*, s. 33; and see title COMPANIES, Vol. V., pp. 151, 152.

(*m*) *Ibid.*, s. 71 (2).

(*n*) *Ibid.*, s. 71 (3). The chairman of a general meeting has *prima facie* authority to decide all incidental questions which necessarily require decision at the time, and his decision governs the entry of the minute in the books; his decision so entered as to the result of a poll is valid until displaced (*Re Indian Zedone Co.* (1884), 26 Ch. D. 70, C. A.).

(*o*) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 220. This has been held to include an allotment book stating the date of allotment, although there was no record of a board or committee meeting on that date (*Re Great Northern Salt and Chemical Works, Ex parte Kennedy* (1890), 44 Ch. D. 472, 483); and an entry in the company's books that a person is a contributory is, until displaced, evidence that he is so (*Arnott's Case* (1887), 36 Ch. D. 702, 712, C. A.). For the law under earlier Acts, see *Re Moseley Green Coal and Coke Co., Ltd., For's Case* (1863), 3 De G. J. & Sm. 465.

(*p*) *Re Pyle Works* (No. 2), [1891] 1 Ch. 173, *per* STIRLING, J., at p. 184.

(*q*) Public Health Act, 1875 (38 & 39 Vict. c. 55), Sched. I. (1), r. 10, r. 8 (2) (minutes of meetings of local boards or committees), Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50), s. 22 (5) (minutes of meetings of town councils); Education Act, 1902 (2 Edw. 7, c. 42), Sched. I., A (4) (minutes of proceedings of education committee); Sched. I., B (8), (9) (minutes of proceedings of body of managers appointed under that Act).

SECT. 3.

Proof of Contents of Documents.

Posting, how proved.

Postmark.

Delivery, how proved.

Posting evidence of service.

(iii.) *Letters.*(a) *Posting and Delivery.*

760. The posting of a letter may be proved by the person who posted it, or by showing facts from which posting may be presumed. Thus, evidence of posting may be given by proving that a letter was delivered to a clerk who in the ordinary course of business would have posted it (r), or that it was put into a box which is cleared every day by the postman (s).

The postmark on an envelope is *prima facie* evidence as to the time and place of posting (t).

The fact that a letter has been posted is evidence, but not conclusive evidence (u), of its delivery (v). In contracts entered into wholly or partly by correspondence the acceptance of an offer made by letter is complete as soon as a properly addressed letter containing the acceptance is posted (a). On similar grounds an equitable assignment (b) or a breach of contract (c) may become effective on the posting of a letter in terms which sufficiently evidence the intention of the sender.

In many cases provision is made by statute (d) that the

(r) *Trotter v. Maclean* (1879), 13 Ch. D. 574; compare *Pritt v. Fairclough* (1812), 3 Camp. 305. In *Hetherington v. Kemp* (1815), 4 Camp. 193, it was held insufficient to show that the letter was written by a merchant in his office and put on a table for the purpose of being taken to the post office, and that by the course of business at the office all letters put on that table were carried to the post office by the porter.

(s) *Skilbeck v. Garbett* (1845), 7 Q. B. 846, *per* Lord DENMAN, C.J., at p. 849: "If a public servant belonging to the post office takes charge of the letter in the exercise of his public duty, it is the same as if it were carried to the office." As to letters handed to a postman, see note (e), p. 557, *post*.

(t) *Stocken v. Collin* (1841), 7 M. & W. 515; *Re London and Northern Bank, Ex parte Jones*, [1900] 1 Ch. 220. This applies in the case of special marks used by a district post office, to show that a letter was posted there and not at the General Post Office. In *Abbey v. Lill* (1829), 5 Bing. 299, a question was raised as to the necessity of calling the person who made the post mark to prove it; it appears that this must be done in case of dispute, although it is said elsewhere that the evidence of persons who are in the habit of receiving letters from the post office in question will suffice (*Woodcock v. Houldsworth* (1846), 16 M. & W. 124).

(u) *Reidpath's Case* (1870), L. R. 11 Eq. 86.

(v) Compare *R. v. Johnson (Hon. R.)* (1805), 7 East, 65.

(a) See title CONTRACT, Vol. VII., pp. 352 *et seq.*

(b) *Alexander v. Steinhardt, Walker & Co.*, [1903] 2 K. B. 208.

(c) *Holland v. Bennett*, [1902] 1 K. B. 867, C.A. (letter posted abroad), following *Cherry v. Thompson* (1872), L. R. 7 Q. B. 573, *Mattheus v. Alexander* (1873), 7 I. R. C. L. 575, and *Hamilton v. Barr* (1886), 18 L. R. Ir. 297, O. A.; compare *Mutzenbecher v. La Aseguradora Española*, [1906] 1 K. B. 254, C.A. (letter posted in London by agent sent from abroad). See also as to payments which may be effected by posting *Thairwall v. Great Northern Rail. Co.*, [1910] 2 K. B. 509, following *Norman v. Ricketts* (1886), 3 T. L. R. 182, C. A.

(d) Provisions of this description are contained in the following statutes:—Agricultural Holdings Act, 1908 (8 Edw. 7, c. 28), s. 45; Army Act, 1881 (44 & 45 Vict. c. 58), s. 163; Children Act, 1908 (8 Edw. 7, c. 67), s. 87; Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 116, Sched. I., Table A, art. 110; Companies Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 16), s. 136; Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), s. 67; Copyhold Act, 1894 (57 & 58 Vict. c. 46), s. 57; Corrupt and Illegal Practices Prevention Act, 1883 (46 & 47 Vict. c. 51), s. 62; County Rates Act, 1844 (7 & 8 Vict. c. 33), s. 6;

posting of a notice is sufficient evidence of service of the notice (e).

The fact that a letter has been copied into a letter-book is, as against the person keeping the book, evidence that the letter was posted (f).

The date which a letter bears is *prima facie* evidence of the date on which it was written (g).

SECT. 2.

Proof of Contents of Documents.

Press copy evidence of posting.

Date.

(b) Without Prejudice.

761. Letters written during a dispute or negotiation between the parties, and expressed or otherwise proved to have been written "without prejudice," cannot in general be admitted in evidence without the consent of both parties (h).

Letters written without prejudice.

But this rule is strictly confined to cases where there is a dispute or negotiation, and terms are offered for the settlement thereof (i); and, where this is not the case, a writer cannot, apart from some special relation existing between the sender and recipient, by marking a letter "without prejudice," or "private," or "private and confidential," impose on the recipient any condition as to the

Only protected where there is a dispute.

Diseases of Animals Act, 1894 (57 & 58 Vict. c. 57), s. 48; Ecclesiastical Dilapidations Act, 1871 (34 & 35 Vict. c. 43), s. 69; Electric Lighting (Clauses) Act, 1899 (62 & 63 Vict. c. 19), Sched., s. 62; Elementary Education Act, 1870 (33 & 34 Vict. c. 75), s. 81; Endowed Schools Act, 1869 (32 & 33 Vict. c. 56), s. 57; Employers' Liability Act, 1880 (43 & 44 Vict. c. 42), s. 7; Factory and Workshop Act, 1901 (1 Edw. 7, c. 22), s. 148; Finance (1909-10) Act, 1910 (10 Edw. 7, c. 8), s. 31; Friendly Societies Act, 1896 (59 & 60 Vict. c. 25), s. 94; Land Transfer Act, 1875 (38 & 39 Vict. c. 87), s. 90; Licensing Consolidation Act, 1910 (10 Edw. 7 & 1 Geo. 5, c. 24); Lunacy Act, 1890 (53 & 54 Vict. c. 5), s. 327; Metalliferous Mines Regulation Act, 1872 (35 & 36 Vict. c. 77), s. 40; Parliamentary Voters Registration Act, 1843 (6 & 7 Vict. c. 18), s. 100; Patents and Designs Act, 1907 (7 Edw. 7, c. 29), s. 81; Poor Law Amendment Act, 1844 (7 & 8 Vict. c. 101), s. 72; Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 267; Regulation of Railways Act, 1873 (36 & 37 Vict. c. 48), s. 35; Taxes Management Act, 1880 (43 & 44 Vict. c. 19), s. 16; Telegraphs Act, 1878 (41 & 42 Vict. c. 76), s. 12; Valuation (Metropolis) Act, 1869 (32 & 33 Vict. c. 67), s. 65; Workmen's Compensation Act, 1906 (6 Edw. 7, c. 58), s. 2; and several Acts, of less general application, which are mentioned in the list given in the note in 1 Taylor on Evidence, ed. 1906, s. 180.

(e) It must be shown that the letter was prepaid (*Walthamstow Urban District Council v. Henwood*, [1897] 1 Ch. 41). But note that although a letter handed to a country postman, who is allowed by the General Post Office to receive it, is considered as posted, this is not so where it is handed to a town postman, who is forbidden to receive it (*Re London and Northern Bank, Ex parte Jones*, [1900] 1 Ch. 220). As to duties of post office officials, see title **POST OFFICE**.

(f) *Sturge v. Buchanan* (1839), 10 Ad. & El. 598.

(g) *Goodtitle d. Baker v. Milburn* (1837), 2 M. & W. 853; compare *Malpas v. Clements* (1850), 19 L. J. (Q. B.) 435. A doubt as to this was expressed in *Butler v. Mountgret (Viscount)* (1859), 7 H. L. Cas. 633, 646.

(h) *Whiffen v. Hartwright* (1848), 11 Beav. 111; *Hoghton v. Hoghton* (1852), 15 Beav. 278, where ROMILLY, M.R., gives as the reason for the rule (at p. 321): "For, if parties were to be afterwards prejudiced by their efforts to compromise, it would be impossible to attempt an amicable arrangement of difficulties"; see also *Cory v. Bretton* (1830), 4 O. & P. 462; *Re River Steamer Co., Mitchell's Claim* (1871), 6 Ch. App. 822, per MELLISH, L.J., at p. 831, cited note (q), p. 558, *post*; and cases cited, *post*, under this head.

(i) *Grace v. Baynton* (1877), 21 Sol. Jo. 631; *Kiteat v. Sharp* (1892), 48 L. T. 64; *Re Daintrey, Ex parte Holt*, [1893] 2 Q. B. 116.

SECT. 2.
Proof of
Contents of
Documents.

Exceptions
to rule.

When
admissible.

Privilege
extends
to whole
correspond.

mode in which it may be used (*k*). So a letter "without prejudice" containing threats of what the writer will do in the event of a request not being complied with is not protected (*l*).

Similarly, the rule has no application to a document which in its nature may prejudice the person to whom it is addressed (*m*). This is the case where, for example, a letter addressed to a creditor is of itself an act of bankruptcy (*n*).

Where the rule applies these letters are admissible to show that an attempt has been made to compromise the suit (*o*), and for no other purpose; they are not admissible as admissions (*p*), or to take a debt out of the Statute of Limitations (*q*), or for the purpose of determining whether there is good cause for depriving a successful litigant of costs (*r*), or in order to prove malice (*s*).

Where the privilege exists, it covers not only the particular letter itself, but also all subsequent parts of the same correspondence on both sides, notwithstanding that they are not expressed to be "without prejudice" (*t*). Moreover, where a letter offering terms, but not stated to be "without prejudice," is followed by another saying that the communications between the parties are to be "without prejudice," the former letter is protected (*a*).

The fact that such letters have been written (but not their contents) may, however, be considered where a question of *laches* is raised, or in order to show that negotiations have taken place (*b*),

(*k*) *Grace v. Baynton* (1877), 21 Sol. Jo. 631; *Kitcat v. Sharp* (1882), 48 L. T. 64. The statement in the text is only a rule of evidence, and the use of letters in evidence must be carefully distinguished from the publication of them in any other manner. The unauthorised publication of a letter usually amounts to conversion; see titles TRESPASS; TROVER AND CONVERSION.

(*l*) See cases cited in last note; *Kurtz & Co. v. Spence & Sons* (1887), 58 L. T. 538.

(*m*) *Re Daintrey, Ex parte Holt*, [1893] 2 Q. B. 116.

(*n*) *Ibid.*

(*o*) *Jones v. Foxall* (1852), 15 Beauv. 388.

(*p*) *Ibid.*

(*q*) *Cory v. Bretton* (1830), 4 C. & P. 462; *Re River Steamer Co., Mitchell's Claim* (1871), 6 Ch. App. 822, where MELLISH, L.J., says, at p. 831: "I am strongly of opinion . . . that a letter which is stated to be 'without prejudice' cannot be relied upon to take a case out of the Statute of Limitations, for it cannot do so unless it be relied upon as a new contract. Now, if a man says his letter is 'without prejudice,' that is tantamount to saying 'I make you an offer which you may accept or not as you like, but, if you do not accept it, the having made it is to have no effect at all.' It appears to me . . . that when a man says in his letter it is to be 'without prejudice' he cannot be held to have entered into any contract by it if the offer contained in it is not accepted." The point was not expressly decided in this case, but the question can scarcely be considered an open one; see also title LIMITATION OF ACTIONS.

(*r*) *Walker v. Wilsher* (1889), 23 Q. B. D. 335, C. A. The *dicta* to the contrary in *Woodward v. Eastern Counties and London and Blackwall Rail. Co.* (1855), 1 Jur. 899, cannot, it is submitted, be supported.

(*s*) *Watt v. Watt*, [1905] A. C. 115.

(*t*) *Paddock v. Forrester* (1841), 3 Scott (N. R.), 715, 734; *Re Harris, Ex parte Harris* (1875), 44 L. J. (BCY.) 33; *Peacock v. Harper* (1877), 26 W. R. 109; compare *Walker v. Wilsher*, *supra*; *Oliver v. Nautilus Steam Shipping Co.*, [1903] 2 K. B. 639, C. A.

(*a*) *Peacock v. Harper*, *supra*; compare *Oliver v. Nautilus Steam Shipping Co.*, *supra*.

(*b*) *Walker v. Wilsher*, *supra*, at p. 338; and see *Jones v. Foxall* (1852), 15 Beauv. 388, and *Waldridge v. Kennison* (1794), 1 Esp. 143.

and the contents of the letters are admissible where the offer they contain has been accepted (c).

The privilege can be waived, but the better opinion appears to be that the consent of both writer and recipient must be given before the letter can be read (d).

The court may look at a document written "without prejudice" for the purpose of deciding the question of its admissibility (e).

SECT. 2.
Proof of
Contents of
Documents.

How the
privilege
may be
waived.

(iv.) Telegrams.

762. The form handed in to the post office by the sender (and not the form delivered by the post office) is the original of a telegram (f), and either this must be produced by an official from the post office, or proof of its destruction given before a copy can be admitted (g). Where a telegram is sent by means of a code the onus is upon the sender, if he relies on the telegram having one of two possible meanings, to prove that it could not reasonably be misunderstood (h).

Telegrams.

Presumptions as to the date and hour of sending a telegram are, it is conceived, the same as in the case of letters (i).

Date.

(v.) Deeds.

763. The subject of deeds is fully dealt with elsewhere (k).

Deeds.

(vi.) Wills.

764. Probate is evidence of the effect of a will of personal estate, but the original will may be looked at for the purpose of construing the will (l). Other cases in which the will itself is admissible, as well as the principles on which parol evidence is admissible in relation to wills, are dealt with elsewhere (m).

Probate.

Wills thirty years old produced from proper custody prove themselves (n).

Descriptions in a will, or even in the draft of a will (o), relating to the family of the testator are admissible in pedigree cases as

Descriptions
in wills
admissible
to prove
pedigree.

(c) *Holdsworth v. Dimsdale* (1871), 19 W. R. 798; *Re River Steamer Co., Mitchell's Claim* (1871), 6 Ch. App. 822; *Re Leite, Leite v. Ferreira* (1881), 72 L. T. Jo. 97; compare *Walker v. Wilsher* (1889), 23 Q. B. D. 335, C. A.

(d) *Walker v. Wilsher*, *supra*, where the contrary opinion expressed in *Williams v. Thomas* (1862), 2 Drew. & Sm. 29, is disapproved.

(e) *Re Daintrey, Ex parte Holt*, [1893] 2 Q. B. 116.

(f) See *Henkel v. Pape* (1870), L. R. 6 Exch. 7; *R. v. Regan* (1887), 16 Cox, C. C. 203. A signature to an acceptance of a contract on such a form may suffice to satisfy the Statute of Frauds (*Godwin v. Francis* (1870), L. R. 5 C. P. 295); see also **TELEGRAPHS AND TELEPHONES**.

(g) *R. v. Regan*, *supra*.

(h) *Fulch v. Williams*, [1900] A. C. 176, P. C.

(i) See p. 556, *ante*.

(k) See **TITLE DEEDS AND OTHER INSTRUMENTS**, Vol. X., pp. 355 *et seq.*

(l) *Re Harrison, Turner v. Hellard* (1885), 30 Ch. D. 390, C. A., and see p. 512, *ante*, and **TITLES EXECUTORS AND ADMINISTRATORS; WILLS**.

(m) See **TITLES EXECUTORS AND ADMINISTRATORS; WILLS**. Parol evidence is admissible to prove that words have been inserted in a will by inadvertence and did not represent the intention of the testatrix (*Brisco v. Baillie Hamilton*, [1902] P. 234). As to declarations by testators as to their wills, see p. 471, *ante*.

(n) See p. 512, *ante*.

(o) *Re Lambert's Trusts* (1886), 56 L. T. 15.

SECT. 2. statements by deceased persons (*p*); but statements intended to be operative as part of a will which for want of due execution of the document in which they are contained are not so operative will not be allowed to be effective in some other way (*q*).

Proof of Contents of Documents.

(vii.) *Family Papers.*

Family papers admissible to prove pedigree.

765. Family papers produced from proper custody (*r*) are in general admissible in cases of pedigree (*s*). Under this rule entries in family Bibles (*t*) or other books (*a*) are admitted to prove facts concerned with pedigree. In the case of family Bibles, which are the ordinary register in families (*b*), and other writings which are public in the family (*c*), no evidence is required that the writer was related to the family (*d*), but in all other cases the declaration is only admissible if made by a member of the family.

What papers admitted.

Other examples of family papers admissible in pedigree cases are family correspondence (*e*), wills (*f*), deeds (*g*) executed by a member of the family (*h*), pedigrees (*i*), or genealogical accounts of the

(*p*) See p. 469, *ante*.

(*q*) *E.g.*, as cancelling a debt due to the would-be testator (*Re Hyslop, Hyslop v. Chamberlain*, [1894] 3 Ch. 522).

(*r*) See pp. 505, 512, *ante*.

(*s*) See p. 469, *ante*.

(*t*) *Berkeley Peerage Case* (1811), 4 Camp. 401, H. L.; *Payne v. Bennett* (1904), 20 T. L. R. 203.

(*a*) Bibles do not stand on any special footing (see *Berkeley Peerage Case*, *supra*, at p. 418 (opinion of the judges): "Such a writing in a Bible or any other book or on any other piece of paper would be admissible in evidence as a declaration of the father in matter of a pedigree"). See, for further instances, *Slane Peerage* (1835), 5 Cl. & Fin. 23, 41, H. L. (missal); *Herbert v. Tuckal* (1863), T. Raym. 84 (almanack); compare *Monkton v. A.-G.* (1831), 2 Russ. & M. 147, 162; *The Sussex Peerage* (1844), 11 Cl. & Fin. 85, 114, H. L. (prayer book); compare *The Trary Peerage* (1843), 10 Cl. & Fin. 154, H. L.; *Hood v. Beauchamp* (1836), 8 Sim. 26 (religious book).

(*b*) *Berkeley Peerage Case*, *supra*, per Lord ELLENBOROUGH, at p. 421.

(*c*) The family Bible, the public wearing of a ring, the public exposure of an inscription upon a tombstone, and the public hanging up of the family pedigree in the mansion are all relied upon because, in all those cases, the publicity supplies the want of connection between the pedigree, the tombstone, the ring, or the Bible, with particular individuals, members of the family (*Monkton v. A.-G.* (1831), 2 Russ. & M. 147, per Lord BROUGHAM, L.C., at p. 163).

(*d*) *Berkeley Peerage Case*, *supra*; *Monkton v. A.-G.*, *supra*; *Hubbard v. Lees and Purden* (1866), L. R. 1 Exch. 255. The document must be produced from the proper custody before this rule can apply (*Hubbard v. Lees and Purden*, *supra*). For what is proper custody, see pp. 505, 512, *ante*. In *Hood v. Beauchamp*, *supra*, a religious book containing entries of births etc. of members of the family was admitted, and one entry was admitted without proof of authorship by a member of the family, the authorship of the others having been proved.

(*e*) *Kidney v. Cockburn* (1831) 2 Russ. & M. 167; compare *Butler v. Mountgarret (Viscount)* (1859), 7 H. L. Cas. 633. In *The Shrewsbury Peerage* (1858), 7 H. L. Cas. 1, letters addressed to a lady who had married into a certain family were admitted to prove the character in which she was addressed by members of that family.

(*f*) See *Vulliamy v. Huskisson* (1838), 3 Y. & C. (ex.) 80, 82; *Hungate v. Gascoyne* (1846), 2 Ph. 25.

(*g*) *Neal d. Athol (Duke) v. Wilding* (1741) 2 Stra. 1151.

(*h*) *Slaney v. Wade* (1836) 1 My. & Cr. 338; *Fort v. Clarke* (1826), 1 Russ. 601, 604.

(*i*) *Monkton v. A.-G.*, *supra*,

family (*k*), and, generally, any writing by a member of the family (*l*); while an old will, by which the testator purports to leave all his property to collaterals or friends, is admissible to prove that he died without children (*m*).

It is no objection to the admissibility of family papers that they were drawn up or entries were made in them for the purpose of preventing disputes in the family (*n*).

(viii.) *Account Books.*

766. Account books of a deceased person are admissible as declarations by such person (*o*) against interest if the entries have been made by such person (*p*), or by someone acting on his instructions (*q*), or have been in any way adopted by him (*r*). But where the entry was made by an agent, evidence must be produced of his employment as such (*s*).

Account books are also receivable as admissions against the party keeping them or causing them to be kept (*a*), and in special circumstances may be admitted even in favour of such party (*b*).

Where the court directs an account, it may direct that the books of account in which the accounts in question have been kept shall be taken as *prima facie* evidence of the truth of the matters therein contained (*c*).

Accounts thirty years old prove themselves (*d*).

SECT. 2.
Proof of
Contents of
Documents.

Papers
drawn up
for the
purpose of
preventing
disputes.

Account
books
admissible
against
interest.

Admissions.

(*k*) *Robson v. A.-G.* (1813), 10 Cl. & Fin. 471, H. L.

(*l*) *Berkeley Peerage Case* (1811), 4 Camp. 401, H. L. As to the question whether actual proof of execution by a member of the family is necessary in the case of other instruments than deeds, see *The Tracy Peerage* (1843), 10 Cl. & Fin. 154, H. L.; *The Fitzwalter Peerage* (1843), 10 Cl. & Fin. 193, H. L.

(*m*) *Hungate v. Gascoyne* (1846), 2 Ph. 25; *Robson v. A.-G.*, *supra*; *The Tracy Peerage*, *supra*, at p. 172.

(*n*) *Berkeley Peerage Case*, *supra*; *Monkton v. A.-G.* (1831), 2 Russ. & M. 147, 161. The weight, not the admissibility, of the evidence is affected (*ibid.*).

(*o*) For declarations by deceased persons in general, see p. 463, *ante*.

(*p*) *Doe d. Sturt v. Mobbs* (1841), Car. & M. 1; *Doe d. Bodenham v. Colcombe* (1841), Car. & M. 155; *Doe d. Ashburnham (Earl) v. Michael* (1851), 17 Q. B. 276.

(*q*) *Exeter Corporation v. Warren* (1844), 5 Q. B. 773; *Bradley v. James* (1853), 13 C. B. 822. In this case the actual writer need not be dead to make the entry admissible (*Doe d. Graham v. Hawkins* (1841), 2 Q. B. 212).

(*r*) *E.g.*, by producing them as his accounts at an audit (*Doe d. Graham v. Hawkins*, *supra*), or by signing them (*Doe d. Lichfield (Earl) v. Stacey* (1833), 6 C. & P. 139). As to estoppel against an agent accounting to his principal, see title ESTOPPEL, p. 338, *ante*.

(*s*) *De Rutzen (Baron) v. Furr* (1835), 4 Ad. & El. 53.

(*a*) *Symonds v. Gas Light and Coke Co.* (1848), 11 Beav. 283.

(*b*) *Ibid.*; *Lodge v. Prichard* (1853), 3 De G. M. & G. 906, C. A. It is conceived that this is confined to cases where the court directs an account to be taken. This is now governed by R. S. C., Ord. 33, r. 3 (see next note).

(*c*) R. S. C., Ord. 33, r. 3; *Ewart v. Williams* (1857), 7 De G. M. & G. 68. No special order is required in a partnership action where an account is ordered (*Gething v. Keighley* (1878), 9 Oh. D. 547). See, further, *Cookes v. Cookes* (1863), 11 W. R. 871 (accounts kept by trustee); *Newberry v. Benson* (1853), 23 L. J. Ch. 1003; Yearly Practice of the Supreme Court, 1911, Vol. I., p. 430; and title PRACTICE AND PROCEDURE.

(*d*) See p. 512, *ante*; *Doe d. Ashburnham (Earl) v. Michael*, *supra*.

SECT. 2.

(ix.) *Bills of Exchange, Cheques, and Promissory Notes.***Proof of Contents of Documents.**

Bills of exchange etc., as evidence of payment.

767. A bill, cheque, or promissory note may be evidence of the payment of a debt (e) where it appears to have been received by the creditor, but, standing alone, is not evidence of the existence of a debt (f).

Where the cheque in question has been lost, the counterfoil is, it seems, admissible to prove the giving of the cheque (g).

(x.) *Receipts.*Receipts in general only *prima facie* evidence of payment.

768. Receipts are in general only *prima facie* evidence of payment (h), and can be contradicted by proof that the money was not in fact paid (i), that the transaction was fraudulent (k), that the terms of the receipt do not accurately state the transaction (l), that the money was in fact paid by another person (m), or that the receipt was given without prejudice (n).

But in some cases a receipt may amount to a contract, the terms of which are embodied in it (o), and apart from any question of contract a receipt will be conclusive in cases where it works an estoppel (p).

Receipts are also admissible where they amount to a statement by a deceased person against interest (q).

(e) *Roswell v. Smith* (1833), 6 C. & P. 60.

(f) *Egg v. Barnett* (1800), 3 Esp. 196; but see *Aubert v. Walsh* (1812), 4 Taunt. 293; *Pearce v. Davis* (1834), 1 Mood. & R. 365; *Cary v. Gerrish* (1801), 4 Esp. 9, per Lord KENYON, C.J., at p. 10: "If the plaintiff had shown any money transactions between the testator and the defendant, from which a loan could be inferred, or any application to borrow money at the time, that, coupled with the giving the draft, might be evidence to go to a jury"; *Pfiel v. Van-batenburg* (1810), 2 Camp. 439.

(g) *R. v. Wilkinson* (1867), 10 Cox, C. C. 537.

(h) *Skaipe v. Jackson* (1824), 3 B. & C. 421; *Graves v. Key* (1832), 3 B. & Ad. 313; *Farrar v. Hutchinson* (1839), 9 Ad. & El. 641; *Bowes v. Foster* (1858), 2 H. & N. 779. They operate in general only as admissions, as to which see p. 456, *ante*.

(i) *Skaipe v. Jackson*, *supra*; *Bowes v. Foster*, *supra*; compare *Straton v. Rastall* (1788), 2 Term Rep. 366; *Lainpon v. Corke* (1822), 5 B. & Ald. 606. *Alner v. George* (1808), 1 Camp. 392, must be considered now as bad law.

(k) *Farrar v. Hutchinson*, *supra*; *Wallace v. Kelsall* (1840), 7 M. & W. 264.

(l) *Nathan v. Ogdens, Ltd.* (1905), 93 L. T. 553; and see *Lee v. Lancashire and Yorkshire Rail. Co.* (1871), 6 Ch. App. 527, where plaintiff gave a receipt in full discharge of all claims, but was allowed to produce parol evidence to prove an agreement that this should not preclude him from making a further claim if his injuries should prove to be serious; distinguish *Stewart v. Great Western Rail. Co. and Saunders* (1865), 2 De G. J. & Sm. 319, which was a case of fraud. Receipts, being as a rule informal documents, may be varied or contradicted by parol evidence; see, as to this, p. 566, *post*, and title DEEDS AND OTHER INSTRUMENTS, Vol. X., p. 444.

(m) *Graves v. Key*, *supra*.

(n) *Oliver v. Nautilus Steam Shipping Co.*, [1903] 2 K. B. 639.

(o) *Roberts v. Eastern Counties Rail. Co.* (1859), 1 F. & F. 460; *Rideal v. Great Western Rail. Co.* (1859), 1 F. & F. 706; and distinguish *Lee v. Lancashire and Yorkshire Rail. Co.*, *supra*. The only question arising in these cases is really one of construction of a contract, the documents in question being something more than mere receipts. See *Prosser v. Lancashire and Yorkshire Accident Insurance Co.* (1890), 6 T. L. R. 285, C. A.; *Ellen v. Great Northern Rail. Co.* (1901), 17 T. L. R. 453, C. A.; see, further, title CONTRACT, Vol. VII., p. 453.

(p) See title ESTOPPEL, p. 386, *ante*; and as to receipts in deeds, see title DEEDS AND OTHER INSTRUMENTS, Vol. X., p. 464.

(q) See p. 463, *ante*.

Receipts thirty years old prove themselves (r).

Bills of lading, in so far as they are receipts for the goods shipped, are governed, *mutatis mutandis*, by the same rules as receipts for money (s), but as against the master or other person signing them they are conclusive evidence in favour of a *bonâ fide* holder for value of the shipment of the goods (t).

SECT. 2.

Proof of Contents of Documents.

Bills of lading.

(xi.) *Works of History and Science.*

769. Historical works may be referred to wherever it is important to ascertain ancient facts of a public nature (u); and in general, standard authors may be referred to as showing the opinions of eminent men upon particular subjects, but not to prove facts (a).

Historical works evidence of facts of a public nature.

But a history is not admissible to prove a particular custom (b) or the boundary of a county (c).

An engineer's reports as to a past state of facts not within living memory, accepted by engineers as accurate, have been admitted on the same principle as historical works (d).

Engineer's reports.

(xii.) *Plans and Maps.*

770. Private, as distinct from public (e), maps, plans, and surveys are not in general admissible in evidence against third

Private maps inadmissible except

(r) *Bertie v. Beaumont* (1816), 2 Price, 303. For this rule, see p. 512, *ante*.

(s) *Cox v. Bruce* (1886), 18 Q. B. D. 147, C. A.; *Bennett and Young v. Bacon (John), Ltd.* (1897), 2 Com. Cas. 102, C. A.; *Hine Brothers v. Free, Rodwell & Co.* (1897), 2 Com. Cas. 149; *Smith & Co. v. Dedouin Steam Navigation Co.*, [1896] A. C. 70; *Parsons v. New Zealand Shipping Co.*, [1901] 1 K. B. 548, C. A.; and see, further, titles *ESTOPPEL*, p. 387, *ante*; *SHIPPING AND NAVIGATION*.

(t) Bills of Lading Act, 1855 (18 & 19 Vict. c. 111), s. 3.

(u) *Read v. Lincoln (Bishop)*, [1892] A. C. 644, P. C., a ritual case, where various books on church history dealing with the subject were admitted; compare *Ridsdale v. Clifton* (1877), 2 P. D. 276, P. C. See also *Steyner v. Droitwich Corporation* (1695), Skin. 623; S. C., 1 Salk. 281, and 12 Mod. Rep. 85; and *Ivy (Lady) v. Neal* (circa 1683) therein cited; *St. Katherine's Hospital Case* (1671), 1 Vent. 149, 151, where a chronicle was admitted to prove a particular point in the history of Edward III.'s reign. In *Neale v. Fry* (circa 1693) (cited 1 Salk. p. 281) histories were referred to to show the date at which Philip assumed his titles. This case appears to be the same as that of *Ivy (Lady) v. Neal*, *supra*, and that of *Neal v. Jay* (circa 1683), cited 12 Mod. Rep. 86. The old authorities are collected in *Evans v. Getting* (1834), 6 O. & P. 586, 587, n. The principle is approved in *East London Rail. Co. v. River Thames Conservators* (1904), 90 L. T. 347.

(a) *Darby v. Ouseley* (1856), 1 H. & N. 1, per POLLOCK, C.B., at p. 8. In this case the canons of Roman Catholic councils and books by Roman Catholic ecclesiastics were not admitted to prove Roman Catholic doctrines; these, being matters of fact, were held provable only by expert witnesses.

(b) *Steyner v. Droitwich Corporation*, *supra*. "An history may be evidence of the general history of the realm, but not of a particular custom" (Skin., p. 623, *per cur.*). Camden's "Britannia" was the book in question in this case.

(c) *Evans v. Getting*, *supra*, where the previous authorities are collected.

(d) *East London Rail. Co. v. River Thames Conservators*, *supra*. The reports in question were those of Sir T. Brunel, made on the making of the Thames tunnel in 1824.

(e) For this distinction, see p. 472, *ante*.

SECT. 2.

Proof of
Contents of
Documents.

between
parties and
privies.
Ordnance
survey.

parties (*f*), although as between parties and privies they will operate as admissions (*g*) if they come from the proper custody (*h*).

But such instruments are admissible against the whole world for the purpose of proving public or general rights where they amount to a declaration as to such rights by a deceased person of competent knowledge (*i*).

Where a map is drawn on or annexed to a will or instrument, so as to form part thereof, it is to be looked at with the instrument (*j*).

The Ordnance Survey does not come under the head of public documents, and so it is not in general admissible as between individuals as evidence of title or otherwise (*k*).

(xiii.) *Inscriptions.*

Inscriptions.

771. In pedigree cases (*l*) inscriptions of various kinds are admissible if they have been made by or under the direction of a deceased (*m*) member of the family, or have been adopted expressly or tacitly by such member or by the family at large (*n*).

(*f*) *Earl v. Lewis* (1801), 4 Esp. 1; *Pollard v. Scott* (1791), Peake, 18; *Wakeman v. West* (1836), 7 C. & P. 479; compare *Doe d. Hughes v. Lakin* (1836), 7 C. & P. 481; *Assheton-Smith v. Owen* (1905), 75 L. J. (CH.) 181, 192; *Mercer v. Denne*, [1904] 2 Ch. 534, per FARWELL, J., at p. 545, affirmed [1905] 2 Ch. 538, C. A.; see *Hammond v. Bradstreet* (1854), 10 Exch. 390.

(*g*) For admissions in general, see p. 456, *ante*; *Bridgman v. Jennings* (1699), 1 Ld. Raym. 734, appears to have been a case of this class.

(*h*) *Craven (Earl) v. Pridmore* (1902), 18 T. L. R. 282, C. A. (estate map produced from defendants' possession). As to proper custody, see p. 512, *ante*.

(*i*) In *Hammond v. Bradstreet*, *supra*, COLERIDGE, J., says (at p. 396), of the map then in question (which was rejected): "They" (the authors) "do not appear to have been deputed to make the map by any persons interested in the question, nor to have any knowledge of their own on the subject, nor to have been in any way connected with the district, so as to make it probable that they had such knowledge." See also *Stuart v. Greenall* (1821), 9 Price, 106; *Daniel v. Wilkin* (1852), 7 Exch. 429; *Pipe v. Fulcher* (1858), 5 Jur. (N. S.) 146; *Bidder v. Bridges* (No. 2) (1885), 34 W. R. 514; *R. v. Berger*, [1894] 1 Q. B. 823; *Mercer v. Denne*, *supra*; *Smith v. Lister* (1895), 72 L. T. 20; *Vyner v. Wirrall Rural District Council* (1909), 73 J. P. 242; *R. v. Norfolk County Council* (1910), 26 T. L. R. 269. Proof of the authenticity of ancient maps may be assisted by the rule relating to documents thirty years old (for which see p. 512, *ante*). For declarations by deceased persons, see p. 463, *ante*. In *R. v. Milton (Inhabitants)* (1843), 1 Car. & Kir. 58, it was said that information given by a deceased person to a surveyor for the purpose of laying down the boundaries of a parish on a map made under an inclosure Act would be admissible as evidence of reputation.

(*j*) *Lyle v. Richards* (1866), L. R. 1 H. L. 222; compare *Brain v. Harris* (1855), 10 Exch. 908; *Nicholson v. Rose* (1859), 4 De G. & J. 10, C. A.

(*k*) *Bidder v. Bridges* (No. 2), *supra*. For a similar rule in respect of the Irish Survey, see *Swift v. M'Tiernan* (1848), 11 I. Eq. R. 602; *Tisdall v. Parnell* (1863), 14 I. C. L. R. 1. See also *Caton v. Hamilton* (1889), 53 J. P. 504, which, however, seems of doubtful authority.

(*l*) See p. 560, *ante*.

(*m*) See p. 469, *ante*, for the general principles governing the admissibility of statements by deceased persons.

(*n*) *Davies v. Loundes* (1843), 6 Man. & G. 471, Ex. Ch., per DENMAN, C.J., at p. 525: "A pedigree, whether in the shape of a genealogical tree or map, or contained in a book or burial or monumental inscription, if it is recognised by a deceased member of the same family, is admissible." A ring worn publicly, stating the date of the person's death whose name is engraved on it, and an inscription upon a tombstone open to all mankind, and erected or supposed to be erected by the family, are also received in evidence (*Monkton*

This rule includes inscriptions of various kinds, such as inscriptions on rings (*o*), tombstones (*p*), mural inscriptions (*q*), inscriptions on portraits (*t*), coffin-plates.

An inscription on a tombstone has been admitted, though with hesitation, to prove the death of a *cestui que vie* (*s*).

Inscriptions whose removal is impossible or highly inconvenient may be proved by secondary evidence (*t*).

SECT. 2.
Proof of
Contents of
Documents.

Secondary
evidence.

(xiv.) *Photographs.*

772. Photographs properly verified on oath by a person able to speak to their accuracy (*u*) are, in general, admissible to prove the identity of persons (*x*), or the configuration of land as it existed at a particular moment (*a*), or the contents of a lost document (*b*), but a photograph of a document cannot be used for purposes of comparison with another document (*c*), and in matrimonial cases the court will not act upon identification of a person by photographs alone, except in very special circumstances (*d*).

Photographs.

(xv.) *Newspaper Reports.*

773. A witness may refer to a newspaper report to refresh his memory if he read it at the time when he had a recollection of the statements therein contained and knew them to be true (*e*); but a newspaper report is not admissible as evidence of the facts therein recorded (*f*).

Newspaper
reports.

v. *A.-G.* (1831), 2 Russ. & M. 147, 162, and as to the principle of admissibility, see p. 560, *ante*. Foreign inscriptions are admissible if they conform to the above principles (*The Earldom of Perth* (1848), 2 H. L. Cas. 865, 876; compare *The Tracy Peerage* (1843), 10 Cl. & Fin. 154, H. L.

(*o*) *Monkton v. A.-G.*, *supra*, at p. 162; *Vowles v. Young* (1806), 13 Ves. 140, 144.

(*p*) *Haslam v. Cron, Olivant's Claim* (1871), 19 W. R. 968; *Monkton v. A.-G.*, *supra*; compare *Goodright d. Stevens v. Moss* (1777), 2 Cowp. 591; *Vowles v. Young*, *supra*, at p. 144; *The Tracy Peerage*, *supra*; *The Shrewsbury Peerage* (1858), 7 H. L. Cas. 1.

(*q*) *Slaney v. Wade* (1836), 1 My. & Cr. 338; *The Earldom of Perth*, *supra*; *The Berkeley Peerage* (1861), 8 H. L. Cas. 21.

(*r*) *The Camoys Peerage* (1839), 6 Cl. & Fin. 789, H. L.

(*s*) *Whittuck v. Waters* (1830), 4 O. & P. 375.

(*t*) As to the relative weight of evidence of this kind in these cases, see *The Tracy Peerage*, *supra*, at p. 191. In *The Shrewsbury Peerage*, *supra*, an old "collection of monumental inscriptions" in country churches was held inadmissible to show what had been the inscription on a partly defaced tomb. But copies made or accepted by the family, or a member thereof, are worthy of confidence (*Slaney v. Wade*, *supra*; *Davies v. Lowndes* (1843), 6 Man. & G. 471, Ex. Ch.).

(*u*) See *R. v. Tolson* (1864), 4 F. & F. 103; *Hindson v. Ashby*, [1896] 2 Ch. 1, C. A.

(*x*) *R. v. Tolson*, *supra*; compare *Frith v. Frith*, [1896] P. 74.

(*a*) *R. v. United Kingdom Electric Telegraph Co.* (1862), 3 F. & F. 73; *Hindson v. Ashby*, *supra*, at p. 21.

(*b*) *M'Cullough v. Munn*, [1908] 2 I. R. 194, C. A.

(*c*) *Ibid.*

(*d*) *Frith v. Frith*, *supra*, per GORELL BARNES, J.; see title HUSBAND AND WIFE.

(*e*) *Topham v. M'Gregor* (1844), 1 Car. & Kir. 320; *Dyer v. Best* (1866), 4 H. & C. 189, per POLLOCK, C.B., at p. 192.

(*f*) *Rossmore (Lord) v. Mowatt* (1850), 15 Jur. 238.

SECT. 3.

**Exclusion
of Extrinsic
Evidence to
contradict
or vary
Documents.**

Oral evidence
in general
excluded.

SECT. 3.—Exclusion of Extrinsic Evidence to contradict or vary Documents.

SUB-SECT. 1.—General Rule (g).

774. Oral evidence is, in general, inadmissible to add to, vary, modify, or contradict a written instrument (*h*), but this principle is subject to certain exceptions, apparent rather than real (*i*).

The rule excludes extrinsic evidence of every description, whether parol or contained in writings such as instructions (*k*), drafts (*l*), articles (*m*), conditions of sale (*n*), or preliminary agreements (*o*).

Extrinsic evidence cannot be received in order to prove the object with which a document was executed (*p*), or that a person appearing on the face of the document to be a principal was in fact an agent so as to discharge him from liability (*q*), or, generally, that the intention of the parties was other than that appearing on the face of the instrument (*r*).

(*g*) See titles **DEEDS AND OTHER INSTRUMENTS**, Vol. X., pp. 444—454; **WILLS**. Even where a will expressly mentions “wishes verbally expressed,” parol evidence cannot be admitted to show what the wishes were (*Re Hetley, Hetley v. Hetley*, [1902] 2 Ch. 866).

(*h*) *Robinson v. Gee* (1749), 1 Ves. Sen. 251; *Davis v. Symonds* (1787), 1 Cox, Eq. Cas. 402; *Humble v. Hunter* (1848), 12 Q. B. 310; *Halhead v. Young* (1856), 6 E. & B. 312; *O'Rourke v. Railways Commissioner* (1880), 15 App. Cas. 371, P. C.; *Vezey v. Rushleigh*, [1904] 1 Ch. 634; *Horncastle v. Equitable Life Assurance Society of the United States* (1906), 22 T. L. R. 735, C. A.; and see, further, titles **DEEDS AND OTHER INSTRUMENTS**, Vol. X., p. 444, where the subject of oral evidence in relation to written documents is more fully treated; **AUCTION AND AUCTIONEERS**, Vol. I., p. 510, as to statements made by auctioneers at time of sale; **BILLS OF EXCHANGE**, Vol. II., p. 482, as to oral evidence in relation to bills of exchange; and **SHIPPING AND NAVIGATION**, as to oral evidence in relation to bills of lading and charterparties.

(*i*) See p. 567, *post*; and title **DEEDS AND OTHER INSTRUMENTS**, Vol. X., p. 444. As to delivery as an escrow, see *ibid.*, p. 387.

(*k*) See *Guardhouse v. Blackburn* (1866), L. R. 1 P. & D. 109.

(*l*) *Mtler v. Travers* (1832), 8 Bing. 244; *National Bank of Australasia v. Falkingham & Sons*, [1902] A. C. 585, P. C. As to looking at a signed draft where two copies differ, see *Ingleby v. Slack* (1890), 6 T. L. R. 284.

(*m*) *Pritchard v. Quinchant* (1752), Amb. 147.

(*n*) *Gunniss v. Erhart* (1789), 1 Hy. Bl. 289; *Powell v. Edmunds* (1810), 12 East, 6; *Doe d. Norton v. Webster* (1840), 12 Ad. & El. 442.

(*o*) *Leggott v. Burrett* (1880), 15 Ch. D. 306, 309, C. A.; compare *Mercantile Bank of Sydney v. Taylor*, [1893] A. C. 317, 321, P. C.; *Lee v. Alexander* (1883), 8 App. Cas. 853.

(*p*) *Prison Commissioners v. Middlesex Clerk of the Peace* (1882), 9 Q. B. D. 506, C. A.; *R. v. Pembridge (Inhabitants)* (1841), Car. & M. 157; *Pulmer v. Newell* (1855), 20 Beav. 32.

(*q*) *Humble v. Hunter* (1848), 12 Q. B. 310; *Wake v. Harrop* (1861), 6 H. & N. 768; affirmed (1862), 1 H. & C. 202, Ex. Ch., per BYLES, J. at p. 209; *Pontifex and Wood, Ltd. v. Hartley & Co.* (1893), 62 L. J. (Q. B.) 196. It is different where there was an actual agreement with the other party that the agent should not be liable. The court will then rectify on the ground of mistake (see *Wake v. Harrop*, *supra*); and evidence that a person who has signed a document as agent for another intended to sign on his own behalf is admissible if it does not contradict the terms of the document (*Young v. Schuler* (1883), 11 Q. B. D. 651, C. A.).

(*r*) *Cocks v. Nash* (1832), 9 Bing. 341, 346; *Halhead v. Young* (1856), 6 E. & B. 312; *Cowlshaw v. Hardy* (1857), 25 Beav. 169; *Mercantile Bank of Sydney v. Taylor*, [1893] A. C. 317, P. C.; *Turner v. Turner, Hall v. Turner* (1880), 14 Ch. D. 829; *Henderson v. Arthur*, [1907] 1 K. B. 10, C. A. This rule does not of course prejudice any rights the parties may have to rectification or rescission, as to which see titles **DEEDS AND OTHER INSTRUMENTS**, Vol. X., p. 355; **MISTAKE**.

SUB-SECT. 2.—*Exceptions.*

775. The rule as to the exclusion of extrinsic evidence does not apply in the following cases (s):—Where the document is informal, and was never intended by the parties to be an agreement at all (t), or to contain all the terms (u); where the parties contracted with implied reference to a local or mercantile custom not mentioned in the agreement (w); where there is an agreement purely collateral (x); where the instrument was not intended by the parties to operate as an agreement unless a certain condition was fulfilled (a), or unless it was signed by the other party (b), or by a third person (c); where the transaction is affected by fraud (d), illegality or immorality (e), duress or mistake (f); to show the true consideration (g), or the existence of consideration (h) or of consideration in addition to that stated (i); to show the nature of the transaction (j), or the true relationship of the parties (k).

SECT. 3.
Exclusion of Extrinsic Evidence to contradict or vary Documents.
—
Exceptions to the rule.

(s) For a fuller treatment of these exceptions, which have been worked out in a large number of cases, see title DEEDS AND OTHER INSTRUMENTS, Vol. X., p. 433.

(t) *Harris v. Rickett* (1856), 4 H. & N. 1; *Rogers v. Hadley* (1862), 2 H. & C. 227; *Clever v. Kirkman* (1876), 33 L. T. 672.

(u) See *McCullin v. Gilpin* (1880), 28 W. R. 813; affirmed (1881), 29 W. R. 408, 409, C. A.; *Pontifer and Wood, Ltd. v. Hartley & Co.* (1893), 62 L. J. (q. b.) 196, 200; *Lindley v. Lacey* (1864), 17 C. B. (N. S.) 578. Other examples are *Jeffery v. Walton* (1816), 1 Stark. 267; *Allan v. Sundius* (1862), 1 H. & C. 123, 131; *Lockett v. Nicklin* (1848), 2 Exch. 93. The best instance is to be found in the case of receipts, as to which see p. 562, *ante*.

(w) *Wigglesworth v. Dullison* (1779), 1 Doug. (K. B.) 201; 1 Smith, L. C., 11th ed., 541; *Allan v. Sundius*, *supra*; *Cockburn v. Alexander* (1848), 6 C. B. 791; *Lilly, Wilson & Co. v. Smales, Feles & Co.* [1892] 1 Q. B. 456. The custom must conform to the requisites of a valid custom (as to which see title CUSTOM AND USAGES, Vol. X., p. 217), and must not be repugnant to the instrument.

(x) *De Lassalle v. Guildford*, [1901] 2 K. B. 215, C. A.

(a) *Pym v. Campbell* (1856), 6 L. & B. 370; *Murray v. Stair (Earl)* (1823), 2 B. & C. 82; *Wallis v. Little* (1862), 11 C. B. (N. S.) 369; *Lindley v. Lacey*, *supra*; *Pattle v. Hornbrook*, [1897] 1 Ch. 25.

(b) *Furness v. Meek* (1857), 27 L. J. (EX.) 34; *M'Clean v. Kennard* (1874), 9 Ch. App. 336.

(c) *Boyd v. Hind* (1855), 1 H. & N. 938.

(d) *Foster v. Mackinnon* (1869), 1 L. R. 4 C. P. 704; *Lewis v. Clay* (1897), 67 L. J. (q. b.) 224; and see title MISREPRESENTATION AND FRAUD.

(e) *Collins v. Blantern* (1767), 2 Wils. 341; 1 Smith, L. C., 11th ed., 369.

(f) *Raffles v. Wichelhaus* (1864), 2 H. & C. 906.

(g) *R. v. Scammonden (Inhabitants)* (1789), 3 Term Rep. 474; *Townend v. Toker* (1866), 1 Ch. App. 446. Compare *Cochrane v. Moore* (1890), 25 Q. B. D. 57, C. A.

(h) *Re Holland, Gregg v. Holland*, [1902] 2 Ch. 360, 388, C. A.

(i) *Clifford v. Turrell* (1841), 1 Y. & O. Ch. Cas. 138; *Frith v. Frith*, [1906] A. C. 254, P. C.; *Re Barnstaple Second Annuitant Society* (1884), 50 L. T. 424.

(j) *Barton v. Bank of New South Wales* (1890), 15 App. Cas. 379, P. C. (conveyance on its face absolute may be shown to be a mortgage); *Rochevoucauld v. Bousted*, [1897] 1 Ch. 190, C. A. (conveyance on its face absolute may be shown to be subject to a trust). Compare *Re Boyes*, *Boyes v. Carritt* (1884), 26 Ch. D. 531; *Re Marlborough (Duke)*, *Davis v. Whitehead*, [1894] 2 Ch. 133; and see, further, titles TRUSTS AND TRUSTEES; WILLS. As to the right of one of several purchasers to show that they are mutually entitled to the benefit of covenants entered into by each of the purchasers of several plots on one estate, although not expressly mentioned in the conveyance, and the distinction between this right and a collateral agreement, see *Spicer v. Martin* (1888), 14 App. Cas. 12, and title SALE OF LAND.

(k) *Higgins v. Senior* (1841), 8 M. & W. 834 (to show that a person in fact

SECT. 4.

Admission
of Extrinsic
Evidence to
interpret
Documents.

Oral evidence
to interpret
documents
or rebut
presumptions
admitted.

Ambiguity.

SECT. 4.—*Admission of Extrinsic Evidence to interpret Documents.*

776. Parol evidence is also, in general, admissible to interpret documents (*l*), and to rebut a presumption such as that of trust or advancement (*m*). These cases do not form an exception to the general rule above stated, since the evidence is admitted not to modify the written instrument in any way, but (in the former case) to show the meaning which the parties attached to the words they have used (*n*), and (in the latter case) to support the instrument in its natural sense against the artificial construction placed upon it by equity (*o*).

An ambiguity which appears on the face of an instrument of which it is not an essential characteristic that it should accurately express on its face what is intended may be explained by parol evidence of the circumstances in which it arose (*p*), but where such an ambiguity exists in an instrument, such as a written contract or a deed, which fails in its purpose if it is capable on its face of bearing more than one meaning, parol evidence is only admissible to explain ambiguities which are latent (*q*).

contracted as agent; but this cannot be done where agency is inconsistent with the instrument; see *Humble v. Hunter* (1848), 12 Q. B. 310; *Macdonald v. Whitfield* (1883), 8 App. Cas. 733, P. C. (to prove that three successive indorsees of a bill of exchange were sureties *inter se* for the same debt); *Re Lander and Bayley's Contract*, [1892] 3 Ch. 41 (to show date of commencement of a lease); *Newell v. Radford* (1867), L. R. 3 C. P. 52 (to show the trades of the parties to a memorandum of sale as indicating which was seller and which was buyer); *Bank of Australasia v. Palmer*, [1897] A. C. 540, P. C. (to show that a document signed by one of the parties to an agreement did not form part of the agreement).

(*l*) Extrinsic evidence of every material fact which will enable the court to ascertain the nature and qualities of the subject-matter of the instrument, or, in other words, to identify the persons and things to which the instrument refers, must of necessity be received (*Bank of New Zealand v. Simpson*, [1900] A. C. 182, 188, P. C.); *Van Diemen's Land Co. v. Table Cape Marine Board*, [1906] A. C. 92, P. C. (acts of user before grant to explain what was granted); *Cameron v. Wiggins*, [1901] 1 K. B. 1 (initial letters N M added to invoice as description of the goods at request of the purchaser); *Inglis v. Buttery* (1878), 3 App. Cas. 552 (surrounding circumstances to be considered, but not the communications of the parties). See further as to this, in the case of instruments *inter vivos*, title DEEDS AND OTHER INSTRUMENTS, Vol. X., pp. 448—453; and, in the case of wills, title WILLS.

(*m*) See, as to this, titles EQUITY, *ante*; TRUSTS AND TRUSTEES; WILLS.

(*n*) *Smith v. Wilson* (1832), 3 B. & Ad. 728; *Grant v. Maddox* (1846), 15 M. & W. 737. Under this rule parol evidence is admissible to give to words a secondary meaning. See *Holt & Co v. Collyer* (1881), 16 Ch. D. 718, where FRY, J., at p. 720, states the principle: "Where there is a popular and common word used in an instrument, that word must be construed *prima facie* in its popular and common sense. If it is a word of a technical or legal character it must be construed according to its technical or legal meaning. . . . But before you can give evidence of the secondary meaning of a word you must satisfy the court from the instrument itself, or from the circumstances of the case, that the word ought to be construed not in its popular or primary signification, but according to its secondary intention."

(*o*) See *Chichester (Lord) v. Coventry* (1867), L. R. 2 H. L. 71; *Re Lacon, Lacon v. Lacon*, [1891] 2 Ch. 482, O. A.; *Pryor v. Petre*, [1894] 2 Ch. 11, O. A.

(*p*) *Summers v. Moorhouse* (1884), 13 Q. B. D. 388.

(*q*) See titles CONTRACT, Vol. VII., p. 523; DEEDS AND OTHER INSTRUMENTS, Vol. X., p. 453. As to parol evidence to explain ambiguities in wills, see title WILLS.

Part V.—Witnesses.

SECT. 1.—Competency.

SECT. 1.
Com-
petency.

777. All persons are now competent to be witnesses in civil proceedings who are of sufficient understanding to give evidence and who appreciate the nature and obligation of an oath or affirmation (*r*).

Who are
competent
witnesses.

The following classes of persons are incompetent as witnesses: (1) Children of such tender years that they have neither sufficient intelligence to testify nor a proper appreciation of the duty of speaking the truth (*s*); (2) idiots and insane persons who at the time of being tendered as witnesses are mentally incapable of testifying (*t*); (3) deaf and dumb persons, if they are unable by writing or signs or otherwise to understand questions put to them, or to communicate their answers to others (*a*); (4) other persons

Incompetent
witnesses.

(*r*) At common law there were various classes of persons who were incompetent as witnesses, *e.g.*, parties to an action or their husbands and wives, persons interested in an action, infamous persons and persons who had no religious belief (1 Starkie, *Law of Evidence*, 3rd ed., p. 92). Persons interested were made competent witnesses by the Evidence Act, 1843 (6 & 7 Vict. c. 85); parties to an action were made competent by the Evidence Act, 1851 (14 & 15 Vict. c. 99), s. 2, and the Evidence Amendment Act, 1853 (16 & 17 Vict. c. 83); the husbands and wives of parties by the last-named Act and by the Evidence Further Amendment Act, 1869 (32 & 33 Vict. c. 68); infamous persons by the Evidence Act, 1843 (6 & 7 Vict. c. 85); and persons who had no religious belief by the Oaths Act, 1888 (51 & 52 Vict. c. 46). A husband who has been convicted of an aggravated assault on his wife has a right to be heard as a witness on an application by her to justices for a separation order (*Jones v. Jones*, [1895] P. 201, overruling *Powell v. Powell* (1889), 14 P. D. 177). It is doubtful whether a person under a sentence of death can give evidence (*R. v. Webb* (1867), 11 Cox, C. C. 133, *per LUSH, J.*; see *R. v. Fitzgerald* (1884), *per HARRISON, J.*, cited in 2 Taylor, *Law of Evidence*, 10th ed., p. 959, n. A deaf and dumb person may testify either in writing or by signs, see *Dickinson v. Blisset* (1754), 1 Dick. 268.

(*s*) The judge must examine the child to ascertain whether he is possessed of sufficient intelligence to appreciate the binding obligation of an oath; see *R. v. Brasier* (1779), 1 Leach, 199; *R. v. Pike* (1829), 3 C. & P. 598; *R. v. Perkins* (1840), 2 Mood. C. C. 139; *R. v. Holmes* (1861), 2 F. & F. 788; see also *R. v. Baylis* (1849), 4 Cox, C. C. 23; *R. v. Cox* (1898), 62 J. P. 89. It seems that a child's evidence may be received after a postponement to permit of his instruction on the nature of an oath, if his ignorance arises from neglect and not merely from extreme youth; but there is some doubt on the point; see *R. v. Murphy* (1795), 1 Leach, 4th ed., 430, n.; *R. v. Wade* (1825), 1 Mood. C. C. 86; *R. v. Williams* (1835), 7 C. & P. 320; *R. v. Nicholas* (1846), 2 Car. & Kir. 246. As to the unsworn evidence of children in criminal cases, see title CRIMINAL LAW AND PROCEDURE, Vol. IX., p. 408. An adult witness may be incompetent from insufficient appreciation of the moral duty of speaking the truth (*R. v. Wade* (1825), 1 Mood. C. C. 86). As to legal capacity of infants generally, see title INFANTS AND CHILDREN.

(*t*) A person suffering from unsoundness of mind may yet give evidence, if the judge at the trial at which he is tendered as a witness is satisfied that he is then of sufficient understanding to give rational evidence; the mere fact that such a person is then suffering from delusions does not render him incompetent (*R. v. Hill* (1851), 2 Den. 254, C. C. R.). Before a person who is known to be in such a state of mind can be received as a witness, there should be a preliminary inquiry as to his fitness to give evidence (*Spittle v. Walton* (1871), L. R. 11 Eq. 420). As to lunatics and idiots generally, see title LUNATICS AND PERSONS OF UNSOUND MIND.

(*a*) *R. v. Ruston* (1786), 1 Leach, 408; *Morrison v. Lennard* (1827), 3 C. & P. 127; *Bartholomew v. George* (1851), *per Lord CAMPBELL, C.J.*; Best, *Law of Evidence*, 10th ed., p. 133; *R. v. Whitehead* (1866), L. R. 1 C. C. R. 33.

SECT. 1.
Com-
petency.

Distinction
in criminal
cases.

Duty of
judge to
determine
competency.

who, from temporary causes, such as illness or drunkenness, are for the time incapable of understanding questions, and of giving a rational account of events.

In criminal cases the defendant, and the wife or husband of the defendant, are only competent to testify in accordance with certain limitations (b); in other respects the rules as to the competency and incompetency of witnesses are the same in criminal as in civil matters.

Questions as to the competency or incompetency of a witness are decided by the judge, generally on a preliminary examination called the *voir dire*, but if the incompetency of a witness is not discovered till after he is sworn and has given evidence, his evidence may none the less be objected to and rejected (c).

SECT. 2.—Privilege.

Privilege.

778. A witness, though competent generally to give evidence, may in certain cases claim privilege as a ground for refusing to disclose matter which is relevant to the issue (d).

(b) See title CRIMINAL LAW AND PROCEDURE, Vol. IX., p. 388.

(c) *Jacobs v. Layborn* (1843), 11 M. & W. 685; *R. v. Whitehead* (1866), 1. R. 1 C. O. R. 33. A judge who is sitting alone on the trial of a case cannot, because of his position, be a witness during that trial; part of a judge's duty is to decide questions as to the admissibility of evidence, and if a judge left the bench and gave evidence as a witness, he could not at the same time decide a question as to the admissibility of his own evidence. A judge who is sitting with others may leave the bench and give evidence, but he should not return to the bench or take any further part in the trial as a judge (*R. v. Antrim County Justices*, [1901] 2 I. R. 133, 141, 164, C. A.; *R. v. Galway Justices* (1897), 31 I. L. T. 160; *R. v. Hacker* (1660), Kel. 12).

*A juror may be sworn as a witness in the jury box at the trial at which he is acting as a jurymen and may continue to act as a jurymen after giving evidence (*Manley v. Shaw* (1840), Car. & M. 361; *R. v. Posser* (1836), 7 O. & P. 648; *R. v. Heath* (1744), 18 State Tr. 1, 123; *Fitz-James v. Moys* (1663), 1 Sid. 133; *Bennet v. Hartford (Hundred)* (1650), Sty. 233). Peers who are sitting to try one of their number may give evidence and also share in the final decision (*R. v. Five Popish Lords* (1678), 7 State Tr. 1218, 1458; *R. v. Macclesfield (Earl)* (1725), 16 State Tr. 1252; see also titles COURTS, Vol. IX., p. 19; PARLIAMENT; PEERAGES AND OTHER DIGNITIES. There is no recent instance of a juror giving evidence, and the practice seems undesirable. As to jurors generally, see title JURIES.

Counsel or solicitors who are acting as advocates in the case should not also act in the same case as witnesses, but if they do tender evidence, their evidence is not inadmissible; see title BARRISTERS, Vol. II., p. 396. A litigant in person who is conducting his own case, may act as his own advocate, and also be sworn as a witness (*Cobbett v. Hudson* (1852), 1 E. & B. 11).

It is doubtful whether the King, foreign sovereigns, and foreign ambassadors accredited to England are competent as witnesses; they are not subject to the coercive powers which the courts exercise over witnesses, and are not punishable for perjury; see titles CONSTITUTIONAL LAW, Vol. VI., pp. 374, 427 *et seq.*; CRIMINAL LAW AND PROCEDURE, Vol. IX., pp. 244, 401, note (a).

(d) The privilege in most cases is that of the witness, and not that of a party to the suit, unless, as in the case of communications with a legal adviser, a party is also within the protection of the privilege; a party not within the protection cannot raise an objection on the ground of privilege (*R. v. Kinglake* (1870), 11 Cox, C. C. 499; *Thomas v. Newton* (1826), Mood. & M. 48, n.; *R. v. Adey* (1831), 1 Mood. & R. 94; *Marston v. Downes* (1834), 1 Ad. & El. 31; *Doe d. Egremont (Earl) v. Date* (1842), 3 Q. B. 609; *Doe d. Rowcliffe v. Egremont (Earl)* (1841), 2 Mood. & R. 386; see *Procter v. Smiles* (1886), 55 L. J. (Q. B.) 527, C. A.).

SUB-SECT. 1.—Judges, Jurors, Counsel, Solicitors.

SECT. 2.
Privilege.

779. A judge of the superior courts may refuse to give evidence as to judicial proceedings that have taken place before him (e).

Who may
claim
privilege :
(i.) Judges.

An arbitrator may be called as a witness in a legal proceeding to enforce his award, and may be asked as to what passed before him, and as to what matters were presented to him for consideration, but may not be asked as to what passed in his own mind when exercising his discretionary power on the matters submitted to him (f).

The grand jury are sworn to secrecy, and grand jurors may not give evidence as to what passed before them (g). (ii.) Jurors.

The evidence of petty jurors as to what passed between them at the trial or while they were considering their verdict is not admissible (h).

780. Confidential communications, whether oral or written, passing between a client and his legal advisers, *i.e.*, solicitor or counsel, and whether made directly or indirectly through an agent of either, are, if made for the purpose of obtaining or giving legal advice, privileged from disclosure; neither the client nor the legal adviser can be compelled to disclose such communications. The communications must have been made to or by the legal adviser in his professional capacity (i), and while the relation of client and legal adviser subsisted (j), but it is immaterial whether such (iii.) Legal advisers.
Confidential communications.

(e) *Buckleuch (Duke) v. Metropolitan Board of Works* (1872), 1 L. R. 5 H. L. 418, 433; *R. v. Gazard* (1838), 8 C. & P. 595; *R. v. Harvey* (1858), 8 Cox, C. C. 99, *per* BYLES, J., at p. 103; see 2 Taylor, Law of Evidence, 10th ed., p. 987, n. A surveyor appointed to assist the court ought not to be called as a witness (*Broder v. Saillard* (1876), 24 W. R. 456).

(f) *Buckleuch (Duke) v. Metropolitan Board of Works*, *supra*. See also title ARBITRATION, Vol. I., 477.

(g) *R. v. Hughes* (1844), 1 Car. & Kir. 519; *R. v. Marsh* (1837), 6 Ad. & EL. 236; *R. v. Cooke* (1838), 8 C. & P. 582; *Micklethwait's Case* (1640), Clay. 84; but see *Freeman v. Arkell* (1823), 1 C. & P. 135, 137. Evidence as to proceedings before a grand jury may, it seems, be given by other persons than the grand jurors (*R. v. Watson* (1817), 32 State Tr. 1, 107).

(h) *Palmer v. Crowle* (1738), Andr. 382; *Jackson v. Williamson* (1788), 2 Term Rep. 281; *Vaise v. Delaval* (1785), 1 Term Rep. 11; *Owen v. Warburton* (1805), 1 Bos. & P. (N. R.) 326; *Straker v. Graham* (1839), 8 L. J. (EX.) 86; *Burgess v. Langley* (1843), 5 Man. & G. 722; *Raphuel v. Bank of England* (1855), 17 C. B. 161; *Nesbitt v. Parrett* (1902), 18 T. L. R. 510. But evidence may, it seems, be given to explain the circumstances in which a jurymen came into the jury box (*Bailey v. Macaulay* (1849), 13 Q. B. 815), or the condition of a jurymen while there (*Ex parte Morris* (1907), 72 J. P. 5).

(i) *Bunbury v. Bunbury* (1839), 2 Beav. 173; *Daugh v. Cradocke* (1832), 1 Mood. & B. 182 (one solicitor acting for both parties).

(j) *R. v. Downer* (1880), 14 Cox, C. C. 486, C. C. R.; *R. v. Farley* (1846), 2 Car. & Kir. 313; *R. v. Brewer* (1834), 6 C. & P. 363; *Cuts v. Pickering* (1672), 1 Vent. 197; and see titles BARRISTERS, Vol. II., p. 395; DISCOVERY ETC., Vol. XI., p. 72; SOLICITORS. A solicitor cannot claim privilege from disclosing the name of his client (*Bursill v. Tanner* (1885), 16 Q. B. D. 1, O. A.; *Re Cathcart, Ex parte Campbell* (1870), 5 Ch. App. 703); he cannot claim privilege from discovering a deed, if his client is not entitled to resist its production (*Bursill v. Tanner, supra*); nor can he refuse to state when he parted with it and to whom (*Banner v. Jackson* (1847), 1 De G. & Sm. 472); he is not precluded from giving

SECT. 2.
Privilege.

**Waiver of
privilege.**

communications were or were not made when litigation was pending or contemplated (*k*).

The privilege may be waived by the client or his successors in title (*l*), but, unless waived, holds good after the relation of legal adviser and client has ceased, and indeed for ever (*m*). But secondary evidence of such communications, if written, may be given in spite of the privilege attaching to the originals (*n*).

A barrister may, if he chooses, give evidence of what he has heard or seen in court when engaged as counsel; if he is called by his client, he cannot, it seems, refuse to give evidence, even of confidential communications (*o*).

Confidential communications other than those passing between a client and his legal advisers, or the agents of either, are not privileged from disclosure (*p*).

Even confidential communications between a client and his legal advisers are not privileged if made for the purpose of committing a fraud or crime (*q*).

SUB-SECT. 2.—Officers of State.

**State
secrets.**

781. Secrets of state, state papers, confidential official documents, and communications between the Government and its officers are

evidence as to what passed at the time of the execution of a deed (*Crawcour v. Salter* (1881), 18 Ch. D. 30, C. A.). A client's address confidentially communicated by the client to the solicitor when the client is applying to him for advice is privileged from disclosure, unless the solicitor and client were jointly engaged in the commission of some wrongful act and the address was communicated while they were so engaged (*Re Arnott, Ex parte Chief Official Receiver* (1888), 60 L. T. 109); see *Re Cathcart, Ex parte Campbell* (1870), 5 Ch. App. 703. The privilege extends to communications between either of two co-adventurers with either of their solicitors (*Rochevoucauld v. Boustead* (1896), 65 L. J. (CH.) 794).

(*k*) *Minet v. Morgan* (1873), 8 Ch. App. 361.

(*l*) *Calcraft v. Guest*, [1898] 1 Q. B. 759, 761, C. A.; see *Merle v. More* (1826), Ry. & M. 390; *Lea v. Wheatley* (1678), 26 State Tr. 574, n.; *Baillie's (Captain) Case* (1779), 21 State Tr. 1359. If a privileged document is referred to in the pleading of a litigant, he may be ordered to give particulars of it (*Milbank v. Milbank*, [1900] 1 Ch. 376, C. A.).

(*m*) *Bullivant v. A.-G. for Victoria*, [1901] A. C. 196; *Pearce v. Foster* (1883), 15 Q. B. D. 114, C. A.; *Bullock v. Corry* (1878), 3 Q. B. D. 356; and compare *Getty v. Getty*, [1907] P. 334.

(*n*) *Calcraft v. Guest*, *supra*.

(*o*) See titles BARRISTERS, Vol. II., p. 396; DISCOVERY ETC., Vol. XI., p. 72.

(*p*) *Wilson v. Rastall* (1792), 4 Term Rep. 753, 758; *Slade v. Tucker* (1880), 14 Ch. D. 824. Even confidential communications passing between a person and a legal adviser are not privileged, unless the relationship of counsel or solicitor and client exists between the parties, and unless the communication is made by or to the legal adviser in his professional character (*R. v. Downer* (1880), 14 Cox, C. O. 486, C. O. R.; *Smith v. Danell* (1874), L. R. 18 Eq. 649; *Wilson v. Rastall*, *supra*; *R. v. Farley* (1846), 2 Car. & Kir. 313; *R. v. Brewer* (1834), 6 O. & P. 363; *Cuts v. Pickering* (1672), 1 Vent. 197). As to communications made to a minister of religion, see title CRIMINAL LAW AND PROCEDURE, Vol. IX., p. 401, and *Normanshaw v. Normanshaw and Measham* (1893), 69 L. T. 468. As to the admissibility of confessions in criminal cases, see title CRIMINAL LAW AND PROCEDURE, Vol. IX., p. 394.

(*q*) *Bullivant v. A.-G. for Victoria*, [1901] A. C. 196; *R. v. Cox and Ruiton* (1884), 14 Q. B. D. 153, C. O. R.; *Re Postlethwaite, Re Rickman, Postlethwaite v. Rickman* (1887), 35 Ch. D. 722; *R. v. Brown* (1862), 9 Cox, C. O. 28, C. O. R.; *Russell v. Jackson* (1851), 9 Hare, 387; *R. v. Hayward* (1846), 2 Car. & Kir.

privileged from disclosure (r). Secondary evidence of such documents cannot be given (s).

Public officials are privileged from disclosing the source of information that has been communicated to them, and witnesses for the Crown in criminal prosecutions undertaken by the Government are privileged from disclosing the channel through which they have communicated information (t).

A witness, whether a member of either House of Parliament or not, may refuse to disclose, without permission of the House of Parliament which has jurisdiction in the matter, what has taken place in either House, or what was said, or how any person voted (a).

SECT. 2.
Privilege.

Public
officials.
Crown
witnesses.

Members of
Parliament.

SUB-SECT. 3.—*Husband and Wife.*

782. A husband or wife may refuse to disclose any communication made to him or her during the marriage by the other party to the marriage (b).

Husband
and wife.

234; *R. v. Jones* (1846), 1 Den. 166, C. C. R.; *R. v. Avery* (1838), 8 C. & P. 596; *Williams v. Quebrada Railway, Land and Copper Co.*, [1895] 2 Ch. 751.

(r) *Dawkins v. Rokeby* (Lord) (1873), L. R. 8 Q. B. 255, Ex. Ch. (minutes of proceedings of a military court of inquiry); *Home v. Bentinck* (1820), 2 Brod. & Bing. 130, Ex. Ch. (report of such a court); *Hennessey v. Wright* (1888), 21 Q. B. D. 509 (dispatches, reports, and other communications passing between a Secretary of State for the Colonies and the governor of a colony); see *Chatterton v. Secretary of State for India in Council*, [1895] 2 Q. B. 189, 195, C. A. As to letters written by a private individual to an official, see *Blake v. Pilfold* (1832), 1 Mood. & R. 198, and as to reports of a prison doctor, see *Leigh v. Gladstone* (1909), 26 T. L. R. 139. If the head of a public department who has possession of a public document, or some responsible official acting under his authority, states that the production of the document would be injurious to the public interest, the document cannot be disclosed (*Re Hargreaves* (*Joseph*), *Ltd.*, [1900] 1 Ch. 347, C. A.; *Hughes v. Vargas* (1893), 9 T. L. R. 551, C. A.; *Re H.M.S. Bellerophon* (1874), 44 L. J. (ADM.) 5; see *Ford v. Blest* (1890), 6 T. L. R. 295; *A.-G. v. Nottingham Corporation* (1904), 20 T. L. R. 257, 258; *Kain v. Farrer* (1877), 37 L. T. 469; *Wright & Co. v. Mills* (1890), 62 L. T. 558; *Deaton v. Skene* (1860), 2 L. T. 378; *Smith v. East India Co.* (1841), 1 Ph. 50; *Anderson v. Hamilton* (1820), 2 Brod. & Bing. 156, n.; *Williams v. Star Newspaper Co., Ltd.* (1908), 24 T. L. R. 297, and title DISCOVERY ETC., Vol. XI., p. 64). It is a criminal offence for a person in the public service, corruptly and contrary to his official duty, to communicate a public document in his possession to any person to whom, in the public interest, the document ought not to be communicated (Official Secrets Act, 1889 (52 & 53 Vict. c. 52), s. 2).

(s) *Home v. Bentinck*, *supra*.

(t) *R. v. Hardy* (1794), 24 State Tr. 199, 753; *R. v. Watson* (1817), 32 State Tr. 1, 100; *R. v. Richardson* (1863), 3 F. & F. 693; *A.-G. v. Briant* (1846), 15 M. & W. 169; *Marks v. Beyfus* (1890), 25 Q. B. D. 494, C. A.; but a detective cannot refuse on grounds of public policy to answer a question as to where he was secreted (*Webb v. Catchlove* (1886), 3 T. L. R. 159). As to public officials generally, see title PUBLIC AUTHORITIES AND PUBLIC OFFICERS.

(a) *Plunkett v. Cobbett* (1804), 5 Esp. 136; *Chubb v. Salomons* (1852), 3 Car. & Kir. 15.

(b) Evidence Amendment Act, 1853 (16 & 17 Vict. c. 83), s. 3; Criminal Evidence Act 1898 (61 & 62 Vict. c. 36), s. 1 (d). The rule is not limited to communications of a strictly confidential character (*O'Connor v. Majoribanks* (1842), 6 Jur. 509), and applies even after the marriage tie has been severed by death or divorce (*Doker v. Hasler* (1824), Ry. & M. 198; *Monroe v. Twissleton* (1802), Peake, Add. Cas. 219). The rule still applies, even in the cases where a wife or husband may be called as witness against the other party to the marriage; see Criminal Evidence Act, 1898 (61 & 62 Vict. c. 36), s. 4 (1), s. 1 (d). As to evidence relating to adultery, see p. 576, *post*. As to the evidence of the husband or wife in criminal proceedings, see title CRIMINAL LAW AND PROCEDURE,

SECT. 2.

Privilege.

Title deeds
of witnesses.

Grounds for
refusing
to give
evidence.

What are
sufficient
grounds.

SUB-SECT. 4.—*Title Deeds.*

783. A witness, whether a party to an action or not, may refuse, and cannot be compelled, to produce his title deeds (c).

SUB-SECT. 5.—*Matter incriminating Witness.*

784. A witness may refuse to answer a question on the ground that the answer may tend to incriminate him, that is, may tend to expose the witness, or the husband or wife of the witness (d), to any kind of criminal charge (e), or to any kind of penalty (f) or forfeiture (g).

The mere statement by a witness that he believes that the answer may tend to incriminate him does not excuse him from answering, and the court must be satisfied from the circumstances of the case and the nature of the evidence which the witness is called upon to give that there is reasonable ground to apprehend danger from his being compelled to answer. If it is once made to appear that the witness is in danger, great latitude should be allowed to him in judging for himself of the effect of any particular

Vol. 1X., pp. 405, 406. A third person may give evidence of a conversation he has heard between husband and wife (*R. v. Smithies* (1832), 5 C. & P. 332; *R. v. Simons* (1834), 6 C. & P. 540; *R. v. Bartlett* (1837), 7 C. & P. 832).

(c) *Egremont Burial Board v. Egremont Iron Ore Co.* (1880), 14 Ch. D. 158; *Minet v. Morgan* (1873), 8 Ch. App. 361; *Doe d. Loscombe v. Clifford* (1847), 2 Cur. & Kir. 448; *R. v. Upper Boddington (Inhabitants)* (1820), 8 Dow. & Ry. (K. B.) 726; *Pickering v. Noyes* (1823), 1 B. & C. 262; *Harris v. Hill* (1822), 3 Stark. 140. The rule applies to documents which a witness holds as mortgagee or pledgee (*Chichester v. Donegall (Marquis)* (1870), 5 Ch. App. 497; *Costa Rica Republic v. Erlanger* (1874), L. R. 19 Eq. 33). As to production of documents before trial, see *Budden v. Wilkinson*, [1893] 2 Q. B. 432, C. A.; *Morris v. Edwards* (1890), 15 App. Cas. 309; *A.-G. v. Newcastle-upon-Tyne Corporation*, [1899] 2 Q. B. 478, C. A. As to production of deeds by solicitors, agents, or servants, see p. 581, *post*.

(d) *R. v. Oliver (Inhabitants)* (1788), 2 Term Rep. 263; *Cartwright v. Green* (1802), 8 Ves. 405; *R. v. All Saints, Worcester (Inhabitants)* (1817), 6 M. & S. 194.

(e) *Lamb v. Munster* (1882), 10 Q. B. D. 110; *Fisher v. Ronalds* (1852) 12 C. B. 762; *R. v. Staney* (1832) 5 C. & P. 213; *R. v. Pegler* (1833), 5 C. & P. 521; *Maloney v. Bartley* (1812), 3 Camp. 210; *Paxton v. Douglas* (1812), 19 Ves. 225; *Claridge v. Hoare* (1807), 14 Ves. 59. In *Parkhurst v. Lowten* (1816), 1 Mer. 391, *Brownsword v. Edwards* (1751), 2 Ves. Sen. 243, 245, and *Finch v. Finch* (1752), 2 Ves. Sen. 491, 493, the rule was applied to a criminal charge in an ecclesiastical court, but the rule would probably not be so applied now except in the case of persons in orders refusing to answer. Bankruptcy proceedings are no longer of such a criminal nature as to prevent the bankrupt being called by a creditor (*Re X. Y., Ex parte Haes*, [1902] 1 K. B. 98, C. A.; see *Re a Debtor*, [1910] 2 K. B. 59, 64, C. A.).

(f) *R. v. Freind* (1896), 13 State Tr. 1, 16; *Maccallum v. Turton* (1828), 2 Y. & J. 183; *Dandridge v. Corden* (1827), 3 C. & P. 11; *Derby Corporation v. Derbyshire County Council*, [1897] A. C. 550.

(g) *Pye v. Butterfield* (1864), 5 B. & S. 829; *Cork (Bishop) v. Porter* (1877), 11 L. R. C. L. 94; *Uxbridge (Lord) v. Staveland* (1747), 1 Ves. Sen. 56; *Hambrook v. Smith* (1852), 17 Sim. 209; see Witnesses Act, 1806 (46 Geo. 3, c. 37). An objection that to answer a question would expose the witness to criminal proceedings, punishment, and penalties in a foreign country is no ground for refusing to answer the questions, unless the judge has materials before him from which he can judge whether there is a reasonable likelihood of a danger of such a prosecution etc. (*Two Sicilies (King) v. Willcox* (1851), 1 Sim. (N. S.) 301; *United States of America v. McRae* (1897), 3 Ch. App. 79).

question. Subject to this reservation, the court is bound to insist on the witness answering, unless it is satisfied that the answer will tend to place the witness in peril (*h*).

**SECT. 2.
Privilege.**

An objection to answer questions or interrogatories tending to incriminate must be taken at the time by the witness or person interrogated, and the objection must be taken on oath or affirmation (*i*). But, it seems, the witness, if he chooses to answer part of an inquiry, does not waive his right to object to answer subsequent questions (*k*).

When refusal must be made.

A witness cannot refuse to be examined on the ground that the only answer he can give will tend to incriminate him; he can only object to answer after he has been sworn or has affirmed, and must then object to answer a particular question (*l*).

Witness cannot refuse examination.

No one except the witness or person interrogated can avail himself of the objection (*m*).

If a witness objects on oath to answer a question on the ground that the answer may tend to incriminate him, and there is good ground for the objection, but the witness is improperly compelled to answer the question, the answer cannot lawfully be admitted in evidence against him in a subsequent proceeding (*n*).

Answer improperly obtained is inadmissible in subsequent proceeding.

If proceedings cannot be taken against the witness, in respect of the charge, penalty, or forfeiture on account of which he refuses to answer, by lapse of time (*o*), or by pardon of the criminal offence in question (*p*), or by waiver of the penalty or forfeiture, then the witness cannot refuse to answer the question (*q*).

When witness cannot refuse to answer.

Except in the cases stated above, a witness cannot refuse to answer a question on a matter material to the issue on the ground that his answer would tend to degrade him (*r*), or to

(*h*) *Re Genese, Ex parte Gilbert* (1886), 3 Morr. 223, C. A.; *Re Reynolds, Ex parte Reynolds* (1882), 20 Ch. D. 294, C. A.; *R. v. Boyes* (1861), 1 B. & S. 311; *Sidebottom v. Adkins* (1857), 5 W. R. 743; *Osborn v. London Dock Co.* (1855), 10 Exch. 698.

(*i*) *Webb v. East* (1879), 5 Ex. D. 23; *Sammons v. Baily* (1890), 24 Q. B. D. 727; *Spokes v. Grosvenor Hotel Co.*, [1897] 2 Q. B. 124, C. A.; *The Mary or Alexandra* (1868), L. R. 2 A. & E. 319; *Boyle v. Wiseman* (1855), 10 Exch. 647; *East v. Chapman* (1827), 2 C. & P. 570; *Smith v. Beadnell* (1807), 1 Camp. 30; *Bickford v. Darcy* (1866), L. R. 1 Exch. 354; but see *R. v. Garbett* (1847), 1 Den. 236; and title DISCOVERY ETC., Vol. XI., p. 83.

(*k*) *R. v. Garbett, supra*; but see *East v. Chapman, supra*.

(*l*) *Boyle v. Wiseman, supra*.

(*m*) *R. v. Kinglake* (1870), 11 Cox, C. C. 449; *Thomas v. Newton* (1826), Mood. & M. 48, n.; *R. v. Adey* (1831), 1 Mood. & R. 94. An interrogatory cannot be struck out on the ground that it tends to criminate (*Fisher v. Owen* (1878), 8 Ch. D. 645, C. A.; *Webb v. East* (1879), 5 Ex. D. 23; *Sammons v. Bailey* (1890), 24 Q. B. D. 727; *Spokes v. Grosvenor Hotel Co.*, [1897] 2 Q. B. 124, C. A.; *The Mary or Alexandra* (1868), L. R. 2 A. & E. 319; *Bickford v. Darcy, supra*; *National Association of Operative Plasterers v. Smithies*, [1906] A. C. 434). Interrogatories are not allowed in actions for forfeiture or penalties. See title DISCOVERY ETC., Vol. XI., p. 41.

(*n*) *R. v. Garbett, supra*; *R. v. Coot* (1873), L. R. 4 P. C. 599.

(*o*) *Roberts v. Allatt* (1828), Mood. & M. 192; *Williams v. Farrington* (1789), 2 Cox, Eq. Cas. 202; *Davis v. Reid* (1832), 5 Sim. 443.

(*p*) *R. v. Boyes, supra*.

(*q*) *R. v. Charlesworth* (1860), 2 F. & F. 326; *Ex parte Fernandez* (1861), 10 C. B. (N. S.) 3; *Trinity House Corporation v. Burge* (1828), 2 Sim. 411.

(*r*) See the note in *R. v. Pitcher* (1823), 1 C. & P. 85, 86; and *Millman v. Tucker* (1803), Peake, Add. Cas. 222, and cases cited in note, *ibid.*, p. 223.

SECT. 2.
Privilege.

subject him to a civil action or pecuniary loss, or to charge him with a debt (s).

**When bound
to answer.**

785. There are some cases in which, by the express provisions of a statute, a witness is bound to answer a question, although the answer may tend to incriminate him (t). Provisions have been made absolving from penal consequences persons who make a full discovery of what they know in inquiries instituted under certain statutes, and a person who is indemnified thereby cannot refuse to answer a question on the ground that it would tend to incriminate him (a).

**When
evidence of
adultery may
be adduced.**

786. In proceedings instituted in consequence of adultery (b) no witness is liable to be asked or bound to answer any question tending to show that he or she has been guilty of adultery, unless such witness has already given evidence in the same proceedings in disproof of his or her alleged adultery (c).

In other proceedings, it seems, a witness could not refuse to answer a question on the ground that the answer might tend to show that he or she had committed adultery (d).

(s) Witnesses Act, 1806 (46 Geo. 3, c. 37); *Doe d. Egremont (Earl) v. Dale* (1842), 3 Q. B. 609. But see *Venables v. Schweitzer* (1873), L. R. 16 Eq. 76; *Re Desportes, Ex parte Official Receiver* (1893), 68 L. T. 233. As to refusal of defendant on criminal charge, who gives evidence on his own behalf or for a fellow prisoner, to answer questions, see title CRIMINAL LAW AND PROCEDURE, Vol. IX., p. 404; and *R. v. Rowland*, [1910] 1 K. B. 458, C. A.

(t) See Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 17. As to objecting to produce a book kept pursuant to statute, see *Bradshaw v. Murphy* (1836), 7 C. & P. 612.

(a) Bankruptcy Act, 1890 (53 & 54 Vict. c. 71), s. 27; Larceny Act, 1861 (24 & 25 Vict. c. 96), s. 85; Larceny Act, 1901 (1 Edw. 7, c. 10); and see title CRIMINAL LAW AND PROCEDURE, Vol. IX., 399, note (q). There are some questions which a bankrupt is compellable to answer in his examination, although they criminate him (see title BANKRUPTCY AND INSOLVENCY, Vol. II., p. 73), but which a mere witness examined in bankruptcy may refuse to answer (*Re Firth, Ex parte Schofield* (1877), 6 Ch. D. 230, C. A.; *R. v. Hullam* (1872), 12 Cox, C. C. 174; *R. v. Cherry* (1871), 12 Cox, C. C. 32; *R. v. Cross and Leyland* (1856), 7 Cox, C. C. 226, C. C. R.; *Re Smith* (1833), 2 Deac. & Ch. 230; *Re Heath* (1833), 2 Deac. & Ch. 214; *Re Falk* (1832), 2 Deac. & Ch. 415; *R. v. Sloggett* (1856), *Dears* C. C. 656). See the Corrupt Practices Prevention Acts, 1854—1883; title ELECTIONS, Vol. XII., pp. 466, 514; Gaming Act, 1845 (8 & 9 Vict. c. 109), s. 9; Gaming Act, 1892 (55 & 56 Vict. c. 9); Gaming Houses Act, 1854 (17 & 18 Vict. c. 38), ss. 5, 6; and title CRIMINAL LAW AND PROCEDURE, Vol. IX., p. 400.

(b) *Nottingham Guardians v. Tomkinson* (1879), 4 C. P. D. 343; *Evans v. Evans*, [1904] P. 378. As to such proceedings generally, see title HUSBAND AND WIFE.

(c) Evidence Further Amendment Act, 1869 (32 & 33 Vict. c. 68), s. 3. See *Redfern v. Redfern*, [1891] P. 139, C. A.; *Hebblethwaite v. Hebblethwaite* (1869), L. R. 2 P. & D. 29; *Babbage v. Babbage* (1870), L. R. 2 P. & D. 222; *Brown v. Brown* (1874), L. R. 3 P. & D. 198. The witness questioned must himself claim the protection of the section, and counsel for either party cannot object to such a question (*Hebblethwaite v. Hebblethwaite*, *supra*).

(d) *Evans v. Evans*, [1904] P. 378; *R. v. Castro* (1873), *Shorthand Notes*, I., 1002. The possibility of proceedings in the ecclesiastical court being brought in consequence of adultery is probably now too remote to be a ground for a refusal to answer a question relating to this subject; but see *Redfern v. Redfern*, *supra*, at p. 145.

SECT. 9.—Attendance.

787. All competent witnesses who are amenable to the jurisdiction of the Supreme Court of Judicature are also in civil cases compellable to attend and give evidence (e).

SUB-SECT. 1.—*Subpœna ad testificandum.*(i.) *Witnesses within the Jurisdiction.*

788. The attendance of witnesses in proceedings in the High Court is enforced by the writ of *subpœna ad testificandum* (f). The

SECT. 8.
Attendance.

Attendance of witnesses within the jurisdiction.

Subpœna ad testificandum.

(e) As to compellable witnesses in criminal cases, see title CRIMINAL LAW AND PROCEDURE, Vol. IX., p. 401. There are some persons, e.g., the King, a foreign sovereign who is in England, and foreign ambassadors at the English Court, who, if competent witnesses, are not compellable; see note (c) p. 570, *ante*.

(f) This writ in civil proceedings issues out of the Central Office of the Supreme Court of Judicature; for the forms of the writ, see R. S. C., App. J; Yearly Practice of the Supreme Court, 1911, Vol. II., pp. 1916—9. To obtain a writ of *subpœna*, a *prœcipe* in the form given in R. S. C., App. G, No. 21, must be delivered and filed at the Central Office (R. S. C., Ord. 37, r. 26). The Probate, Divorce and Admiralty Division may issue writs of *subpœna*; see, as to divorce, Matrimonial Causes Act, 1857 (20 & 21 Vict. c. 85), s. 49, and rr. 109 and 180 of the Rules and Regulations of 26th December, 1865, made under the Matrimonial Causes Act, 1857 (20 & 21 Vict. c. 85); and the Matrimonial Causes Act, 1860 (23 & 24 Vict. c. 144); see, as to probate, Court of Probate Act, 1857 (20 & 21 Vict. c. 77), s. 24; Court of Probate Act, 1858 (21 & 22 Vict. c. 95), s. 23; see, as to Admiralty, Admiralty Court Act, 1861 (24 & 25 Vict. c. 10), s. 21. Writs of *subpœna* are issued from the Crown Office, not only to witnesses in causes pending on the Crown side of the King's Bench Division of the High Court, but where the attendance of witnesses is required at the assizes or the Central Criminal Court, or in any inferior criminal court, and also in inferior tribunals which have not the means of enforcing the attendance of witnesses (Short and Mellor, Practice of the Crown Office, 2nd ed., p. 405; Crown Office Rules, 1906, App. C, Nos. 151—168). No writ of *subpœna* can be issued against a defendant in a criminal case, or his or her wife or husband, except in the cases in which a defendant, or his or her wife or husband, is a compellable witness; see title CRIMINAL LAW AND PROCEDURE, Vol. IX., pp. 388, 402—407. As to proceedings in chambers, see R. S. C., Ord. 37, r. 28; R. S. C., Ord. 55, rr. 16, 17; as to proceedings before an official referee, see R. S. C., Ord. 36, r. 49; as to proceedings before a taxing officer, see R. S. C., Ord. 65, r. 27 (25); as to proceedings before an examiner, see R. S. C., Ord. 37, r. 20; as to proceedings before an arbitrator, see Arbitration Act, 1889 (52 & 53 Vict. c. 49), ss. 8, 18; as to the summoning for cross-examination of a witness who has made an affidavit, see R. S. C., Ord. 38, r. 28; and *Re Baker, Connell v. Baker* (1885), 29 Ch. D. 711; as to examinations of witnesses in bankruptcy, see Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 27; *Re Franks, Ex parte Gittins*, [1892] 1 Q. B. 646; Bankruptcy Rules, 1886, rr. 61—66; and title BANKRUPTCY AND INSOLVENCY, Vol. II., pp. 71, 140, 318; as to the summoning of witnesses in the winding up of a company, see Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 174. As to the summoning of witnesses before either House of Parliament, see Erskine May, Parliamentary Practice, 11th ed., pp. 402, 424; before the Judicial Committee of the Privy Council, the Judicial Committee Act, 1833 (3 & 4 Will. 4, c. 41), s. 19. As to the summoning of witnesses before a coroner's court, see Coroners Act, 1887 (50 & 51 Vict. c. 71), ss. 19, 21; and title CORONERS, Vol. VIII., pp. 261—68; as to summoning of witnesses before county courts, see County Court Act, 1888 (51 & 52 Vict. c. 43), s. 110; and title COUNTY COURTS, Vol. VIII., p. 529. As to the summoning of witnesses before the ecclesiastical courts, see Public Worship Regulation Act, 1874 (37 & 38 Vict. c. 85), s. 9; as to their evidence, see title ECCLESIASTICAL LAW, Vol. XI., p. 518; and as to taking evidence by deposition before an examiner, see r. 86 of the rules made under the Clergy

SECT. 3.

Attendance.

Who can
issue.

Validity as
to time.

Service.

When
subpœna
must be
served.
Conduct
money.

production of documents in the possession of a witness is enforced by the writ of *subpœna duces tecum* (g).

Any party to a proceeding in the High Court is entitled to a *subpœna* as of right (h), but a *subpœna* improperly issued may be set aside (i).

Any *subpœna* other than a *subpœna* issued from the Crown Office, or in an action to be tried at the assizes, remains in force until the trial of the action or matter in which it is issued (k).

A *subpœna* must be served personally (l) by delivering a copy of the writ and of the indorsement, and at the same time producing the original writ (m).

A *subpœna* must be served within twelve weeks after the *teste* of the writ, and within a reasonable time before the trial or proceeding at which the attendance of the witness is required (n).

At the time of the service of the *subpœna*, or within a reasonable time before the day named for the attendance of the witness, a witness in a civil case is entitled to have tendered to him his conduct money, that is, his full expenses for going to and returning from the place of trial, and for his maintenance there during the trial. A professional witness is also entitled to have tendered to him compensation to the amount of one guinea a day for loss of time (o).

Discipline Act, 1892 (55 & 56 Vict. c. 32), s. 9. As to witnesses in criminal matters, see title CRIMINAL LAW AND PROCEDURE, Vol. IX., pp. 314, 321; and before justices, title MAGISTRATES. There are a great number of special statutory provisions providing for the summoning of witnesses before special courts and bodies, and persons having *quasi-judicial* functions; see 2 Taylor, Law of Evidence, 10th ed., pp. 931, 944.

(g) See p. 580, *post*. A *subpœna* other than a *subpœna duces tecum* is to contain three names when necessary or required, but may contain any larger number of names (R. S. C., Ord. 37, r. 29); no more than three persons are to be included in a *subpœna duces tecum*, and a *subpœna* may be sued out for each person if it is deemed necessary or desirable (R. S. C., Ord. 37, r. 30). As to correcting errors in names and resealing a *subpœna*, see R. S. C., Ord. 37, r. 31.

(h) *Raymond v. Tapson* (1882), 22 Ch. D. 430, C. A.; *Holden v. Holden, Hill v. Holt* (1857), 7 De G. M. & G. 397.

(i) *London and Globe Finance Corporation v. Kaufman* (1899), 69 L. J. (CH. 196; *Re Mundell, Fenton v. Cumberlege* (1883), 48 L. T. 776. A *subpœna* not issued *bonâ fide* for the purpose of obtaining relevant evidence may be set aside (*R. v. Haines*, [1909] 1 K. B. 258).

(k) R. S. C., Ord. 37, r. 34A.

(l) It is said that an order for substituted service can be made (*Dyson v. Foster* (1908), 7th February, *per* JELF, J., Yearly Supreme Court Practice, 1911, Vol. I., 511).

(m) R. S. C., Ord. 37, r. 32; *Wadsworth v. Marshall* (1832), 1 Cr. & M. 87; *R. v. Wood* (1832), 1 Dowl. 509; *Garden v. Creswell* (1837), 2 M. & W. 319; *Pitcher v. King* (1845), 2 Dow. & L. 755; *Doe d. Clarke v. Thomson* (1841), 9 Dowl. 948.

(n) R. S. C., Ord. 37, r. 34; *Hammond v. Stewart* (1722), 1 Stra. 510; *Barber v. Wood* (1838), 2 Mood. & R. 172; *Maunsell v. Ainsworth* (1840), 8 Dowl. 869; *Jackson v. Seager* (1844), 2 Dow. & L. 13; see *London and Globe Finance Corporation v. Kaufman*, *supra*. As to an action against a person who prevents the service of a *subpœna*, see *Wigens v. Cook* (1859), 6 C. B. (N. S.) 784, 787. If a witness is in court at the trial, he may there and then be served with a *subpœna* (*Doe d. Jupp v. Andrews* (1778), 2 Cowp. 845), and cannot refuse to give evidence, unless he is a solicitor engaged in another matter (*Pitcher v. King*, *supra*).

(o) See *Re Working Men's Mutual Society* (1882), 21 Ch. D. 831; *Bowles v. Johnson* (1748), 1 Wm. Bl. 36; *Newton v. Harland* (1840), 1 Man. & G. 956;

If a witness in a civil case has been regularly served with a *subpœna* and has had his expenses tendered to him within a reasonable time, and does not attend at the trial or proceeding, or attends and refuses to give evidence, he may, in the absence of reasonable excuse, be attached for contempt (*p*); or an action will lie against him at the suit of the party who sued out the *subpœna* (*q*).

A witness who attends on a *subpœna* may, in a civil case, refuse to give evidence until he has been paid his full expenses, including, if he is a professional man, compensation for his loss of time at the above-mentioned rate (*a*).

SECT. 3.
Attendance.

Consequence of refusal to attend.

Payment of expenses.

(ii.) *Witnesses out of the Jurisdiction.*

789. Where in a civil case the attendance of a witness who is within the United Kingdom, but is not within the jurisdiction of the court in which the action is pending, is required, a writ of *subpœna* may be issued by special leave of a judge of the High Court (*b*).

Witnesses out of the jurisdiction.

In criminal matters, when witnesses are not bound over to appear and give evidence at the trial, or are out of the jurisdiction of the particular court, if such witnesses are within the United Kingdom,

Crown Office *subpœna*.

Brocas v. Lloyd (1856), 23 Beav. 129. As to criminal cases, see Costs in Criminal Cases Act, 1908 (8 Edw. 7, c. 15), s. 1.

(*p*) *R. v. Daye*, [1908] 2 K. B. 333; *R. v. Russell* (Lord John), *R. v. Fox Maule* (1839), 7 Dowl. 693; *Chapman v. Davis* (1841), 3 Man. & G. 609; *Lamont v. Crook* (1840), 6 M. & W. 615; *Barrow v. Humphreys* (1820), 3 B. & Ald. 598; *Guff v. Mills* (1844), 2 Dow. & L. 23; *R. v. Fenn* (1835), 3 Dowl. 546. As to what is a reasonable excuse, see *Blandford v. De Tastet* (1813), 5 Taunt. 260; *Farrah v. Keat* (1838), 6 Dowl. 470; *R. v. Sloman* (1832), 1 Dowl. 618; *Malcolm v. Day* (1819), 3 Moore (c. p.), 579; *Vaughton v. Brine* (1840), 9 Dowl. 179; *Re Jacobs* (1835), 1 Har. & W. 123; *Whiteland v. Grant* (1840), 4 Jur. 1061. If a witness attends at the hearing, he cannot refuse to be examined on the ground that he has not been duly served (*Wisden v. Wisden* (1849), 6 Hare, 549).

(*q*) *Needham v. Fraser* (1845), 1 C. B. 815; *Couling v. Cox* (1848), 6 C. B. 703; *Mullett v. Hunt* (1833), 1 Cr. & M. 752; *Lamont v. Crook* (1840), 6 M. & W. 615; *Masterman v. Judson* (1832), 8 Bing. 224; *Davis v. Lovell* (1839), 4 M. & W. 678; *Amey v. Long* (1808), 9 East. 473. If a witness promises to attend at a trial without a *subpœna*, an action will lie against him for breach of the promise (*Yeatman v. Dempsey* (1860), 7 C. B. (n. s.) 628). If conduct money has been paid to a witness, and his attendance becomes unnecessary, and he has incurred no expense, the conduct money may be recovered by the person who paid it (*Martin v. Andrews* (1856), 7 E. & B. 1). A witness who has not been paid his expenses has an action for them against the party who sues out the *subpœna* (*Collins v. Godefroy* (1831), 1 B. & Ad. 950; *Robins v. Bridge* (1837), 3 M. & W. 114; *Hale v. Bates* (1858), E. B. & E. 575).

(*a*) See *Re Working Men's Mutual Society* (1882), 21 Ch. D. 831; and cases cited, note (*q*), *supra*.

(*b*) Attendance of Witnesses Act, 1854 (17 & 18 Vict. c. 34), ss. 1, 2; Judicature Act, 1854 (47 & 48 Vict. c. 61), s. 16; see *Allen v. Hamilton* (Duke) (1867), L. R. 2 O. P. 630. A reasonable and sufficient sum of money to defray the expenses of coming and attending to give evidence, and of returning from giving such evidence, must be tendered to the person whom the *subpœna* is served upon him (Attendance of Witnesses Act, 1854 (17 & 18 Vict. c. 34), s. 4. Disobedience to the writ is punishable in the courts of the country in which it is served (*ibid.*, s. 3). An order will not be made under the Attendance of Witnesses Act, 1854 (17 & 18 Vict. c. 34), for the attendance of witnesses before an arbitrator to whom an action and all matters in difference have been referred (*Hall v. Brand* (1853), 12 Q. B. D. 39, O. A.). It seems that in such a case the proper course would be to procure a Crown Office *subpœna*.

SECT. 3. their attendance is enforced by a Crown Office *subpœna*, which may
Attendance. be served anywhere in the United Kingdom (c).

SUB-SECT 2.—*Habeas Corpus ad testificandum*.

**Attendance
of prisoners.**

790. Any prisoner in custody may be brought up to give evidence before a court of record by a writ of *habeas corpus ad testificandum* granted by a judge of the High Court (d), or by a warrant or order of a judge of the High Court (e).

A Secretary of State may order the attendance of any prisoner at any place, if it is proved to his satisfaction that such attendance is required in the interests of justice or for the purpose of any public inquiry (f).

SUB-SECT 3.—*Subpœna duces tecum*.

(i.) *In General*.

**Production
of material
documents.**

791. The production at the trial of a material document which is in the possession of any person other than the party who desires its production, and which such person is not willing to produce voluntarily, is enforced by a *subpœna duces tecum* (g).

**Documents
required
must be
specified.**

The *subpœna* must specify the particular documents required, and if too general in language will not be enforced (h).

(c) Writ of Subpœna Act, 1805 (45 Geo. 3, c. 92), s. 3. Under this Act a reasonable and sufficient sum of money to defray the expenses of the witness coming and attending to give evidence, and of returning from giving such evidence, must be tendered to the witness when the *subpœna* is served (*ibid.*, s. 4).

(d) R. S. C., App. J, Form No. 2; *Graham v. Glover* (1855), 5 E. & B. 591; *Marsden v. Overbury* (1856), 18 C. B. 34. Where a person is (1) detained in a lunatic asylum (*Fennell v. Tait* (1834), 1 Cr. M. & R. 584), or (2) is an officer in the army or navy who cannot attend a trial without leave of his superior officers (*R. v. Roddam* (1777), 2 Cowp. 672), and an affidavit is made stating that such officer is willing to attend and has been served with a *subpœna*, then a writ of *habeas corpus ad testificandum* may be granted by a judge of the High Court, and the witness may be brought to give evidence.

(e) See *Jenks v. Ditton* (1897), 76 L. T. 591; Criminal Procedure Act, 1853 (16 & 17 Vict. c. 30), s. 9, amended by the Prison Act, 1898 (61 & 62 Vict. c. 41), s. 15, and Sched. If the proceedings are in the county court, the county court judge may make an order for the attendance of the witness (County Courts Act, 1888 (51 & 52 Vict. c. 43), s. 112, and see title COUNTY COURTS, Vol. VIII., p. 530).

(f) Prison Act, 1898 (61 & 62 Vict. c. 41), s. 11.

(g) The writ is in the same form as a *subpœna ad testificandum*, with the addition of an order for the production of the document or documents specified. For forms, see R. S. C., App. J, Nos. 5, 7, 7B, 7D, 7E. The writ is served in the same way as a *subpœna ad testificandum* (see p. 578, *ante*). No more than three names are to be included in one *subpœna duces tecum*, and the party suing out the writ may sue out a *subpœna* for each person if it is deemed necessary or desirable (R. S. C., Ord. 37, r. 30). The provisions of the Attendance of Witnesses Act, 1854 (17 & 18 Vict. c. 34) (see p. 579, *ante*), are applicable to a *subpœna duces tecum* as well as to a *subpœna ad testificandum*. No affidavit or record of the High Court is to be taken out of the Central Office without the order of a judge or master, and no *subpœna* for the production of any such document is to be issued (R. S. C., Ord. 61, r. 28). A sealed packet is a document, and may be ordered to be produced by a *subpœna duces tecum* (*R. v. Daye*, [1908] 2 K. B. 333; and see Extradition Act, 1873 (36 & 37 Vict. c. 60), s. 5). As to a Crown Office *subpœna duces tecum*, see Crown Office Rules, 1906, App. C, No. 151.

(h) *Lee v. Angas* (1866), L. R. 2 Eq. 59; *A.-G. v. Wilson* (1839), 9 Sim. 526.

If the *subpœna* is in proper form and is properly served, and the witness receives his conduct money, he must attend at the place directed with the documents specified, if he has them in his possession (i). If he admits that he has the specified documents in his possession, he cannot insist on being first sworn (k), but must produce them without being sworn, unless he has an objection to produce them; if he has any such objection, he is sworn and makes the objection on oath and it is for the judge who tries the case to decide on the validity of the objection (l).

A witness who attends on a *subpœna duces tecum* may object to produce a document on the ground that it is privileged from production (m).

A witness cannot object to produce a document on the ground that he has a lien on it (n), unless, perhaps, where the party who asks for the production of the document is the person against whom the lien is claimed (o).

SECT. 3. Attendance.

Duty of witness in possession of documents.

Objection to produce.

When lien can be the ground of objection.

(ii.) Solicitors.

792. A solicitor who has been served with a *subpœna duces tecum* in respect of a document which he holds confidentially for his client, and which his client could withhold, cannot be forced to produce it (p).

Production by solicitor.

(i) *Amey v. Long* (1808), 9 East, 473. If he does not so attend, he is liable to the same proceedings as a person who disobeys a *subpœna ad testificandum* (*ibid.*; and see p. 579, ante).

(k) *Lee v. Angas* (1866), L. R. 2 Eq. 59. It is the ordinary practice to call upon a witness who attends on such a *subpœna* to produce such documents without his being sworn.

(l) *Amey v. Long*, *supra*; *R. v. Greenaway* (1845), 7 Q. B. 126. If a person has possession of documents only as a servant, he cannot be compelled to produce them if his master refuses to allow him to bring them (*Austin v. Evans* (1841), 2 Man. & G. 430; *Crowther v. Appleby* (1873), L. R. 9 Q. P. 23; *Re Higge, Ex parte Leicester* (1892), 66 L. T. 296).

(m) A document is privileged from production on the same grounds as those on which a witness is privileged from giving evidence (see p. 570, ante).

(n) *Re Toleman and England, Ex parte Bramble* (1880), 13 Ch. D. 885; *Re South Essex Estuary and Reclamation Co., Ex parte Paine and Layton* (1869), 4 Ch. App. 215; *Pratt v. Pratt* (1882), 51 L. J. (CH.) 838; *Locket v. Cary* (1864), 3 New Rep. 405; *Hope v. Liddell* (1855), 7 De G. M. & G. 331, where *Griffith v. Ricketts* (1849), 7 Haro, 299, was disapproved; *Re Cameron's Coalbrook etc. Rail. Co.* (1857), 25 Beav. 1; *Ley v. Barlow* (1848), 1 Exch. 800; *Thompson v. Mosely* (1833), 5 C. & P. 501, 502; *Hunter v. Leathley* (1830), 10 B. & C. 858; *Brassington v. Brassington* (1823), 1 Sim. & St. 455; *Furion v. Howard* (1804), 2 Sch. & Lef. 115; *Re Rapid Road Transit Co.*, [1909] 1 Ch. 96, 99; see Bankruptcy Rules, 1886, r. 349.

(o) *Kemp v. King* (1842), 2 Mood. & R. 437. But in some cases a solicitor has been ordered to produce a document when the lien is claimed against the party calling for it (*Fowler v. Fowler* (1881), 50 L. J. (CH.) 686; see *Locket v. Cary, supra*; *Vale v. Oppert* (1875), 10 Ch. App. 340).

(p) *Hibberd v. Knight* (1846), 2 Exch. 11; *Volant v. Soyer* (1853), 13 C. B. 231; *Doe d. Egremont (Lord) v. Langdon* (1848), 12 Q. B. 711; *Doe d. Carter v. James* (1837), 2 Mood. & R. 47; *Ditcher v. Kenrick* (1824), 1 C. & P. 161; *Harris v. Hill* (1822), 3 Stark. 140; *Nixon v. Mayo* (1831), 1 Mood. & R. 76. If the solicitor willingly produces such a document, the evidence may be received (*Hibberd v. Knight, supra*). A deed which a solicitor refuses to produce may yet, it seems, be ordered to be produced for identification (*Phelps v. Frew* (1854), 3 E. & B. 430). As to secondary evidence, when production is refused, see *Phelps*

SECT. 3.
Attendance.
Solicitor's
lien

A solicitor who has been served with a *subpœna duces tecum*, and has a lien on documents, will be ordered to produce them without prejudice to his lien (q).

A solicitor having a lien on documents in his possession belonging to a client, a party to an action, may not refuse to produce the documents, if they are wanted by a third party for the purpose of the action, although the documents may have come into the possession of the solicitor before the commencement of the action (r).

(iii.) *Production of Documents at proceedings other than Trial.*

Production
of documents
at any stage
of pro-
ceedings.

793. An order may be made by the court or a judge directing the attendance of any person, at any stage of the proceedings in any cause or matter, for the purpose of producing any writings or other documents named in the order which the court or judge may think fit to be produced, but no person can be compelled to produce under any such order any writing or other document which he could not be compelled to produce at the hearing or trial (s).

v. *Prew*, *supra*; *Doe d. Egremont (Lord) v. Langdon* (1848), 12 Q. B. 711; *Ditcher v. Kenrick* (1824), 1 C. & P. 161; *Calcraft v. Guest*, [1891] 1 Q. B. 759, C. A. As to the production by a solicitor of a document belonging to a client in a criminal trial, see *R. v. Tuffs* (1848), 1 Den. 319; *R. v. Hankins* (1849), 2 Car. & Kir. 823; *R. v. Avery* (1838), 5 C. & P. 596; *R. v. Haynard* (1846), 2 Car. & Kir. 234; *R. v. Jones* (1846), 1 Den. 166; *R. v. Brown* (1862), 9 Cox, C. C. 281; *R. v. Downer* (1880), 14 Cox, C. C. 486, C. O. R.; see *R. v. Cox and Railton* (1884), 14 Q. B. D. 153, C. C. R.; and p. 574, *ante*.

(g) *Re Hawkes, Ackerman v. Lockhart*, [1898] 2 Ch. 1. As to solicitor's lien, see title SOLICITORS.

(r) *Re Hawkes, Ackerman v. Lockhart*, *supra*.

(s) R. S. C., Ord. 37, r. 7. The object of this rule is to remove the difficulties which existed in compelling production of documents at various stages of the proceedings both before and after the trial, at the hearing of motions, petitions, summonses, and examinations of witnesses and the like. The rule does not give any new right to discovery against persons not parties to the proceedings, and the court has no jurisdiction to order a person not a party to the proceedings to produce a document belonging to him, unless the parties to the proceedings are entitled to the production of the document at the time when the order is made (*Elder v. Carter Ex parte Slide and Spur Gold Mining Co.* (1890), 25 Q. B. D. 194, C. A.), nor to order inspection of the books of persons who are not parties to the action, or the production of such books at the office of the solicitor of one of the parties (*Straker v. Reynolds* (1889), 22 Q. B. D. 262; see *O'Shea v. Wood*, [1891] P. 286, C. A.; *Burchard v. Macfarlane, Ex parte Tindall*, [1891] 2 Q. B. 241, C. A.). The production which can be ordered under this rule is not a production for the purpose of private inspection, but must have some reference to a proceeding in the litigation (*Re Smith, Williams v. Frere*, [1891] 1 Ch. 323). An order under this rule is equivalent to a *subpœna duces tecum* and has the same effect; the person summoned must attend with the documents specified, but may, when he attends, make any legitimate objection to the production of any document (*ibid.*). The order may be made *ex parte* (*Zumbech v. Biggs* (1900), 48 W. R. 507). A person who disobeys an order under this rule is to be deemed guilty of contempt of court and may be attached (R. S. C., Ord. 37, r. 8; *Carew v. Carew*, [1891] P. 360; *Shurrock v. Lillie* (1888), 4 T. L. B. 355). A person required to attend under R. S. C., Ord. 37, r. 7 is entitled to the like conduct money and payment for expenses and loss of time as upon attendance at a trial in court (Ord. 37, r. 9); a judgment debtor ordered to attend under R. S. C., Ord. 42, r. 32, does not come within this rule (*Rendell v. Grundy*, [1895] 1 Q. B. 16, C. A.); nor does a person directed to attend for the purpose of being examined pursuant to the Court of Probate Act, 1857 (20 & 21 Vict. c. 77), s. 26 (*In the Goods of Wyatt*, [1898] P.

SUB-SECT. 4.—*Expenses.*

SECT. 8.

Attendance.

794. No person served with a *subpœna* in a civil cause is bound to attend the trial unless he is paid or tendered a reasonable sum of money for going to, staying at, and returning from the place of trial, nor is he liable to a penalty if in such circumstances he refuses to attend (*a*). The sum must be sufficient for his subsistence during his probable stay at the place of trial (*b*).

Conduct money must be reasonable and sufficient.

The reasonableness of the sum is a question of degree, and depends on the situation in life of the witness and the circumstances in which he may happen to be placed (*c*).

A professional witness served with a *subpœna* for the purpose of giving expert evidence only, and not evidence as to the facts of the case, is entitled to claim compensation for loss of time before giving his evidence (*d*).

A witness may waive payment of the expenses to which he is entitled, or of part of them, as, for example, the expenses of going to the place of trial; but in the latter case he is still entitled to demand money for his return (*e*). A witness who makes no complaint that the sum tendered is insufficient, but offers to bear his own expenses, has no answer to a motion for attachment if he refuse to attend the trial on his *subpœna* (*f*), on the ground that he

Waiver of expenses.

15). As to the costs of attendance of a witness at the trial, and also at a preliminary examination, see *Delaroque v. Oxenholme & Co.*, [1883] W. N. 227. And, generally, as to stages in proceedings, see title PRACTICE AND PROCEDURE.

(*a*) Stat. (1563) 5 Eliz. c. 9, s. 6. By this statute the witness is entitled to be paid, "according to his countenance or calling, such reasonable sums of money for his costs and charges as having regard to the distance of the places is necessary to be allowed in that behalf." The statute was made perpetual by the Statute Law Revision Act, 1863 (26 & 27 Vict. c. 125); see also *Bowles v. Johnson* (1763), 1 Wm. Bl. 36; *Fuller v. Prentice* (1788), 1 Hy. Bl. 49; *Chapman v. Paynton* (1741), 13 East, 16, n.; *Newton v. Harland* (1840), 1 Man. & G. 956; *Brocas v. Lloyd* (1856), 23 Beav. 129.

(*b*) *Horne v. Smith* (1815), 6 Taunt. 9.

(*c*) *Horne v. Smith*, *supra*; *Vice v. Anson (Countess)* (1827), 3 C. & P. 19 (witness served in London in August to attend trial in October, and at the time of service about to depart for the Continent, held entitled to expenses of coming from the Continent to the place of trial); *Dixon v. Lee* (1834), 1 Cr. M. & R. 645 (woman with a sick infant at the breast held entitled to expenses of coach journey as inside passenger).

(*d*) *Webb v. Page* (1843), 1 Car. & Kir. 23; *Clark v. Gill* (1856), 1 K. & J. 19; *Re Working Men's Mutual Society* (1882), 21 Ch. D. 831. An ordinary witness could never at common law claim compensation for loss of time; see *Collins v. Godefroy* (1831), 1 B. & Ad. 950, and remarks thereon in *Chamberlain v. Stoneham* (1889), 24 Q. B. D. 113. But the right may be given by statute in certain cases, e.g., by the Bankruptcy Rules, 1886, r. 71 (*Chamberlain v. Stoneham*, *supra*). The two last-cited cases, however, were cases of actions to recover fees brought subsequent to the proceedings in which the evidence was given, and it would seem that in view of the scale of allowances for witnesses provided by R. S. C., 1883, a witness served with a *subpœna* in a civil case may recover from the person on whose behalf he was served, not only his bare expenses, but such remuneration as is provided by the scale (2 Taylor, Law of Evidence, 10th ed., s. 1260). As to questions arising on taxation as to allowances to witnesses, see titles PRACTICE AND PROCEDURE; SOLICITORS.

(*e*) *Newton v. Harland* (1840), 1 Man. & G. 956, per TINDAL, C.J., at p. 957.

(*f*) *Goff v. Mills* (1844), 13 L. J. (Q. B.) 227.

SECT. 3.
Attendance.

Witness
served by
both parties.

has not been paid expenses due to him for attendance on an earlier occasion (*g*).

A witness served with a *subpœna* by both parties is entitled to be paid by the second party serving him all that he would be entitled to receive from him after exhausting what he has received from the other party (*h*).

A party to an action who is about to attend the trial on his own behalf cannot claim conduct money or expenses if served with a *subpœna* by the other side (*i*).

When
conduct
money may
be recovered.

When the attendance of a witness has become unnecessary, and no expenses have been incurred by him under his *subpœna*, the conduct money paid him may be recovered back as money had and received (*k*).

Solicitor's
liability for
expenses.

A solicitor who causes a *subpœna* to be served is not personally liable to the witness for his expenses, in the absence of a contract express or implied (*l*). But the fact that a witness attends and gives evidence without demanding his expenses is evidence from which a promise may be inferred by the party for whom he appears to pay the expenses subsequently (*m*).

Rule in
criminal
cases.

795. The rule in criminal cases is different. No tender of conduct money or expenses (with the exceptions referred to below) is necessary where the *subpœna* is served in England (*n*), whether the *subpœna* be served by the Crown or by the defence, and it is immaterial that the indictment has been removed by *certiorari* and comes to the assizes as a civil record (*o*). But by the Writ of Subpœna Act, 1805 (*p*), which enacts that a *subpœna* served in any part of the United Kingdom in connection with a criminal prosecution shall be as effectual as though served in that part of the United Kingdom in which the witness is required to appear, the omission to tender a sufficient sum for his expenses justifies a witness in

(*g*) *Gaunt v. Johnson* (1848), 6 Hare, 551.

(*h*) *Betteley v. M'Leod* (1837), 3 Bing. (N. C.) 405; *Allen v. Yoxall* (1844), 1 Car. & Kir. 315; *Hale v. Bates* (1858), E. B. & E. 575 (sum paid by but repaid to one party recoverable from the other).

(*i*) *Reed v. Fairless* (1863), 3 F. & F. 958. If a necessary and material witness, he may be allowed his reasonable expenses on taxation as a witness; but not if he only attended to superintend the course of the trial (*Hovves v. Barber* (1852), 18 Q. B. 588; *Dowdell v. Australian Royal Mail Co.* (1854), 3 E. & B. 902).

(*k*) *Martin v. Andrews* (1856), 7 E. & B. 1.

(*l*) *Robins v. Bridge* (1837), 3 M. & W. 114. The rule with regard to expert witnesses is the same (*Lee v. Everest* (1857), 2 H. & N. 285). *Semble*, that where a solicitor is conducting a speculative action, a contract to make himself personally liable to the witnesses might be implied; see *Miller v. Appleton* (1906), 50 Sol. Jo. 192, which, though only a county court decision, is, it is submitted, in accordance with the general principle.

(*m*) *Hallet v. Mears* (1813), 13 East, 15; *Pell v. Daubeny* (1850), 5 Exch. 955.

(*n*) *R. v. Cooke* (1824), 1 O. & P. 321; *R. v. Cousens* (1843), cited in Russell on Crimes and Misdemeanours, 7th ed., 2258; *Pell v. Daubeny*, *supra*, per ALDERSON, B., at p. 957. It is apprehended that genuine inability to obey the *subpœna* by reason of poverty would be held a sufficient excuse.

(*o*) *R. v. Cooke*, *supra*.

(*p*) 45 Geo. 3, c. 92.

refusing to attend the trial (*g*). The Attendance of Witnesses Act, 1854 (*r*), contains similar provisions with regard to a *subpœna* served in any part of the United Kingdom in connection with civil proceedings, but so far as regards the tender of expenses to witnesses, merely reproduces the common law (*a*).

SECT. 3.
Attendance.
—
Exceptions
to rule.

Witnesses summoned in connection with criminal proceedings under the Fugitive Offenders Act, 1881 (*b*), are also entitled to be tendered their expenses (*c*).

796. Similar provisions have been made in the case of witnesses summoned to county courts (*d*), courts of bankruptcy (*e*), courts of summary jurisdiction (*f*), revising barristers' courts (*g*), ecclesiastical courts (*h*), courts-martial (*i*), and before commissioners appointed to take evidence in the United Kingdom in suits pending in the United Kingdom (*k*), in colonial courts (*l*), or in foreign courts (*m*), as well as before other bodies and persons exercising judicial or semi-judicial functions (*n*).

Rules in
other courts.

SUB-SECT. 5.—*Privilege from Arrest.*

797. Witnesses (as well as the parties themselves and their solicitors) are privileged from arrest on civil (*o*) but not criminal

Privilege of
witness from
arrest.

(*g*) Writ of Subpœna Act, 1805 (45 Geo. 3, c. 92), ss. 3, 4. As to the allowance of witnesses' costs and expenses after trial, see Costs in Criminal Cases Act, 1908 (8 Edw. 7, c. 15), and title CRIMINAL LAW AND PROCEDURE, Vol. IX., pp. 445 *et seq.*

(*r*) 17 & 18 Vict. c. 34.

(*a*) *Ibid.*, s. 4.

(*b*) 44 & 45 Vict. c. 69. See, also, title EXTRADITION AND FUGITIVE OFFENDERS.

(*c*) *Ibid.*, ss., 15, 27.

(*d*) County Courts Act, 1888 (51 & 52 Vict. c. 43), s. 111; *Chamberlain v. Stoneham* (1889), 24 Q. B. D. 113.

(*e*) Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 27 (2); Bankruptcy Rules, 1886, r. 71. This rule has no application to the debtor himself (*Re Balson, Ex parte Hastie* (1894), 70 L. T. 382).

(*f*) Summary Jurisdiction Acts, 1848 (11 & 12 Vict. c. 43), s. 7; 1879 (42 & 43 Vict. c. 49), s. 36; 1881 (44 & 45 Vict. c. 24), s. 4 (3). See title MAGISTRATES.

(*g*) Parliamentary and Municipal Registration Act, 1878 (41 & 42 Vict. c. 26), s. 36. As to revision courts, see title ELECTIONS.

(*h*) Rules made under the Clergy Discipline Act, 1892 (55 & 56 Vict. c. 32), s. 9 (Stat. R. & O., 1903, tit. Ecclesiastical Court, England, p. 106). The *subpœna* of the Ecclesiastical Courts was known as a "compulsory," but the rules as to the tender of expenses to a witness did not differ from those of the common law. The practice as to the attendance of witnesses under the Public Worship Regulation Act, 1874 (37 & 38 Vict. c. 85), is assimilated to that of the High Court. For proceedings under these Acts, see title ECCLESIASTICAL LAW, Vol. XII., pp. 515 *et seq.*

(*i*) See Army Act, 1881 (44 & 45 Vict. c. 58), s. 126; Naval Discipline Act, 1866 (29 & 30 Vict. c. 109), s. 66; and as to courts-martial, title ROYAL FORCES.

(*k*) Evidence by Commission Act, 1843 (6 & 7 Vict. c. 82), s. 7.

(*l*) Evidence by Commission Act, 1859 (22 Vict. c. 20), s. 3.

(*m*) Foreign Tribunals Evidence Act, 1856 (19 & 20 Vict. c. 113), s. 4.

(*n*) As, for example, in the case of inquiries under the Factory and Workshop Act, 1901 (1 Edw. 7, c. 22), s. 22 (4); before the Customs Board (Customs Consolidation Act, 1876 (39 & 40 Vict. c. 36), s. 37); before inspectors of the Local Government Board (Poor Law Board Act, 1847 (10 & 11 Vict. c. 109), ss. 21, 26, Local Government Board Act, 1871 (34 & 35 Vict. c. 70)); before inspectors of the Board of Trade (Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), s. 729); in rating cases (Poor Rate Act, 1839 (2 & 3 Vict. c. 84)).

(*o*) *Re Freston* (1883), 11 Q. B. D. 515, O. A., where the distinction

SECT. 3.

Attendance.

Application
of rule.

Exceptions.

process (*p*), *eundo, morando et redeundo*—that is to say, while going to, attending at, and returning from the place of trial (*q*).

The rule applies in all cases where a person is attending a properly constituted tribunal for the purpose of giving testimony (*r*), or where he has some relation to or interest in the proceedings, either as a party, or as solicitor, or agent, or for any other reason (*s*). But the rule has no application to a common informer going to lay a *qui tam* information, or to a person going to obtain a summons, even though he obtains it (*t*). It is immaterial that the person has been served with no *subpœna* or process by which his presence might be compelled (*a*); but he must be acting *bonâ fide* in the capacity on which he bases his claim to the privilege (*b*). The time over which

is fully discussed. As to privileges of solicitors generally, see title SOLICITORS.

(*p*) *Re Douglas* (1842), 3 Q. B. 825; *Re Freston* (1883), 11 Q. B. L. 545, C. A. (solicitor who disobeys order of the court made against him as an officer of the court is guilty of a criminal contempt, and has no privilege); *Kimpton v. London and North Western Rail. Co.* (1854), 9 Exch. 766. A witness may be arrested by his bail, for that is a retaking only (*Ex parte Lyne* (1822), 3 Stark. 132).

(*q*) The general principle is stated by BRETT, M.R., in *Re Freston*, *supra*, at p. 552; see also *Lightfoot v. Cameron* (1776), 2 Wm. Bl. 1113; *Meekins v. Smith* (1791), 1 Hy. Bl. 636; *Willingham v. Matthews* (1815), 6 Taunt. 358; *Magnay v. Burt* (1844), Dav. & Mer. 652; and, generally, the cases cited under this section.

(*r*) *Ex parte Cobbett* (1857), 7 E. & B. 955, *per* CROMPTON, J., at p. 959: "However inferior the tribunal may be, if it be a lawful tribunal, the privilege on principle exists." See, for cases of the privilege successfully claimed in proceedings before various tribunals, *Arding v. Flower* (1800), 8 Term Rep. 534; *Ex parte King* (1802), 7 Ves. 312; *Ex parte Byne* (1813), 1 Ves. & B. 316; *Willingham v. Matthews*, *supra*; *Re Sewer Krop*, *Ex parte Clarke* (1832), 2 Deac. & Ch. 99 (bankruptcy); *Moore v. Booth* (1797), 3 Ves. 350; *Phillips v. Pound* (1852), 7 Exch. 881; *Re Jewitt* (1864), 10 Jur. (N. S.) 814 (judge's chambers); *Sidgier v. Birch* (1803), 9 Ves. 69; *List's Case* (1814), 2 Ves. & B. 373; *Franklyn v. Colquhoun* (1816), 1 Madd. 580 (masters etc. of High Court); *Newton v. Aikew* (1848), 6 Hare, 319 (Chancery registrar); *Spence v. Stuart* (1802), 3 East, 89; *Ex parte Temple* (1814), 2 Ves. & B. 391; *Randall v. Gurney* (1819), 3 B. & Ald. 252 (arbitration by order of the court); *Webb v. Taylor* (1843), 1 Dow. & L. 676 (the same under a submission agreed to be made a rule of court); *Walter v. Rees* (1819), 4 Moore (C. P.), 34 (under-sheriff); *Webb v. Taylor*, *supra*; *Mountague v. Harrison* (1857), 3 C. B. (N. S.) 292; *Re Freston*, *supra* (magistrates' courts). The privilege with regard to military and naval courts-martial is statutory (see Army Act, 1881 (44 & 45 Vict. c. 58), ss. 125 (2), 179; Naval Discipline Act, 1866 (29 & 30 Vict. c. 109), s. 66).

(*a*) *Walpole v. Alexander* (1782), 3 Doug. (K. B.) 45; *Meekins v. Smith*, *supra*; *Arding v. Flower*, *supra* (bankrupt attending, on notice, meeting to declare dividend); *Ex parte Byne*, *supra* (person attending without summons commissioners in a bankruptcy, and filing uncontradicted affidavit that he is a material witness); *Re Britten (D.)*, *Ex parte Britten (J.)* (1840), 1 Mont. D. & De G. 278 (husband of petitioner in bankruptcy protected because of his possible liability for costs); *Phillips v. Pound* (1852), 7 Exch. 881 (solicitors' clerk at judge's chambers).

(*t*) *Ex parte Cobbett*, *supra*, *per* Lord CAMPBELL, C.J., at p. 956.

(*a*) *Walpole v. Alexander*, *supra* (witness coming from abroad to give evidence); *Meekins v. Smith*, *supra*; *Spence v. Stuart*, *supra*; *Rishton v. Nisbett* (1834), 1 Mood. & R. 347 (witness attending at request of party to arbitration proceedings). There was at one time a difference of opinion as to the necessity of a *subpœna* or other like process (see *Ex parte Byne*, *supra*, and cases there cited, as well as cases cited in *Magnay v. Burt* (1844), Dav. & Mer. 652).

(*b*) *Meekins v. Smith*, *supra*; *Gibbs v. Phillipson* (1829), 1 Russ. & M. 19.

SECT. 3.
Attendance.

the privilege extends is a question of fact and reasonableness in each case (c); a witness is not, for example, protected as from the moment at which, he is served with his *subpœna* (d), but only when he *bonâ fide* begins his journey to the place of trial (e). His journey must be made without unnecessary deviations (f), unless such deviations are clearly connected with the object of the journey (g). So, also, the time during which the privilege will extend while he is actually in attendance at the place of trial will vary according to the circumstances of each case (h); and when he returns he is under no obligation to go home by the shortest route, or the very moment that the trial is over, provided that he acts reasonably and does not abuse the privilege for his own purposes (i). But the fact that he is compelled to prolong his stay for want of means to return is an immaterial consideration (k).

The privilege exists in the interests of public justice (l), and a delay on the part of the witness in asserting the privilege for the purpose of obtaining his discharge from custody will not, therefore, necessarily prejudice him (m); but when the delay is very long and unexplained, the court will possibly not exercise its discretion in his favour (n).

Reason for
privilege.

(c) *Walpole v. Alexander* (1782), 3 Doug. (K. B.) 45, per Lord MANSFIELD, C.J., at p. 46; *Strong v. Dickinson* (1836), 1 M. & W. 488.

(d) *Gibbs v. Phillips* (1829), 1 Russ. & M. 19.

(e) *Ibid.*; *Ricketts v. Gurney* (1819), 7 Price, 699; *Strong v. Dickinson*, *supra*; *Perse v. Perse* (1856), 5 H. L. Cas. 671.

(f) *Ricketts v. Gurney*, *supra*; *Strong v. Dickinson*, *supra*.

(g) *Ricketts v. Gurney*, *supra* (deviation on way to place of trial to collect and arrange necessary papers). Contrast *Gibbs v. Phillips*, *supra*, where witness was held to have no privilege on going to his solicitors' office three days before his examination, for the purpose of looking at the interrogatories which he would have to answer.

(h) *Walpole v. Alexander*, *supra* (witness coming from abroad, and finding case postponed to following sittings, privileged from arrest while staying in London for case to be heard); *Childerston v. Barrett* (1809), 11 East, 439 (arrest of witness on day when case was not in list unjustifiable); *Ex parte Temple* (1814), 2 Ves. & B. 391 (privilege continues during adjournment); *Spencer v. Newton* (1837), 6 Ad. & El. 623 (but not where case is adjourned *sine die*, and witness stays on in the expectation that some step will be taken by the other side).

(i) *Willingham v. Matthews* (1815), 6 Taunt. 356, per cur. at p. 358; *Strong v. Dickinson*, *supra*, per Lord ABINGER, C.B., at p. 491; see also *Lightfoot v. Cameron* (1776), 2 Wm. Bl. 1113 (arrest unjustified where a party after being present at case in morning was dining in the afternoon with his solicitor and witnesses: *sed quære*); *Holiday v. Pitt* (1734), 2 Stra. 985, 986; *Selby v. Hills* (1832), 1 Dowl. 257 (arrest unjustified where witness was arrested a mile from the court, and two hours after leaving it, but on his direct road home); *Pitt v. Coomes* (1834), 5 B. & Ad. 1078 (the same, where witness was in his tailor's shop, which he had visited on his way home). But the privilege covers a witness while returning home after imprisonment for contempt of court committed during the trial (*R. v. Wigley* (1835), 7 C. & P. 4).

(k) *Spencer v. Newton*, *supra*.

(l) *Newton v. Constable* (1841), 2 Q. B. 157, per Lord DENMAN, C.J., at p. 166; *Magnay v. Burt* (1844), Dav. & Mær. 652; *Ex parte Cobbett* (1857), 7 E. & B. 955, per Lord CAMPBELL, C.J., at p. 956.

(m) *Webb v. Taylor* (1843), 1 Dow. & L. 676; *Andrews v. Martin* (1862), 12 C. B. (N. S.) 371.

(n) *Greenshield v. Pritchard* (1841), 8 M. & W. 148 (delay of a year).

SECT. 3.

Attendance.

Application
for discharge
from custody.

Liability of
officer
arresting
witness.

Protection
in respect
of evidence
given.

Penalties for
non-attend-
ance.

Punishment
for contempt
of court.

A witness may obtain his discharge from custody by application either to the court to which he has been summoned to give evidence, or to the court from which the process of his arrest has issued (*o*), unless these are courts of inferior jurisdiction (*p*), in which case, as well as in any other, *habeas corpus* proceedings may be taken to obtain his release (*q*).

But a witness cannot bring any action against the officer who arrests him, even though the officer knew that the privilege existed (*r*), or against those who employed him (*s*), though in the latter case a knowledge of the privilege may possibly be evidence of malice, and therefore may justify an action for damages (*t*). But the court itself could treat the arrest as a contempt, as being a deliberate interference with the course of justice (*u*).

798. A witness is also protected from civil proceedings in respect of the evidence which he gives, and this protection extends not only to evidence given in court, but to such preliminary communications as are necessary to enable that evidence to be given (*a*).

SUB-SECT. 6.—*Penalties for Non-attendance.*

799. By failing to attend on his *subpoena* a witness exposes himself to three kinds of penalties: punishment for contempt of court, a statutory penalty of £10, and an action for damages (*b*).

With regard to the punishment for contempt of court, this may take the form of fine or attachment (*c*). But the court will not

(*o*) *Walker v. Webb* (1797), 3 Anst. 941; *Randall v. Gurney* (1819), 3 B. & Ald. 252; *Selby v. Hills* (1832), 8 Bing. 166; *Re Sewer Krop, Ex parte Clarke* (1862), 2 Deac. & Ch. 99; *A.-G. v. Skinners' Co.* (1837), Coop. Pr. Cas. 1; *Kimpton v. London and North Western Rail. Co.* (1854), 9 Exch. 766.

(*p*) See *Walters v. Rees* (1819), 4 Moore (C. P.), 34.

(*q*) *Ex parte Tillotson* (1816), 1 Stark. 476; *Towers v. Newton* (1841), 1 Q. B. 319; *Astbury v. Delbin* (1850), 3 Car. & Kir. 20. For cases arising in connection with military or naval courts-martial, see Army Act, 1881 (44 & 45 Vict. c. 58), s. 125, and Naval Discipline Act, 1866 (29 & 30 Vict. c. 109), s. 66, which provide that application for discharge shall be made to the court issuing process, or, if that court is not sitting, to a judge of the High Court.

(*r*) *Tariton v. Fisher* (1781), 2 Doug. (K. B.) 671; *Magnay v. Burt* (1844), Dav. & Mer. 652.

(*s*) *Stokes v. White* (1834), 1 Cr. M. & R. 223; *Yearsley v. Heane* (1845), 14 M. & W. 322; *Ewart v. Jones* (1845), 14 M. & W. 774.

(*t*) *Whalley v. Pepper* (1836), 7 C. & P. 506; but in view of the later decisions, such as *Magnay v. Burt*, *supra*, this seems open to question (2 Taylor, Law of Evidence, 10th ed., s. 1340).

(*u*) *Magnay v. Burt*, *supra*.

(*a*) *Seaman v. Neitherclift* (1876), 2 C. P. D. 53, C. A.; *Bynoe v. Bank of England*, [1902] 1 K. B. 467, C. A.; *Barratt v. Kearns*, [1905] 1 K. B. 504, C. A.; *Watson v. M'Erwan*, *Watson v. Jones*, [1905] A. C. 480.

(*b*) A large number of statutes give power to various tribunals and semi-judicial bodies to inflict small fines on persons who fail to appear before them when summoned; these will be found collected in 2 Taylor, Law of Evidence, 10th ed., Part V., Chap. I.

(*c*) Attachment rather than committal (*Re Evans*, *Evans v. Noton*, [1893] 1 Ch. 252, C. A.). For contempt of court and attachment in general, see title CONTEMPT OF COURT ETC., Vol. VII., pp. 280, 303. For cases illustrating the general rule with regard to witnesses, see *Batt v. Rookes* (1577), Cary, 87; *Dolman v. Pritman* (1670), 3 Rep. Ch. 36 [64]; *Vailiant v. Dodomede* (1743), 2 Atk. 592;

interfere unless a clear case of contempt is made out (*d*), such as an intentional defiance of authority (*e*). Thus, it may be a sufficient excuse that the witness was ill (*f*) or unable to travel (*g*); that his employers (who were not parties to the case) refused to allow him to take to court a large number of books and papers belonging to them (*h*); that he had *bonâ fide* and reasonable grounds for thinking that his attendance would not be required (*i*); or that a proper sum was not tendered to him for his expenses (*k*). But the most stringent orders of an employer not to leave business are no excuse (*l*); neither is the fact that the case was not called on (*m*), nor that he would have been in time if the case had not unexpectedly been called on (*n*), nor that his evidence was not material (*o*).

A motion for attachment in such case must be made at the earliest opportunity (*p*), and the affidavit in support must prove that the original writ was shown to the witness at the time of service (*q*),

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What is
clear case
of contempt

Requisites for
motion for
attachment.

Barrow v. Humphreys (1820), 3 B. & Ald. 598; *Mullett v. Hunt* (1833), 1 Cr. & M. 752; *Goff v. Mills* (1844), 13 L. J. (Q. B.) 227.

(*d*) *Horne v. Smith* (1815), 6 Taunt. 9; *Garden v. Creswell* (1837), 2 M. & W. 319.

(*e*) *R. v. Russell* (Lord John), *R. v. Fox Maule* (1839), 7 Dowl. 693; *Chapman v. Davis* (1841), 1 Dowl. (N. S.) 239; *Glendinning v. Thomas* (1862), 6 L. T. 251 (failure to hear call); *Netherwood v. Wilkinson* (1855), 17 C. B. 226 (failure of wife to hand husband notice requiring his attendance on following day; but see *R. v. Daye*, [1903] 2 K. B. 333).

(*f*) *Re Jacobs* (1835), 1 Har. & W. 123; *Scholes v. Hilton* (1842), 10 M. & W. 15.

(*g*) *More v. Worchum* (1580), Cary, 142; compare *Humble v. Malbe* (1559), Cary, 58 (witness impressed as a soldier).

(*h*) *Crowther v. Appleby* (1873), L. R. 9 C. P. 23. In ordinary circumstances a witness must bring the documents specified in the *subpœna duces tecum*, even though not bound to produce them (*R. v. Carey* (1845), 2 New Sess. Cas. 105).

(*i*) *R. v. Sloman* (1832), 1 Dowl. 618; compare *Farrah v. Keat* (1838), 6 Dowl. 470 (case called on whilst witness absent with attorney's consent); and see *Blandford v. De Tastet* (1814), 5 Taunt. 260 (witness subpoenaed without notice as to when case would come on, and leaving on third day of his attendance on urgent business); *Vaughton v. Brine* (1841), 9 Dowl. 179 (defendant's attorney subpoenaed for a particular day, and case postponed at defendant's request).

(*k*) As to conduct money and expenses; see p. 583, *ante*.

(*l*) *Goff v. Mills*, *supra* (even though there is no possibility of communicating with the employer after the *subpœna* is served). This case is not inconsistent with *Crowther v. Appleby*, *supra*, which concerned a *subpœna duces tecum*; see also *Jackson v. Seager* (1844), 2 Dow. & L. 13.

(*m*) *Barrow v. Humphreys*, *supra*.

(*n*) *R. v. Penn* (1834), 3 Dowl. 546.

(*o*) See *Chapman v. Davis*, *supra*; unless, it would seem, the judge's notes make it clear that in fact the witness's evidence would have been wholly immaterial (*Dicas v. Lawson* (1835), 1 Cr. M. & R. 934). The earlier cases, however (*Taylor v. Williams* (1831), 2 B. & Ad. 845; *Tinley v. Porter* (1837), 5 Dowl. 744), seem inconsistent with the law as stated in the text; perhaps the fact that the evidence would have been immaterial only affects the question as to whether the contempt was intentional (2 Taylor, Law of Evidence, 10th ed., s. 1267).

(*p*) *R. v. Stretch* (1835), 3 Ad. & El. 503.

(*q*) *Thorpe v. Gisbournes* (1825), 11 Moore (C. P.), 55; *Burnes v. Williams* (1832), 1 Dowl. 615; *Jacob v. Hungate* (1834), 1 Mood. & R. 445; *Garden v. Creswell*, *supra*; *Pitcher v. King* (1845), 2 Dow. & L. 755; *Marshall v. York, Newcastle and Berwick Rail. Co.* (1851), 11 C. B. 398.

SECT. 3. and that his proper expenses were tendered to him (*r*); but it is not necessary that he should actually have been called on his *subpœna* (*s*).

A witness summoned to give evidence in an inferior court can only be attached for failure to attend where the *subpœna* issued from the Crown Office (*a*).

Statutory penalty.

800. With regard to the statutory penalty, a witness becomes liable, in the event of non-attendance (*b*), to forfeit £10 and pay such further recompense to the person at whose instance the *subpœna* was served as the judge shall award (*c*); but this recompense must be assessed by the court out of which process issues, and not by the judge or jury at *nisi prius* (*d*).

Action for damages.

A more effectual remedy is by an action for damages against the witness, in which proof of actual damage caused by the witness's non-attendance must be given (*e*), and though it must be alleged that the defendant was a material witness in the case (*f*), and that he could and might have appeared (*g*), yet an averment that the plaintiff had a good cause of action (*h*), or that the absence of the defendant was the sole cause of the loss of the suit (*i*), is unnecessary. The action will lie even though the plaintiff himself withdrew the record at the trial, if he did so because of the absence of the defendant as a witness (*k*).

SECT. 4.—Oath and Affirmation.

Evidence must be given on oath or affirmation.

801. Subject to the exceptions referred to below, no evidence is receivable in any kind of legal proceedings except such as is given

(*r*) As to conduct money and expenses, see p. 583, *ante*.

(*s*) *Dixon v. Lee* (1834), 3 Dowl. 259; *R. v. Nenn* (1834), 3 Dowl. 546; *Lamont v. Crook* (1840), 6 M. & W. 615; *Goff v. Mills* (1844), 13 L. J. (Q. B.) 227. These cases are inconsistent with the earlier case of *Malcolm v. Ray* (1819), 3 Moore (C. P.), 222; compare *R. v. Stretch* (1835), 3 Ad. & El. 503.

(*a*) *R. v. Ring* (1800), 8 Term Rep. 585; *R. v. Room* (1831), 3 Nev. & M. (K. B.) 725 (quarter sessions); *R. v. Brownell* (1834), 1 Ad. & El. 598; *R. v. Greenaway* (1845), 7 Q. B. 126 (justices); *R. v. Vickery* (1848), 12 Q. B. 478; compare *R. v. Clement* (1821), 4 B. & Ald. 218.

(*b*) Stat. (1563) 5 Eliz. c. 9. The statute was made perpetual by the Statute Law Revision Act, 1863 (26 & 27 Vict. c. 125). As to county courts, see title COUNTY COURTS, Vol. VIII., p. 530.

(*c*) Stat. (1563) 5 Eliz. c. 9, s. 62.

(*d*) *Pearson v. Hles* (1781), 2 Doug. (K. B.) 556. This procedure has accordingly fallen into disuse.

(*e*) *Couling v. Coxe* (1848), 6 Dow. & L. 399.

(*f*) *Masterman v. Judson* (1832), 8 Bing. 224. Materiality on a single issue is sufficient (*Couling v. Coxe*, *supra*), for the plaintiff may have lost his costs of that issue.

(*g*) *Mauinsell v. Ainsworth* (1840), 8 Dowl. 869. It is not necessary to aver that the original *subpœna* was shown to the witness (*Mullett v. Hunt* (1833), 1 Cr. & M. 752), or that he was called on his *subpœna* at the trial, if he was not in fact present (*Lamont v. Crook* (1840), 6 M. & W. 615). An action will also lie where the witness had contracted to appear, though not served with a *subpœna* (*Yeatman v. Dempsey* (1860), 7 C. B. (N. S.) 628).

(*h*) *Masterman v. Judson*, *supra*.

(*i*) *Davis v. Lovell* (1839), 6 M. & W. 678.

(*k*) *Mullett v. Hunt*, *supra*; and see *Needham v. Fraser* (1845), 14 L. J. (C. P.) 256.

upon oath or affirmation (*l*). At common law the form of the oath is immaterial, provided that it is binding on the witness's conscience (*m*), whether he be of Christian religion or not (*n*).

SECT. 4.
Oath and
Affirmation.

802. By the Oaths Act, 1909 (*o*), any oath may be administered and taken in the form and manner following:—The person taking the oath shall hold the New Testament, or in the case of a Jew, the Old Testament, in his uplifted hand, and shall say or repeat after the officer administering the oath the words "I swear by Almighty God that . . .," followed by the words of the oath prescribed by law, and the officer must, unless the witness objects or is physically incapable of so taking it, administer the oath in that form and manner without question, provided that to a witness who is neither a Christian nor a Jew the oath is to be administered in any manner which was lawful prior to the passing of the Act (*o*).

Form of oath.

The fact that a witness has been sworn in a manner contrary to the custom of his religion is no ground for a new trial; the witness, if he has sworn falsely, may be convicted of perjury (*p*).

803. A witness may object to be sworn on the ground that he has no religious belief, or that the taking of an oath is contrary to his religious belief, and may then be permitted to make a solemn declaration in lieu of an oath, which shall have the same force and effect in law as though the oath had been taken in the ordinary form (*q*). It is for the court to decide by questioning the witness whether he is entitled to take advantage of this provision (*r*), but where the witness has taken the oath without objection the fact

Solemn
declaration
in lieu
of oath.

(*l*) See *R. v. Brazier* (1779), 1 Leach, 199; *A.-G. v. Bradlaugh* (1883), 14 Q. B. D. 667, C. A.

(*m*) *Omychund v. Barker* (1744), 1 Atk. 21; *Atcheson v. Everitt* (1776), 1 Cowp. 382; *Edmonds v. Rowe* (1824), Ry. & M. 77; *Maden v. Catanach* (1861), 7 H. & N. 360; *A.-G. v. Bradlaugh*, *supra*; see also 1 & 2 Vict. c. 105, s. 1. There is no prescribed form of oath, but the usual form for Christians is as follows: "The evidence which you shall give between the parties [or between our Sovereign Lord the King and the prisoner at the bar (felonies), or between our Sovereign Lord the King and the defendant (misdemeanours)] shall be the truth, the whole truth, and nothing but the truth, so help you God," the witness holding the Gospels, or the whole of the New Testament, in his naked hand. For variations of this method of swearing, which have been held good, see *Colt v. Dutton* (1657), 2 Sid. 6, cited Willes, 553; *R. v. Love* (1651), 5 State Tr. 43, 113. As to persons empowered to administer oaths, see Evidence Act, 1851 (14 & 15 Vict. c. 99), s. 16; Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), Sched. II., r. 26; R. S. C., Ord. 37, r. 19; Ord. 53, rr. 16, 17; Ord. 61, r. 5; Ord. 65, r. 27; 2 Taylor, Law of Evidence, 10th ed., s. 1386.

(*n*) *Omychund v. Barker*, *supra*, the witness saying "I do swear by Almighty God etc."; see *R. v. Morgan* (1764), 1 Leach, 54 (Mohammedan); *R. v. Gilham* (1795), 1 Esp. 285 (converted Jew); *R. v. Entrehman* (1842), Car. & M. 248 (Chinaman).

(*o*) 9 Edw. 7, c. 39.

(*p*) *Sells v. Hoare* (1822), 3 Brod. & Bing. 232.

(*q*) Oaths Act, 1888 (51 & 52 Vict. c. 46), s. 1. Prior to the Oaths Act, 1888, it was a rule of the common law that persons of no religious belief were incompetent as witnesses, being incapable of acknowledging the origination of an oath. See *Maden v. Catanach*, *supra*; *A.-G. v. Bradlaugh*, *supra*; *Nash v. Ali Khan* (1892), 8 T. L. R. 444, C. A.

(*r*) *R. v. Moore* (1892), 61 L. J. (M. C.) 80, C. C. R.

SECT. 4.

Oath and Affirmation.Oath in
Scottish
manner.Affirmation
of Quakers
and
Moravians.Statutory
declarations.

that he had at the time no religious belief is not to affect its validity in any way (a).

A witness may, at his own desire, be sworn in the Scottish manner with uplifted hand, instead of in the ordinary form (b).

A special form of affirmation has long been permitted to members of the religious bodies of Quakers and Moravians (c), and even to persons who have ceased to belong to these bodies, but retain their views as to the unlawfulness of oaths (d).

With regard to certain oaths required to be taken out of court and such voluntary declarations as may be required in confirmation of written instruments, proofs of debts, or other matters, all persons may, by the Statutory Declarations Act, 1835 (e), make a solemn declaration in place of an oath (f).

When judge
or juror
must be
sworn.

804. A jurymen (g) or a judge (at any rate if he is not the sole judge trying the case (h)), must be sworn before he can give evidence of any matter which is within his knowledge; and the rule is said to extend to the Sovereign himself (i).

Barristers.

805. A barrister is permitted to make a statement from the bar without being sworn on any matter within his knowledge in

(a) Oaths Act, 1888 (51 & 52 Vict. c. 46), s. 3.

(b) *Ibid.*, s. 5; and see *Rabey v. Birch* (1908), 72 J. P. 106. This Act obviates the necessity of a corporal oath which is an oath ratified by corporally touching a sacred object. The form of Scottish oath is as follows: "I swear by Almighty God as I shall answer to God at the great Day of Judgment that etc." (see circular of the Home Secretary, May 31st, 1893). For earlier cases of Scottish oaths, see *R. v. Mildrone* (1786), 1 Leach, 412; *R. v. Walker* (1783), 1 Leach, 498; *Mee v. Reid* (1790), Peake, 33 [23].

(c) Quakers and Moravians Act, 1833 (3 & 4 Will. 4, c. 49). The form is: "I, A. B., being one of the people called Quakers (or one of the persuasion of the people called Quakers, or of the United Brethren called Moravians), do solemnly, sincerely and truly declare and affirm that etc." (s. 1).

(d) Quakers and Moravians Act, 1838 (1 & 2 Vict. c. 77); this Act was passed in consequence of the decision in *R. v. Doran* (1838), 2 Mood. C. C. 37. The form is: "I, A. B., having been one of the people called Quakers, and entertaining conscientious objections to the taking of an oath, do solemnly etc."

(e) 5 & 6 Will. 4, c. 62.

(f) *Ibid.*, ss. 4, 18, 20. The form is: "I, A. B. of . . . do solemnly and sincerely affirm etc.," and the form in lieu of jurat is "affirmed at . . . this . . . day of . . . before me. . . ."

(g) *R. v. Rosser* (1836), 7 C. & P. 648; *Manley v. Shaw* (1840), Car. & M. 361.

(h) *R. v. Anderson* (1680), 7 State Tr. 811; *Hurpurshad v. Sheo Dyal* (1876), L. R. 3 Ind. App. 259.

(i) See *Abignye v. Clifton* (1611), Hob. 213, where a certificate of the Sovereign was received in place of an affidavit; it may be doubted whether this would be followed at the present day. There is no process known to the law by which the Sovereign could be summoned as a witness if he did not choose to come. For a case concerning the evidence not on oath of the Lord Lieutenant of Ireland, in Ireland, see *Birch v. Somerville* (1852), 2 I. C. L. R. 243. Though a peer when sitting in the House of Lords on the trial of a fellow peer for felony gives his verdict upon his honour, not upon oath, yet in an ordinary court he stands on the same footing as any other of the King's subjects (*Meers (Sir T.) v. Stourton (Lord)* (1711), 1 P. Wms. 146); see also title CONSTITUTIONAL LAW, Vol. VI., p. 373.

connection with the case, as, for example, when a question of his authority to enter into a compromise has arisen (*k*).

SECT. 4.
Oath and
Affirmation.

SECT. 5.—*Ordering out of Court.*

806. At any time during the course of a trial, and on the application of either party (*l*), the judge may order witnesses in the case to leave the court (*m*). The power of doing so is discretionary in the judge, and is not a matter of right so far as the parties are concerned (*n*); and an application, for example, to order a witness out of court during the reading of an affidavit, which he has already seen, will not be granted (*o*).

Power to
order
witnesses out
of court.
At discretion
of judge.

There is some little doubt as to whether this power extends to the exclusion of parties in the case themselves (*p*), but the better opinion would seem to be that, though parties may now give evidence on their own behalf, a judge, while he may have the power, would only be justified in excluding them in exceptional circumstances (*a*). In criminal trials, however, a prosecutor is entitled to remain in court only in his capacity as prosecutor, and if he is a witness also he may be ordered to retire (*b*).

Parties
excluded in
exceptional
circum-
stances.

A solicitor in the case, though a witness, is usually permitted to remain if his presence is necessary for the purpose of instructing counsel or the like (*c*); and it is the usual practice for witnesses who are called to give expert evidence, and not to speak to facts only, to be allowed to remain even though other witnesses are excluded (*d*).

Legal
adviser
allowed to
remain.
Expert
witnesses.

Refusal to leave the court when ordered is a contempt of court and punishable accordingly (*e*), but the witness is not thereby rendered incompetent, though the judge may direct the jury that the weight

Refusal to
leave is
contempt.

(*k*) See title BARRISTERS, Vol. II., p. 396.

(*l*) *Southey v. Nash* (1837), 7 C. & P. 632.

(*m*) So also an examiner (*Re Western of Canada Oil, Lands and Works Co.* (1877), 6 Ch. D. 109); see p. 617, *post*.

(*n*) *R. v. Murphy* (1837), 8 C. & P. 297, 307; *Selfe v. Isaacson* (1858), 1 F. & F. 194. *Southey v. Nash*, *supra*, can no longer be regarded as correctly stating the law on this point.

(*o*) *Penniman v. Hill*, *Hill v. Penniman* (1876), 24 W. R. 245. As to exclusion by an arbitrator, see *Re Haigh's Estate*, *Haigh v. Haigh* (1862), 31 L. J. (CH.) 420.

(*p*) *Charnock v. Dewings* (1853), 3 Car. & Kir. 378; *Outram v. Outram*, [1877] W. N. 75.

(*a*) See 2 Taylor, Law of Evidence, 10th ed., s. 1400, where it is also pointed out that under R. S. C., Ord. 37, r. 11, a commissioner or special examiner must permit parties to be present through the examination, even though they are themselves witnesses; see also *Selfe v. Isaacson*, *supra*. As to examination by a commissioner or a special examiner, see p. 609, *post*.

(*b*) *R. v. Newman* (1842), Car. & Kir. 252.

(*c*) *Pomeroy v. Buddley* (1826), Ry. & M. 430; *Everett v. Lowdham* (1831), 5 C. & P. 91; *Re Aughtie, Ex parte Dugard* (1835), 4 Deac. & Ch. 524 (petitioner in bankruptcy, who was also assignee, allowed to remain as being in position of solicitor in the cause, and his presence likely to be necessary for proper conduct of case).

(*d*) Roscoe, Criminal Evidence, 13th ed., 114; 2 Taylor, Law of Evidence, 10th ed., s. 1400.

(*e*) *Chandler v. Horne* (1842), 2 Mood. & R. 423; *Cobbett v. Hudson* (1852), 1 E. & R. 11.

SECT. 5.
Ordering
out of
Court.

to be attached to his evidence is diminished (*f*). The rule formerly was that it was in the discretion of the judge whether his evidence was admitted or not (*g*), while in revenue cases in the Exchequer it was wholly rejected (*h*); but though there are no recent decisions on the latter point, it is probable that at the present time the practice in revenue cases would be assimilated to that in ordinary trials (*i*).

Hearing
in camera.

Whenever it is reasonably clear that justice cannot be done unless a case is heard in private, the court, by reason of its inherent jurisdiction, has power to order that it be heard *in camera* (*k*).

SECT. 6.—Examination in Chief, Cross-examination, and Re-examination.

SUB-SECT. 1.—Leading Questions.

Examination.

807. A witness is examined in chief by or on behalf of the party for whom he is called to give evidence (*l*).

Leading
questions.

Leading questions, that is to say, questions which by their form suggest the answer which it is desired that the witness shall give (*m*), are not permissible in an examination in chief (*n*). A question couched in an alternative form is not necessarily a leading question (*o*), and the rule has always been relaxed where evidence is being given of facts about which no dispute can possibly arise, or which are merely formal and in the nature of an introduction to the rest of the evidence which the witness proposes to give; such, for example, as his name, address, and calling (*p*). So, too, a witness's mind may be directed to a particular topic on which it is desired to examine him by a preliminary leading question (*q*), the limit of this indulgence

(*f*) *Cooke v. Nethercote* (1835), 6 C. & P. 741; *Chandler v. Horne* (1842), 2 Mood. & R. 423.

(*g*) *Parker v. M'William* (1830), 6 Bing. 683; *Beamon v. Ellice* (1831), 4 C. & P. 585; *Thomas v. David* (1836), 7 C. & P. 350. In *R. v. Colley and Sweet* (1829), Mood. & M. 329, it was said to "depend on circumstances."

(*h*) *A.-G. v. Bulpit* (1821), 9 Price, 4; *Parker v. M'William*, *supra*; *Thomas v. David*, *supra*.

(*i*) See 2 Taylor, Law of Evidence, 10th ed., s. 1401.

(*k*) *D. v. D.*, *D. v. D. and G.*, [1903] P. 144; *Mellor v. Thompson* (1885), 31 Ch. D. 55, C. A.; *Malan v. Young* (1889), 6 T. L. R. 38; Yearly Practice of the Supreme Court, 1911, Vol. I., p. 462; see title PRACTICE AND PROCEDURE.

(*l*) See p. 600, *post*, as to impeaching credit of witness, and occasions when it is permitted to a party to cross-examine his own witness.

(*m*) *Nicholls v. Dowding and Kemp* (1815), 1 Stark. 81.

(*n*) *Ibid.*; *Lincoln v. Wright* (1859), 28 L. J. (CH.) 705, C. A.; *Gregory v. Marychurch* (1850), 19 L. J. (CH.) 289.

(*o*) *Rowe v. Brenton* (1828), 3 Man. & Ry. (K. B.) 133, 212.

(*p*) *Nicholls v. Dowding and Kemp*, *supra*.

(*q*) *Courteen v. Towse* (1807), 1 Camp. 43; *Acerro v. Petroni* (1815), 1 Stark. 100; *Edmonds v. Walter* (1820), 3 Stark. 7. So, also, a witness's attention may be directed to an individual in court for the purpose of identifying him (*R. v. Watson* (1817), 2 Stark. 116, 128; *R. v. Berenger* (1814), 3 M. & S. 67, cited 2 Stark. 129, n. A witness called to explain ancient records may be asked to state the result of his examination of them, and may then be cross-examined on them in detail (*Rowe v. Brenton*, *supra*). As to proving a custom, see *Curtis v. Peek* (1864), 13 W. R. 230.

being a matter of discretion for the judge (*r*). But even if the question is one which contravenes the rules of evidence the witness is bound to answer, unless objection is taken to its admissibility (*s*).

A witness may, in general, give evidence only on matters of fact, and not on matters of his opinion or belief (*t*).

SUB-SECT. 2.—*Refreshing Memory.*

808. A witness is permitted to refresh his memory (*a*) in the course of his evidence by reference to documents or memoranda. By doing so he does not make them evidence (*b*); and it is, indeed, immaterial that they would not in fact be admissible in evidence if tendered as such (*c*).

But the document or memorandum must have been made by the witness contemporaneously with the facts about which he is testifying, or shortly afterwards, while the facts were still fresh in his memory (*d*), or, if not made by him personally, must have been made in his presence or assented to or checked by him (*e*).

SECT. 6.
Examination in Chief, Cross-examination, and Re-examination.

Reference to papers.

What papers may be referred to.

(*r*) See *Bustin v. Curew* (1824), Ry. & M. 127.

(*s*) *Ex parte Fernandez* (1861), 10 C. B. (N. S.) 3.

(*t*) See p. 479, *ante*, and p. 607, *post*, as to evidence of opinion and expert evidence.

(*a*) But from early times he has never been permitted to give the whole of his evidence from writing (*Anon.* (1755), Amb. 252).

(*b*) *Kensington v. Inglis* (1807), 8 East, 273, 289; *Alcock v. Royal Exchange Assurance Co.* (1849), 13 Q. B. 292; *Payne v. Ibbotson* (1858), 27 L. J. (EX.) 341. A deposition taken before justices must be put in evidence if it is sought to contradict a witness for the prosecution by reference to it at the trial on behalf of the prisoner (*R. v. Ford* (1851), 5 Cox, C. C. 184, C. C. R.); *secus*, if it is used to refresh the memory of a witness on behalf of the prosecution (*R. v. Williams* (1853), 6 Cox, C. C. 343).

(*c*) *E.g.*, an unstamped receipt (*Jacob v. Lindsay* (1801), 1 East, 460; *Catt v. Howard* (1820), 3 Stark. 3; *Maugham v. Hubbard* (1828), 8 B. & C. 14; compare *Bolton (Lord) v. Tomlin* (1836), 5 Ad. & El. 856 (lease not complying with Statute of Frauds)).

(*d*) See *Kingston's (Duchess) Case* (1776), 20 State Tr. 537; 2 Smith, L. C., 11th ed., 731; *Kensington v. Inglis*, *supra*; *Jones v. Stroud* (1825), 2 C. & P. 196; *Hill v. Barry* (1812), 7 Jur. 10; and compare *Whitfield v. Aland* (1849), 2 Car. & Kir. 1015. Where a witness has taken notes of a conversation it is not necessary that they should be a *verbatim* report, provided they substantially reproduce what was said (*R. v. O'Connell* (1844), Armstrong & Trevor, 163).

(*e*) *Hiscox v. Batchellor* (1867), 15 L. T. 543; *Rambert v. Cohen* (1802), 4 Esp. 213 (receipt which witness saw given when money was paid); *Burrough v. Martin* (1809), 2 Camp. 112 (log book examined by witness from time to time shortly after events therein recorded); see also *Anderson v. Whalley* (1852), 3 Car. & Kir. 54; *Burton v. Plummer* (1834), 2 Ad. & El. 341 (entries copied daily from waste-book to ledger and checked by witness); *Bolton (Lord) v. Tomlin*, *supra* (document assented to in witness's presence); *Smith v. Morgan* (1839), 2 Mood. & R. 257 (deposition signed by witness after examination by commissioner of bankruptcy), following *Vaughan v. Martin* (1796), 1 Esp. 440; see also *Wood v. Cooper* (1845), 1 Car. & Kir. 645; *Dyer v. Best* (1866), 4 H. & C. 189 (witness who had read in newspaper shortly afterwards report of proceedings at which he had been present allowed to refer to newspaper to refresh his memory as to date of proceedings); *R. v. Mullins* (1848),

SECT. 6.

Examina-
tion in
Chief,
Cross-
examina-
tion, and
Re-examina-
tion.

What copies
may be
referred to.

Documents
must be
produced
at trial.

Documents made with a view to subsequently giving testimony therefrom cannot be referred to (*f*).

Documents may be read over to a witness who has become blind to refresh his memory (*g*).

It is apprehended that copies of documents may not be used to refresh the memory unless the original be lost or destroyed, or cannot for some sufficient reason be produced (*h*), and it is in every case necessary that the witness should be able to swear positively to the accuracy of the copy (*i*).

It is not, however, necessary that the witness should have any independent recollection of the facts to which he testifies and of which he seeks to refresh his memory, apart from the document to which he refers (*k*).

809. The document from which memory is refreshed must be produced at the trial in every case in which the witness has no independent recollection of the facts (*l*), and it is customary (though not necessary) to produce it in all cases, in order that the witness may be cross-examined upon it, if thought desirable, by the other party (*m*), who may not, however, look at those parts of the document which have not been used by the witness for the purpose

3 Cox, C. C. 526 (reports dictated by witness and afterwards read over and signed by him); *R. v. Langton* (1876), 2 Q. B. D. 296, C. C. R. (time-sheet used every week by witness in paying wages); *R. v. Dexter, Laidler v. Coates* (1899), 19 Cox, C. C. 361 (transcript of shorthand notes made by clerk and afterwards read over to witness). A witness may not refresh his memory by referring to proceedings in another court (*Halliday v. Holgate* (1867), 17 L. T. 18). In *Lawes v. Reed* (1835), 2 Lew. C. C. 152, a witness was allowed to refresh his memory from notes made by counsel on his brief; *sed quare*.

(*f*) *Anon.* (1753), cited by Lord KENYON, C.J., in *Doe d. Church v. Perkins* (1790), 3 Term Rep. 749, 752; *Jones v. Stroud* (1825), 2 C. & P. 196; *Steinheller v. Newton* (1838), 9 C. & P. 313; *Ile Sanders, Ex parte Wagstaff, Sayer v. Wagstaff* (1844), 13 L. J. (CH.) 161.

(*g*) *Catt v. Howard* (1820), 3 Stark. 3.

(*h*) See *Burton v. Plummer* (1834), 2 Ad. & El. 341; compare *Jones v. Stroud, supra* (copy made six months after original not permitted to be used, though original illegible). See also *Horne v. MacKenzie* (1839), 6 Cl. & Fin. 628, H. L. (report of surveyor compiled from original notes); *Topham v. McGregor* (1844), 1 Car. & Kir. 320 (extract from newspaper, original MS. being lost). *Tanner v. Taylor* (1756), cited by BULLER, J., in *Doe d. Church v. Perkins, supra*, at p. 754 (and see 1 Lew. C. C. 101), can scarcely stand in face of the later decisions.

(*i*) See *Talbot de Malahide (Lord) v. Cusack* (1864), 17 I. C. L. R. 213; and compare *Doe d. Church v. Perkins, supra*; *R. v. St. Martin's, Leicester (Inhabitants)* (1834), 2 Ad. & El. 210, 215; *Beech v. Jones* (1848), 5 C. B. 696; *Alcock v. Royal Exchange Assurance Co.* (1849), 13 Q. B. 292.

(*k*) *Haig v. Newton* (1817), 6 South Carolina Reports, 423; *R. v. St. Martin's, Leicester (Inhabitants), supra*; *Topham v. McGregor, supra*. In *Dupuy v. Trueman* (1843), 2 Y. & C. Ch. Cas. 341, and *Cator v. Croydon Canal Co.* (1841), 4 Y. & C. (EX.) 405, affirmed (1843), 13 L. J. (CH.) 89, the witness was not permitted to state his belief that certain transactions (of which he had no other knowledge) took place, by reason of the presence of entries in account books, but it seems doubtful whether in any case he could have spoken to the transactions of his own knowledge.

(*l*) *Howard v. Canfield* (1836), 5 Dowl. 417; *Beech v. Jones, supra*.

(*m*) *Kensington v. Inglis* (1807), 8 East, 273; *Sinclair v. Stevenson* (1824), 1 C. & P. 582; *Loyd v. Freshfield* (1826), 2 C. & P. 325; *Burton v. Plummer*

of assisting his memory (*n*). If, in fact, the other party go further, and cross-examine on other parts of the document, he makes it evidence in the case (*o*), but otherwise he does not (*p*). But he may not see the document at all, where the witness is in fact unable to refresh his memory even with its assistance, or where it is used only for the purpose of enabling a witness to identify handwriting (*q*), except for purposes of subsequent recognition or re-examination as to the handwriting (*r*), and therefore, if he does more, he makes it his own evidence (*s*).

SECT. 6.
Examina-
tion in
Chief,
Cross-
examina-
tion, and
Re-examina-
tion.

SUB-SECT. 3.—*Cross-examination.*

810. The cross-examination of a witness (unless postponed by leave of the judge) follows immediately upon the examination in chief (*t*), and evidence in chief is of little or no value until sifted by the process of cross-examination (*a*). A witness, once sworn (*b*) in a proceeding in the High Court, is liable to be cross-examined, even though he has not given evidence or been asked any questions in chief (*c*), unless he has been called by mistake and not examined in consequence of the mistake being discovered (*d*).

When cross-
examination
takes place.

Where, however, a witness is with the consent of the parties (*e*) called and examined by the judge, and not by either of the parties, he cannot be cross-examined save at the judge's discretion (*f*); and

(1834), 2 Ad. & El. 341; *Dupuy v. Trueman* (1843), 2 Y. & C. Ch. Cas. 341.

(*n*) *Burgess v. Bennett* (1872), 20 W. R. 720.

(*o*) *Gregory v. Tavernor* (1833), 6 C. & P. 280; *Stevens v. Foster* (1833), 6 C. & P. 289; *Culvert v. Flower* (1836), 7 C. & P. 386.

(*p*) *R. v. Ramsden* (1827), 2 C. & P. 603; *Payne v. Ibbotson* (1858), 27 L. J. (EX.) 341.

(*q*) *Sinclair v. Stevenson* (1824), 1 C. & P. 582; *Russell v. Rider* (1834), 3 C. & P. 416.

(*r*) *Holland v. Reeves* (1835), 7 C. & P. 36; *R. v. Duncombe* (1838), 8 C. & P. 369; *Peck v. Peck* (1870), 21 L. T. 670.

(*s*) *Palmer v. Nuclear* (1858), 1 Sw. & Tr. 149.

(*t*) *Beatagh v. Beatagh* (1824), Hog. 98. As to cross-examination of a witness by the party calling him, see p. 600, *post*.

(*a*) See *Allen v. Allen*, [1894] P. 248, 253, C. A.

(*b*) *Davis v. Dale* (1830), 4 C. & P. 335; *Summers v. Moseley* (1834), 3 L. J. (EX.) 128 (witness only called to produce document on *subpoena duces tecum*); *Perry v. Gibson* (1834), 1 Ad. & El. 48; *Griffith v. Lunell*, *Griffith v. Ricketts* (1849), 19 L. J. (CH.) 399. So, too, in the High Court, a witness who has made an affidavit which has been filed as evidence may be cross-examined, though it be subsequently withdrawn (*Re Quartz Hill etc. Co., Ex parte Young* (1882), 21 Ch. D. 642, C. A., following *Clarke v. Law* (1855), 2 K. & J. 28); but not so in the Court of Bankruptcy (*Re Ottaway, Ex parte Child* (1882), 20 Ch. D. 126, C. A.).

(*c*) *Phillips v. Middlesex Sheriff* (1795), 1 Esp. 355; *Reed v. James* (1815), 1 Stark. 132; *R. v. Brook* (1819), 2 Stark. 472; *Wood v. Mackinson* (1840), 2 Mood. & R. 273; *Newton v. Belcher* (1848), 18 L. J. (Q. B.) 53.

(*d*) *Clifford v. Hunter* (1827), 3 C. & P. 16 (wrong witness called owing to a mistake in name); *Rush v. Smith* (1834), 3 L. J. (EX.) 355; *Wood v. Mackinson*, *supra* (witness called by counsel's mistake).

(*e*) Neither a judge nor an arbitrator has any right to call a witness in a civil action without the consent of the parties (*Re Enoch and Zaretsky, Bock & Co.'s Arbitration*, [1910] 1 K. B. 327, C. A.).

(*f*) *Coulson v. Disborough*, [1894] 2 Q. B. 316, C. A. As to the cross-examination of witnesses called to give evidence as to a company in liquidation, see *Re Greys Brewery Co.* (1833), 25 Ch. D. 400.

SECT. 6.

* **Examina-
tion in
Chief,
Cross-
examina-
tion, and
Re-examina-
tion.**

**Relaxation
of rules.**

it seems that a witness cannot be cross-examined where the judge has stopped the examination in chief after a single immaterial question has been put and answered (*g*).

A defendant may cross-examine his co-defendant (*h*), or any of his co-defendant's witnesses (*i*), if his co-defendant's interest is hostile to his own (*j*).

811. The more rigid rules governing the examination in chief are relaxed in the case of cross-examination, and leading questions may freely be asked, and must be answered (*k*), though it is not permissible to put the actual words into the witness's mouth for him to repeat (*l*), or to mislead him by false assumptions or actual mis-statements (*m*). Provided the questions are relevant to the matters in issue (*n*), they need not be confined to the subject-matter of the evidence already given by the witness in chief (*o*); and it seems that where one party has examined a witness in chief, who is afterwards called by the other party as his own witness, he is, nevertheless, liable to be cross-examined by the party who first called him (*p*).

Not only questions which are relevant to the actual issues in the case, but any question tending to impeach the credit or veracity of the witness may be asked in cross-examination, for this is a material consideration in weighing the value to be placed upon his evidence (*q*). During the progress of the cross-examination the judge may always disallow questions which appear to him to be vexatious, and not relevant to any matter proper to be inquired into in the case before him (*r*), and in certain classes of cases

(*g*) *Creevy v. Carr* (1835), 7 O. & P. 64, *sed quære*; although the judge in refusing leave to cross-examine is reported to have said that he stopped the witness's evidence, yet the report itself seems to show that counsel closed his case voluntarily after asking the one question.

(*h*) *Allen v. Allen*, [1894] P. 248.

(*i*) *Lord v. Colvin* (1855), 3 Drew. 222; *R. v. Hudwen*, [1902] 1 K. B. 882, C. C. R.

(*j*) *Dunhill v. Dunhill* (1894), 29 L. J. 11. C. 368.

(*k*) *Parkin v. Moon* (1836), 7 C. & P. 408.

(*l*) *R. v. Hardy* (1794), 24 State Tr. 199, *per* BULLER, J., at p. 756.

(*m*) See Starkie on Evidence, 4th ed., 197, citing *Hill v. Coombs* (1818); *Handley v. Ward* (1818).

(*n*) *Haigh v. Belcher* (1836), 7 C. & P. 389; *Tennant v. Humilton* (1839), 7 Cl. & Fin. 122, 11. L.; *Lever & Co. v. Goodwin Brothers*, [1887] W. N. 107; but counsel may undertake to show by subsequent evidence that questions apparently irrelevant are not so in fact (*Haigh v. Belcher, supra*).

(*o*) *Morgan v. Brydges* (1818), 2 Stark. 314; *Berwick Corporation v. Murray* (1850), 19 L. J. (CH.) 281. This is the better opinion, and represents existing practice, but there are decisions the other way; see *Ely (Dean and Chapter) v. Stewart* (1740), 2 Atk. 44; *Re Woodfine, Thompson v. Woodfine* (1878), 47 L. J. (CH.) 832. In this case the judge directed defendant, who was counter-claiming, to recall plaintiff as his own witness, and not to cross-examine him on the matters raised by the counter-claim).

(*p*) *Lord v. Colvin, supra*; see, *contra*, however, in *Dickinson v. Shee* (1801), 4 Esp. 67.

(*q*) As to impeaching credit of witness, see p. 600, *post*.

(*r*) See R. S. O., Qrd. 36, r. 38. The R. S. O. only apply to High Court proceedings, but this rule is probably no more than declaratory of the discretion which the court has always and of necessity possessed (compare *Re Mundell, Fenton v. Cumberlege* (1883), 48 L. T. 776), and the principle which it lays down would doubtless be adopted by every kind of tribunal in this country.

cross-examination is limited in accordance with definite rules of practice (s).

SUB-SECT. 4.—*Re-examination.*

812. On the conclusion of the cross-examination, a witness may be re-examined on behalf of the party for whom he has given evidence in chief for the purpose of explaining any part of his evidence given during cross-examination which is capable of being construed unfavourably to his own side (t); but no questions may be asked in re-examination which introduce wholly new matters (u). Where, however, questions asked in cross-examination let in evidence which would not have been admissible in chief, the witness may be re-examined upon it (a).

SECT. 6.
Examina-
tion, in
Chief,
Cross-
Examina-
tion, and
Re-examina-
tion.

Re-examina-
tion.

SUB-SECT. 5.—*Further Evidence.*

813. The judge may (but in a civil case not without the consent of the parties (b)) call any witness whose evidence he thinks likely to elucidate the truth (c), or may recall any witness who has already given evidence to ask him further questions (d); and questions may be put by the jury to a witness (e). The parties themselves can only recall a witness at the discretion of the judge (f).

Powers of
judge and
jury.

Leave will be given to a party, even after his own case is closed, to call fresh evidence when he has been taken by surprise in the course of his opponent's conduct of his own case (g).

Fresh
evidence.

(s) *E.g.*, in cross-examination upon an account, notice of the items to which cross-examination will be directed must be given (*Bates v. Eley* (1876), 1 Ch. D. 473), and must specify the points and not only the items (*Arthur v. Dudley* (1872), L. R. 15 Eq. 102), and in the winding up of a company contributors are limited in their cross-examination of a person claiming to be a creditor to matters referred to in the affidavit in support of his claim (*Re Brampton and Longtown Rail. Co.* (1871), L. R. 11 Eq. 428).

(t) See *The Queen's Case* (1820), 2 Brod. & Bing. 284, 297, H. L.; *Dicas v. Brougham* (Lord) (1833), 6 C. & P. 249; *R. v. St. George* (1840), 9 C. & P. 483, 488; *Dunn v. Aslett* (1838), 2 Mood. & R. 122.

(u) *The Queen's Case*, *supra* (witness cross-examined as to whether he had not stated that he was to be one of the witnesses to the prosecution can only be asked what induced him to make the statement); *Dicas v. Brougham* (Lord), *supra* (witness admitting in cross-examination a conversation with defendant may be re-examined as to whole of conversation; *secus*, if he denies that he had any such conversation at all); *Prince v. Samo* (1838), 7 Ad. & El. 627 (if cross-examined as to a particular statement only, witness may not be re-examined on other statements in same conversation unconnected with the one spoken to).

(a) *Blewett v. Tregonning* (1835), 5 Nov. & M. (K. B.) 308.

(b) See p. 597, note (e), *ante*. In a criminal case if neither the prosecutor nor the prisoner puts in the depositions the judge may direct the attention of the jury to them as qualifying the other evidence (*R. v. Garner* (1890), 54 J. P. 424).

(c) *The Queen's Case*, *supra*; *R. v. Cliburn* (1898), 62 J. P. 232; *Bevan v. M'Mahon* (1859), 28 L. J. (P. & M.) 40; *Budd v. Davison* (1881), 29 W. R. 192; *Coulson v. Dishborough*, [1894] 2 Q. B. 316, C. A.

(d) *R. v. Remnant* (1807), Russ. & Ry. 136; *R. v. Watson* (1834), 6 C. & P. 653; *Middleton v. Barned* (1849), 4 Exch. 241.

(e) *R. v. Lillyman*, [1896] 2 Q. B. 167, 177, C. C. R.

(f) *Catlin v. Barker* (1847), 5 C. B. 201; *Adams v. Bankart* (1835), 1 Cr. M. & R. 681.

(g) *Bigsby v. Dickinson* (1876), 4 Ch. D. 24, C. A. The plaintiff will not

SECT. 7.
Impeaching
"Credit of
Witness.

Impeaching
 credit.
 Of party's
 own witness.

SECT. 7.—Impeaching Credit of Witness.

SUB-SECT. 1.—Of Party's own Witness.

814. In certain circumstances a party is permitted to cross-examine or contradict a witness whom he has himself called.

A party producing a witness is not allowed (*h*) to impeach his credit by general evidence of bad character (*i*), but if in the opinion of the judge the witness prove adverse, the party calling him may contradict him by other evidence, or by leave of the judge prove that the witness has, at other times, made a statement inconsistent with his present testimony. Before giving proof of this the circumstances of the alleged statement (sufficient to designate the particular occasion) must be mentioned to the witness, and he must then be asked whether or not he made the statement (*k*).

Hostile
 witness.

By an "adverse" witness is meant one who is hostile to the party calling him (*l*), and who, by his manner of giving evidence, shows that he is not desirous of telling the court the truth (*m*). Whether he shows himself so hostile as to justify his cross-examination by the party calling him is a matter for the discretion of the judge (*n*), and this is so even where a party calls a witness who must of necessity be adverse to him, as, for example, his opponent in the case (*o*).

The better opinion is that where a party contradicts his own

usually be allowed to call defendant as a witness after the case of the latter is closed, unless there has been a representation that defendant would be called to support his own case (*Barker v. Furlong*, [1891] 2 Ch. 172). As to calling farther evidence, see also title PRACTICE AND PROCEDURE.

(*h*) Criminal Procedure Act, 1865 (28 & 29 Vict. c. 18), s. 3; replacing the Common Law Procedure Act, 1854 (17 & 18 Vict. c. 125), s. 22, which was finally repealed by the Statute Law Revision Act, 1892 (55 & 56 Vict. c. 19).

(*i*) This was the existing law (*Ewer v. Ambrose* (1823), 3 B. & C. 746).

(*k*) Criminal Procedure Act, 1865 (28 & 29 Vict. c. 18), s. 3. S. 1 of the Act applies the rule to civil as well as to criminal cases. The doubt in the earlier decisions had been as to the right to prove prior inconsistent statements; the right to contradict on relevant facts was not disputed (see *Ewer v. Ambrose*, *supra*; *Wright v. Beckett* (1834), 1 Mood. & R. 414; *Dunn v. Aslett* (1838), 2 Mood. & R. 122; *Holdsworth v. Dartmouth Corporation* (1838), 2 Mood. & R. 153; *Winter v. Butt* (1841), 2 Mood. & R. 357; *Melhuish v. Collier* (1850), 15 Q. B. 878).

(*l*) *Greenough v. Eccles* (1859), 5 O. B. (N. S.) 786. It has been said that where a party calls two equally credible witnesses who contradict each other it is not open to him to discredit one and accredit the other (*Sumner v. John Brown & Co.* (1909), 25 T. L. R. 745).

(*m*) *Coles v. Coles and Brown* (1866), L. R. 1 P. & D. 70. See also *Parkin v. Moon* (1836), 7 C. & P. 408; *R. v. Ball* (1839), 8 C. & P. 745; *R. v. Murphy* (1837), 8 C. & P. 297; *Deur v. Knight* (1839), 1 P. & F. 433.

(*n*) *Ohlsen v. Terrero* (1874), 10 Ch. App. 127; *Rice v. Howard* (1886), 16 Q. B. D. 681; *Price v. Manning* (1889), 42 Ch. D. 372, C. A., disapproving a dictum of BEST, C.J., to the contrary, in *Clarke v. Saffery* (1824), Ry. & M. 126.

(*o*) *Price v. Manning*, *supra*. Where a witness gave evidence contradicting his proof he was treated as hostile (*Amstell v. Alexander* (1867), 16 L. T. 830; contrast *Reed v. King* (1879), 30 L. T. 299; and see *Pound v. Wilson* (1865), 4 F. & F. 301; *Jackson v. Thomason* (1862), 31 L. J. (Q. B.) 11, differently reported 1 B. & S. 745).

witness on one part of his evidence he does not thereby throw over all the witness's evidence, though its value may be impaired in the eyes of the jury (*p*).

SECT. 7.
Impeaching
Credit of
Witness.

SUB-SECT. 2.—Of Opponent's Witness.

815. In the course of cross-examination a witness may be asked any question tending to impeach his character or credit, but unless such questions not only affect the credit of the witness, but are also relevant to the matters actually in issue in the case, the witness's answers are conclusive, and cannot be contradicted by other evidence (*q*), save in the cases referred to below. It is often a matter of some difficulty to decide whether a question relating to a witness's character is at the same time relevant to the issue before the court. Thus, on a charge of rape the prosecutrix may be contradicted if she denies previous connection with the prisoner, for that may be material on the question of consent in the case under investigation (*r*); but her answer is conclusive if she denies connection with other men, for in that case the question only goes to her character and credit (*s*). There are, also, certain limits which must be determined by the discretion of the judge to the questions which may be asked even affecting a witness's credit; thus, a question as to a witness's religious belief has been held not to be admissible to impeach credit, though tendered with that object (*t*).

Impeaching
credit of
opponent's
witness.

Questions
must be
relevant
to issue.

A witness who has not been examined in chief cannot be cross-examined to credit at all, since the object of such cross-examination is to impair the value which might otherwise attach to evidence already given (*a*).

Witness
must have
been
examined.

816. In three cases, a witness's answers are not conclusive, but may be contradicted.

When
answers
may be
contradicted.
Denial or
non-
admission of
conviction

First, a witness, provided he is not himself charged with an offence to which the proceedings relate (*b*), may be questioned as to whether he has been convicted of any felony or misdemeanour (*c*), and if he denies or does not admit the fact, the conviction may be proved,

(*p*) See *Bradley v. Ricardo* (1831), 8 Bing. 57, disapproving the contrary view expressed in *Alexander v. Gibson* (1811), 2 Camp. 555; *contra, Faulkner v. Grine* (1858), 1 F. & F. 254, where, however, *Bradley v. Ricardo*, *supra*, was not cited.

(*q*) *Harris v. Tippet* (1811), 2 Camp. 637; *R. v. Yewin* (1811), 2 Camp. 638, n.; *R. v. Watson* (1817), 2 Stark. 116, 149; *Spenceley v. Willott* (1806), 7 East, 108; *Tennant v. Hamilton* (1839), 7 Cl. & Fin. 122, H. L.; *A.-G. v. Hitchcock* (1847), 1 Exch. 91; *Farmer v. Trower* (1853), 22 L. J. (EX.) 22; *Goddard v. Parr* (1855), 24 L. J. (CL.) 783; *Tolman v. Johnstone* (1860), 2 F. & F. 66; *Baker v. Baker* (1863), 32 L. J. (P. M. & A.) 145; *Re Haggelmacher's Patents*, [1898] 2 Ch. 280.

(*r*) *R. v. Martin* (1834), 6 C. & P. 562; *R. v. Holmes* (1871), L. R. 1 C. C. R. 334.

(*s*) *R. v. Hodgson* (1812), Russ. & Ry. 211; *R. v. Holmes*, *supra*.

(*t*) *Darby v. Ouseley* (1856), 1 H. & N. 1; and see *R. v. Bernard* (1858), 1 F. & F. 240; *Seaman v. Netherclift* (1876), 2 C. P. D. 53, C. A.

(*a*) *Bracegirdle v. Bailey* (1859), 1 F. & F. 536.

(*b*) *Charnock v. Merchant*, [1900] 1 Q. B. 474.

(*c*) Criminal Procedure Act, 1865 (28 & 29 Vict. c. 18), s. 6; replacing Common Law Procedure Act, 1854 (17 & 18 Vict. c. 125), s. 25.

SECT. 7.
Impeaching
Credit of
Witness.

By previous
 verbal
 statement.

Any previous
 written
 statement.

Denial of
 implication
 of partiality.

Evidence of
 general
 veracity.

and a certificate signed by the proper officer of the court where the conviction took place is sufficient evidence of the conviction, provided evidence of identity is also given (*d*).

Secondly, a witness may be asked in cross-examination whether he has made at any previous time a statement inconsistent with his present evidence, and if he denies or does not admit it, or refuses to answer, proof of such prior statement may be given; but the circumstances of the alleged statement sufficient to designate the particular occasion must first be given. A witness may also be cross-examined as to previous statements made by him in writing, without the statements being shown to him (*c*); but if it is intended to contradict him by such writing, his attention must first be called to those parts of the writing which are to be used for that purpose, and the judge may at any time require production of the writing for his own inspection (*f*). It seems that if the writing be lost or be not in the possession of the party cross-examined, he may interpose evidence out of turn, either to prove it in the latter case, or to give secondary evidence of it in the former (*g*).

Thirdly, evidence may be given to contradict a witness who denies the truth of questions tending to show that he is not impartial, or that for some reason or other he has a bias in favour of, or against, one of the parties to the action, as, for example, that he has been bribed (*h*).

It is also permissible, with a view to impeaching a witness's credit, to bring forward evidence of a general reputation for untruthfulness, though not of particular facts from which the inference of untruthfulness might be drawn (*i*); and in any event such evidence must be given by persons well acquainted with the witness, and not by a stranger who has merely made inquiries as to the witness's reputation among his neighbours (*l*).

(*d*) Criminal Procedure Act, 1865 (28 & 29 Vict. c. 18), s. 6; *R. v. Parsons* (1866), 1 L. R. 1 C. C. R. 24; *Ward v. Surfield* (1880), 49 L. J. (Q. B.) 696; *R. v. Baker*, [1895] 1 Q. B. 797, 800, C. C. R.; compare *Police Commissioner v. Donovan*, [1903] 1 K. B. 895.

(*e*) He cannot demand to see it first (*North Australian Territory Co. v. Goldsborough, Mort & Co.*, [1893] 2 Ch. 381, C. A.).

(*f*) Criminal Procedure Act, 1865 (28 & 29 Vict. c. 18), s. 5; replacing Common Law Procedure Act, 1854 (17 & 18 Vict. c. 125), s. 23; and see *Larrow v. Blomfield* (1859), 1 F. & F. 653.

(*g*) *Calvert v. Flower* (1836), 7 C. & P. 386; *A.-G. v. Bond* (1839), 9 C. & P. 189; *Davies v. Davies* (1840), 9 C. & P. 252; *R. v. Shellard* (1840), 9 C. & P. 277.

(*h*) *A.-G. v. Hitchcock* (1847), 1 Exch. 91; see also *The Queen's Case* (1820), 2 Brod. & Bing. 284, 311 (witness suborned); *R. v. Shaw* (1888), 16 Cox, C. C. 503 (witness at enmity with other party). An extreme case is *Thomas v. David* (1836), 7 C. & P. 350, where a witness was the mistress of the party for whom she gave evidence.

(*i*) *R. v. Brown and Hedley* (1867), L. R. 1 C. C. R. 70; *Stebbing v. London and North Western Rail. Co.* (1899), 63 J. P. 138; compare *R. v. Riley* (1887), 18 Q. B. D. 481. The character of a witness who is called to impeach that of another may itself be impeached, but the process may not be carried further (*R. v. Five Popish Lords* (1685), 7 State Tr. 1218, 1459; *R. v. Murphy* (1753), 19 State Tr. 694, 724; *R. v. Whelan* (1881), 14 Cox, C. C. 595; and see 2 Taylor, Law of Evidence, 10th ed., s. 1473).

(*l*) *Manson v. Heartsink* (1803), 4 Esp. 103.

SUB-SECT. 3.—*Re-establishing Credit of Witness.*

SECT. 7.

817. General evidence of good character and reputation is admissible subsequent to the cross-examination of the witness where his character for truthfulness has been impugned (*l*), but here also evidence will not be admitted from which merely an inference might be drawn that the witness has been a witness of truth (*m*); and evidence of good character does not become admissible if the cross-examination goes no further than to show that the witnesses contradict one another (*n*).

**Impeaching
Credit of
Witness.**

Re-establish-
ing credit.

SECT. 8.—*Corroboration.*

818. In certain cases the court will not act upon the evidence of a single witness, but requires corroboration (*o*). This is so in trials for treason (*p*) and perjury (*q*); to a certain extent, where the evidence is that of an accomplice in crime (*r*); where evidence not upon oath is given by a child of tender years (*s*); and in bastardy proceedings (*t*).

When
corroboration
required.

In actions for breach of promise of marriage there must be material corroboration of the plaintiff's evidence (*u*).

Breach of
promise.

In proceedings for the removal of paupers in respect of a settlement acquired by three years' residence, no order for removal may be made upon the evidence of the person to be removed without such corroboration as the court shall think sufficient (*b*).

Removal of
paupers.

In cases in ecclesiastical courts it seems that it is still the practice to require corroboration of the evidence of a single witness, at any rate where charges of immorality are made (*c*).

Ecclesiastical
offences.

In cases under the Motor Car Act, 1903, a person may not be convicted on the opinion of a single witness as to the rate of speed (*d*).

Excessive
speed of
motor car.

(*l*) *Craig d. Annesley v. Anglesea (Earl)* (1743), 17 State Tr. 1139, 1348; *Doe d. Walker v. Stephenson* (1801), 3 Esp. 284; *Durham (Bishop) v. Beaumont* (1808), 1 Camp. 207; *R. v. Clarke* (1817), 2 Stark. 241.

(*m*) *R. v. Parker* (1783), 3 Doug. (K. B.) 242.

(*n*) *Durham (Bishop) v. Beaumont*, *supra*.

(*o*) See title CRIMINAL LAW AND PROCEDURE, Vol. IX., p. 388.

(*p*) *Ibid.*, p. 456.

(*q*) *Ibid.*, p. 494. The evidence of a witness who swears that he has already perjured himself carries no weight (*Ex parte Lord* (1750), 2 Ves. Sen. 26).

(*r*) See title CRIMINAL LAW AND PROCEDURE, Vol. IX., p. 408.

(*s*) See note (*s*), p. 569, *ante*.

(*t*) See title BASTARDY, Vol. II., p. 448.

(*u*) Evidence Further Amendment Act, 1869 (32 & 33 Vict. c. 68), s. 2; *Bessela v. Stern* (1877), 2 O. P. D. 265, C. A.; *Hickey v. Champion* (1872), 20 W. R. 752. The mere refusal to answer letters asserting a promise to marry is not, in the absence of other circumstances, sufficient corroboration (*Wiedemann v. Walpole*, [1891] 2 Q. B. 534, C. A.; *Spooner v. Godfrey* (1908), *Times*, 16th October, C. A.); nor the giving of a ring (*Spooner v. Godfrey*, *supra*; compare *May v. Kelly* (1897), 31 L. L. T. Jo. 67).

(*b*) Divided Parishes and Poor Law Amendment Act, 1876 (39 & 40 Vict. c. 61), s. 34; *R. v. Abergavenny Union* (1880), 6 Q. B. D. 31. See also title POOR LAW.

(*c*) See *Norwich (Bishop) v. Berney* (1866), 36 L. J. (ECCLES.) 8; *Moore v. Oxford (Bishop)*, [1904] A. C. 283, P. O. (a case under the Clergy Discipline Act, 1892 (55 & 56 Vict. 32), s. 2. As to such charges, generally, see title ECCLESIASTICAL LAW, Vol. XI., p. 523).

(*d*) 3 Edw. 7, c. 36, s. 9. But a single policeman may give evidence as to

SECT. 8.

Corrobor-
ation.Claims
against
deceased.Weight of
evidence to
be considered.

Claims against the estate of a deceased person usually require to be corroborated by other evidence than that of the plaintiff himself, but the rule is one of practice rather than of law (*e*). Where there is substantial corroboration of the evidence of an interested party, it confirms the credit not only of the statements which are expressly supported, but of all statements made by him (*f*); but where two persons make a joint claim, the evidence of each is not a sufficient corroboration of the evidence of the other (*g*).

In all other cases the question is one of the weight to be attached to the evidence actually tendered; and circumstances may cause the court to place but little reliance on evidence which is not only admissible, but might otherwise be sufficient for purposes of proof. Thus, the evidence of an attesting witness to a will who impeaches the sanity of the testator (*h*), of a witness who has signed a receipt but alleges that the money was never paid (*i*), of a witness whose testimony is inconsistent with his previous conduct (*k*), will be regarded with suspicion unless corroboration is forthcoming; and where the burden of proof lies on one party, he will not be held to have discharged it unless the evidence which he produces is of a sufficiently trustworthy character to discharge the burden (*l*).

SECT. 9.—Attesting Witnesses, when required to be called.

When
attesting
witness must
be called.

819. It is unnecessary (*m*) to prove by the attesting witness any instrument which, though attested, does not depend upon attestation for its validity (*n*). In the case of instruments which are required

the time marked on his stop-watch, for that is evidence of fact, not of opinion (*Plancey v. Marks* (1906), 94 L. T. 577; compare *Gorham v. Brice* (1902), 18 T. L. R. 424).

(*e*) *Re Hodgson, Beckett v. Ramsdale* (1885), 31 Ch. D. 177, C. A.; *Rawlinson v. Scholes* (1898), 79 L. T. 350, dissenting from *Re Finch, Finch v. Finch* (1883), 23 Ch. D. 267, C. A.; compare *Re Garnett, Gandy v. Macaulay* (1885), 31 Ch. D. 1, C. A., and *Minister of Stamps v. Tounend*, [1909] A. C. 633, P. C. The earlier cases rather state the rule as one of law (*Grant v. Grant* (1865), 34 Beav. 623; *Down v. Ellis* (1865), 35 Beav. 578; *Rogers v. Powell* (1869), 38 L. J. (CH.) 648; *Hill v. Wilson* (1875), 8 Ch. App. 888; *Re Whittaker, Whittaker v. Whittaker* (1882), 21 Ch. D. 657). As to administration of such estates, see title EXECUTORS AND ADMINISTRATORS.

(*f*) *Minister of Stamps v. Tounend*, *supra*, at p. 638.

(*g*) *Vavasseur v. Vavasseur* (1909), 25 T. L. R. 250; the head-note in this case states the rule as one of law, though the judgment itself does not go so far, and is certainly not inconsistent with the principle as stated in the text.

(*h*) *Howard v. Braithwaite* (1812), 1 Ves. & B. 202.

(*i*) *Re Farrow's Estate* (1856), 22 Beav. 400; compare *Gill v. Gill*, [1907] S. C. 532.

(*k*) *Re Barr's Trusts* (1858), 4 K. & J. 212; *Rowley v. Rowley* (1854), 23 L. J. (CH.) 275.

(*l*) See *Forrest v. Forrest* (1865), 5 New Rep. 299, where the plaintiff sought to prove his case by uncorroborated evidence of an oral admission by the defendant (*Re Warwick, Ex parte Jackson* (1839), Mont. & Ch. 263, 271), where the reliance to be placed on evidence of prior intention is discussed. As to evidence of adultery in matrimonial suits, see title HUSBAND AND WIFE.

(*m*) See Criminal Procedure Act, 1865 (28 & 29 Vict. c. 18), s. 8. By s. 1 of the Act its provisions with regard to evidence are applied to all courts.

(*n*) *Ibid.*, s. 7. But all the parties must be before the court, or the stricter rule applies (*Re Reay's Estate* (1855), 3 W. R. 312; *Re Mair's Estate* (1873), 42 L. J. (CH.) 882; *Re Rice (a Person of Unsound Mind)* (1886), 32 Ch. D. 35, C. A.; *Worthington v. Moore* (1891), 64 L. T. 338).

by law to be attested, the attesting witness must be called (*o*), save in certain cases applicable to all classes of such instruments alike (*p*) and also in the particular case of shipping documents, which may be proved by any person who can give evidence as to the requisite facts without calling the attesting witness or witnesses, even though attestation is necessary to give validity to the document (*q*).

The party against whom the instrument is tendered may always demand strict proof of it (*r*), and may not himself be called as a witness by his opponent for the purpose of obtaining an admission of its due execution (*s*).

Secondary evidence of attestation is only admissible where the attesting witness cannot be called at the trial (*t*); but it is immaterial that the instrument itself is destroyed or even cancelled (*a*); and even an attesting witness who has become blind must be called (*b*).

An attesting witness who denies attestation or execution may be contradicted by other evidence (*c*); and when it appears that the

SECT. 9.
Attesting
Witnesses,
when
required to
be called.

When strict
proof
required.

When
secondary
evidence
admissible.

Contradiction
of attesting
witness.

(*o*) It is not necessary to call more than one of several attesting witnesses (*Holdfast v. Anstey v. Dowsing* (1746), 2 Stra. 1253; *Forster v. Forster* (1864), 33 L. J. (P. M. & A.) 113); save in the case of wills of realty, where, in general, it appears to be necessary to call both witnesses (*Oyle v. Cook* (1748), 1 Ves. Sen. 177; *Grayson v. Atkinson* (1752), 2 Ves. Sen. 454, 460; *Bootle v. Bluntell* (1815), 19 Ves. 491; *McGregor v. Topham* (1850), 3 H. L. Cas. 132, 155); but this exception can scarcely be regarded as a rigid rule of law, and where circumstances render it necessary it will be relaxed; see *Lowe v. Jolliffe* (1762), 1 Wm. Bl. 365; *Belbin v. Skeats* (1858), 27 L. J. (P. & M.) 56; *Andrew v. Moiley* (1862), 12 C. B. (N. S.) 326; *Tatham v. Wright* (1831), 2 Russ. & M. 1).

(*p*) See p. 606, *post*.

(*q*) Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), s. 694.

(*r*) *Abbot v. Plumble* (1779), 1 Doug. (K. B.) 216; *Breton v. Cope* (1791), Peake, 43 [31]; *Johnson v. Mason* (1791), 1 Esp. 89; *Call v. Dunning* (1803), 4 East, 53; *R. v. Harringworth (Inhabitants)* (1815), 4 M. & S. 350, 353; *Gillies v. Smither* (1819), 2 Stark. 528; *Mounsey v. Burnham* (1841), 1 Haro, 15.

(*s*) *Whyman v. Garth* (1853), 8 Exch. 803. See *infra*, as to when an admission dispenses with the necessity of proof.

(*t*) *E.g.*, if the witness is dead (*Anon.* (1701), 12 Mod. Rep. 607; *Adam v. Kerr* (1798), 1 Bos. & P. 360; *Nelson v. Whittall* (1817), 1 B. & Ald. 19; *R. v. St. Giles, Camberwell (Inhabitants)* (1853), 1 L. & B. 642; *Daxendale v. de Valmer* (1887), 57 L. T. 556; *Byles v. Cox* (1896), 74 L. T. 222; *In the Goods of Peverett* (1902), 87 L. T. 143); or is a lunatic (*Currie v. Child* (1812), 3 Camp. 283); or is abroad (*Prince v. Blackburn* (1802), 2 East, 250), or cannot be found (*Cunliffe v. Sefton* (1802), 2 East, 183; *Wardell v. Fermor* (1809), 2 Camp. 282; *Crosby v. Percy* (1808), 1 Taunt. 364; *Parker v. Hoskins* (1810), 2 Taunt. 223; *Burt v. Walker* (1821), 4 B. & Ald. 697; *Kay v. Brookman* (1828), 3 C. & P. 555; *Morgan v. Morgan* (1832), 9 Bing. 359; *Willman v. Norrall* (1838), 8 C. & P. 380; *Palmouth (Earl) v. Roberts* (1842), 9 M. & W. 469; *Spencer v. Payne* (1847), 4 C. B. 328; *Austin v. Rumsey* (1849), 2 Car. & Kir. 736; *quare* as to absence through illness (*Jones v. Brewer* (1811), 4 Taunt. 46; *Harrison v. Blades* (1813), 3 Camp. 457).

(*a*) *Breton v. Cope* (1791), Peake, 43 [31]; *Gillies v. Smither*, *supra*; unless the names or handwriting of the attesting witnesses are unknown (*Keeling v. Ball* (1796), Peake, Add. Cas. 88; *R. v. St. Giles, Camberwell (Inhabitants)*, *supra*; *R. v. Fordingbridge (Inhabitants)* (1858), 27 L. J. (M. C.) 290).

(*b*) *Crank v. Firth* (1839), 2 Mood. & R. 262, *per* Lord ABINGER, C. B., at p. 263: "The witness might on recollection give material evidence relating to the transaction"; *Rees v. Williams* (1847), 1 De G. & Sm. 314. But see, *contra*, *Wood v. Drury* (1699), 1 Ld. Raym. 734; *Pedler v. Paige* (1833), 1 Mood. & R. 258, both of which cases were, however, cited in *Crank v. Firth*, *supra*.

(*c*) See *Fitzgerald v. Elsee* (1811), 2 Camp. 635; *Lemon v. Dean* (1810), 2 Camp.

SECT. 9.
Attesting
Witnesses,
when
required to
be called.

Exception to
 general rule.

Instruments
 enrolled.

name of the attesting witness is that of a fictitious person (*d*), or has been inserted without the knowledge of the parties to the instrument (*e*), the instrument may be proved in the ordinary way.

But general exceptions to the rule requiring the evidence of the attesting witness exist where the instrument is more than thirty years old (*f*), where the other party to the suit refuses to produce the instrument after notice to do so (*g*), where, although he produces it (*h*), he claims a subsisting (*i*) interest under it in the subject-matter of the suit (*k*), when the attestation was required merely by reason of the rule of some court, and the court has subsequently acted upon the instrument so attested (*l*); or when the instrument is tendered either against a public officer whose duty it was to procure its execution and who has treated it as duly executed (*m*), or against a party who is estopped from denying its validity (*n*).

It is said also that instruments which have been enrolled under some statute may be proved merely by proof of enrolment; but it is doubtful how far this is permissible, save as against the party on whose acknowledgment they have been enrolled (*o*).

636, n.; *Talbot v. Hodson* (1816), 7 Taunt. 251, overruling *Phipps v. Parker*, (1808), 1 Camp. 412; *Coles v. Coles and Brown* (1866), L. R. 1 P. & D. 70; *Bowman v. Hodgson* (1867), L. R. 1 P. & D. 362; *Dayman v. Dayman* (1894), 71 L. T. 699; *Pilkington v. Gray*, [1899] A. C. 401, P. C.

(*d*) *Fusset v. Brown* (1790), Peako, 33 [23].

(*e*) *M'Craw v. Gentry* (1812), 3 Camp. 232.

(*f*) See p. 512, *ante*.

(*g*) *Cooke v. Tanswell* (1818), 8 Taunt. 450; *Poole v. Warren* (1838), 8 Ad. & El. 582. As to the admission of secondary evidence of documents in general, see p. 518, *ante*.

(*h*) But refuses to relinquish possession of it (*Vacher v. Cocks* (1830), 1 B. & Ad. 145; *Carr v. Burdiss* (1835), 4 L. J. (EX.) 60, 63). The older rule was that the production of an instrument after notice by the adverse party superseded in all cases the necessity of calling attesting witnesses (*R. v. Middlezey (Inhabitants)* (1787), 2 Term Rep. 41; *Bowles v. Langworthy* (1793), 5 Term Rep. 366, overruled by *Gordon v. Secretan* (1807), 8 East, 548).

(*i*) *Collins v. Bayntun* (1841), 1 Q. B. 117; *Fuller v. Patrick* (1849), 13 Jur. 561. It seems that his interest in the suit must be the same as that claimed by his opponent (*Knight v. Martin* (1818), Gow, 26).

(*k*) The validity of an instrument is necessarily admitted where an interest is claimed under it (*Pearce v. Hooper* (1810), 3 Taunt. 60; see also *Orr v. Morice* (1821), 3 Brod. & Bing. 139; *Doe d. Tyndale v. Hemming* (1826), 9 Dow. & Ry. (K. B.) 15; *Doe d. Wilkins (Marquis) v. Cleveland* (1829), 9 B. & C. 864; *Bradshaw v. Dennett* (1831), 1 Mood. & R. 143; *Carr v. Burdiss* (1835), 4 L. J. (EX.) 60; *Doe d. Rowlandson v. Wainwright* (1836), 5 Ad. & El. 520; *Bell v. Chaytor (Sir Wm.)* (1843), 1 Car. & Kir. 162.

(*l*) Thereby recognising its validity; see *Bailey v. Bidwell* (1844), 13 M. & W. 73; *Streeter v. Barlett* (1848), 5 O. B. 562 (debt sued for admitted in a schedule filed in the bankruptcy court); it was held that the schedule being tendered as evidence of an acknowledgment the attesting witness must be called.

(*m*) *Bailey v. Bidwell*, *supra*; *Plumer v. Brisco* (1847), 11 Q. B. 46.

(*n*) See title ESTOPPEL, pp. 375, 393, *ante*; *Bringloe v. Goodson* (1839), 5 Bing. (N. C.) 738; *Fishmongers' Co. v. Dimsdale* (1852), 12 O. B. 557 (incorporation of old instrument in new, new only need be proved); *Laing v. Kaine* (1800), 2 Bos. & P. 85; *Randall v. Lynch* (1810), 2 Camp. 352, 357; *Freeman v. Steggall* (1849), 14 Q. B. 202. An admission in a former suit does not estop a party from denying execution of an instrument tendered in evidence against him (*Call v. Dunning* (1803), 4 East, 53; *Whyman v. Garth* (1863), 8 Exch. 803).

(*o*) See *Thurle v. Madison* (1655), Sty. 462; *Smartle v. Williams* (1694), 3 Lev. 387; *Holcroft (Lady) v. Smith* (1702), Freeman. (OIT.) 259; *Doe d. Freeman v. Lloyd* (1839), 5 Bing. (N. C.) 741; (1840), 10 L. J. (C. P.) 128; Buller, Nisi

SECT. 10.—*Evidence of Opinion and Belief.*SECT. 10.
**Evidence
of Opinion
and Belief.**

820. As a general rule a witness may not give evidence of opinion or belief, but only of facts (*p*). In certain circumstances, however the rule is relaxed. A witness unable to swear positively to a matter about which his recollection may be at fault is permitted to state that to the best of his belief such and such is the truth (*q*), and when evidence of reputation is admissible (*r*) this is, in a sense, evidence of the belief or opinion of a body of persons (*s*).

Evidence
of opinion
and belief.
Faulty
recollection.
Identifica-
tion.

A witness may state his belief or opinion when it is sought to identify persons (*t*) or things (*u*), and to prove that words or expressions of which evidence has been given were understood by him as referring to some particular individual (*b*), but, in general, he may not be asked what meaning he attached to words used unless it appear either from his own or other evidence that there was reason to think that they were used in other than their ordinary sense (*c*).

Evidence of opinion or belief is also admitted for the purpose of proving handwriting where direct evidence of one who was present when the document was written is not available (*d*), but an opinion based on mere inference is insufficient (*e*).

Proof of
handwriting.

Prius, 255. See also Phipson, *Law of Evidence*, 4th ed., p. 484. A doubt also exists as to the necessity of calling attesting witnesses of instruments sealed by a corporation; *semble*, that they must be called if the instrument is one which depends on attestation for its validity (*Doe d. Bank of England v. Chambers* (1836), 4 Ad. & El. 410. See, however, 2 Taylor, *Law of Evidence*, 10th ed., s. 1952; Phipson, *Law of Evidence*, 4th ed., p. 479; *Moises v. Thornton* (1799), 8 Term Rep. 303).

(*p*) See *Bonfield v. Smith* (1813), 2 Mood. & R. 519; and p. 479, *ante*.

(*q*) See *Carnall v. Post* (1839), 8 Watts, 406, 411 (Pennsylvania Supreme Court).

(*r*) See p. 479, *ante*.

(*s*) As to when evidence of reputation is admissible, see p. 479, *ante*.

(*t*) See p. 447, *ante*; and *Il. v. Tolson* (1864), 4 F. & F. 103. Identity may be proved by comparison with portraits and the belief of the witness as to the likeness (*Hindson v. Ashby*, [1896] 2 Ch. 1, 21, C. A.).

(*u*) See p. 447, *ante*.

(*b*) *Bourke v. Warren* (1826), 2 O. & P. 307; *Broome v. Gosden* (1845), 1 C. B. 728.

(*c*) *Daines v. Harley* (1848), 3 Exch. 200; *Brunswick (Duke) v. Harmer* (1850), 3 Car. & Kir. 10; *Barnett v. Allen* (1858), 3 H. & N. 376; *Simmons v. Mitchell* (1880), 6 App. Cas. 156, P. O.; *Gallagher v. Murton* (1888), 4 T. L. R. 304.

(*d*) See p. 482, *ante*; and *Sayer v. Glossop* (1848), 2 Exch. 409; *Wright v. Cobb* (1885), 1 T. L. R. 555; *Carey v. Pitt* (1797), Peake, Add. Cas. 130; *Butcher v. Honeywood (Sir J.)* (1799), 2 Esp. 714; *Greaves v. Hunter* (1826), 2 C. & P. 477; *Drew v. Prior* (1843), 5 Man. & G. 264; *Chant v. Brown* (1852), 9 Haro, 790; *Smith v. Sainsbury* (1832), 5 C. & P. 196; *Doe d. Mudd v. Suckermore* (1836), 5 Ad. & El. 703. It is sufficient if the witness has acted on letters received from the person whose handwriting is in dispute (*Harrington v. Fry* (1824), 1 C. & P. 289; *Tharpe v. Gisburne* (1825), 2 C. & P. 21; *Il. v. Slaney* (1832), 5 C. & P. 213; *Murietta v. Wolfhagen* (1849), 2 Car. & Kir. 744; *Ovenston v. Wilson* (1845), 2 Car. & Kir. 1). A signature may be proved by a witness who has only seen the surname written on some other occasion (*Lewis v. Sapiro* (1827), Mood. & M. 39), disapproving *Powell v. Ford* (1817), 2 Stark. 164; *Willman v. Worrall* (1838), 8 C. & P. 380; compare *Eagleton and Coventry v. Kingston* (1803), 8 Ves. 438, 476; *R. v. Crouch* (1850), 4 Cox, C. C. 103 (constable and prisoner). The rules as to proof of handwriting are the same in criminal as in civil cases (*R. v. Hensay* (1758), 1 Burr. 643).

(*e*) *Da Costa v. Pym* (1797), Peake, Add. Cas. 144; *R. v. Murphy* (1837), 8 C. & P. 297, 310.

SECT. 10.

Evidence
of Opinion
and Belief.

The handwriting in ancient documents may be proved in the same way (*f*), or by comparison with other documents the authenticity of which is not disputed (*g*), or even (where by reason of lapse of time no witness with an acquaintance of the handwriting can be found, and no strict proof can be given of the genuineness of other documents with which comparison might be made) by a witness who, in the course of his business, has acquired a knowledge of the character of the handwriting, and the person whose handwriting is in dispute, from his acquaintance with a number of documents purporting to have been written or signed by that person (*h*); but it is otherwise when the knowledge is acquired not in the course of business, but from a study of such other documents for the purpose of giving evidence (*i*).

Comparison
of disputed
writing.

Comparison of a disputed writing with any writing proved to the satisfaction of the judge to be genuine may be made by a witness (*k*); and such writing, and the evidence of witnesses thereon, may be submitted to the court and jury as evidence of the genuineness or otherwise of the writing in dispute (*l*). It is immaterial that the writing with which the comparison is made is not and cannot be made evidence in the case (*m*); but proof of genuineness must be given, if at all, at the trial itself, and cannot be ordered during preliminary proceedings (*n*).

Where the opinion or belief of a witness is, or becomes, relevant to the issue before the court as evidencing his good faith or the state of his mind, he may give evidence thereof (*o*); but he may not testify as to his own sanity (*p*), nor indeed (unless an expert) as to his opinion on the sanity of another (*q*).

(*f*) *Morewood v. Wood* (1791), cited 14 East, 328; *Taylor v. Cook* (1820), 8 Price, 630; *Doe d. Mudt v. Suckermore* (1836), 5 Ad. & Bl. 703; *The Fitzwalter Peerage* (1843), 10 Cl. & Fin. 193, II. L. As to proof of documents more than thirty years old, see p. 512, *ante*; *Fenwick v. Reed* (1821), Madd. & G. 7; *The Camoys Peerage* (1839), 6 Cl. & Fin. 789, H. L.; *Doe d. Jenkins v. Davies* (1847), 10 Q. B. 314.

(*g*) As to proof by comparison with other handwriting, see *infra*.

(*h*) See p. 482, *ante*; and *The Fitzwalter Peerage*, *supra*; *Doe d. Jenkins v. Davies*, *supra*.

(*i*) *The Fitzwalter Peerage*, *supra*, overruling by implication earlier decisions on this subject; see 2 Taylor, *Law of Evidence*, 10th ed., s. 1876.

(*k*) Criminal Procedure Act, 1865 (28 & 29 Vict. c. 18).

(*l*) *Ibid.*, s. 8. This applies in all courts, civil and criminal (*ibid.*, s. 1).

(*m*) *Birch v. Ridgway* (1858), 1 F. & F. 270; *Cresswell v. Jackson* (1860), 2 F. & F. 24. The comparison may be made by the jury (*Cobbett v. Kilminster* (1865), 4 F. & F. 490; *Scard v. Jackson* (1875), 24 W. L. 159); and may be made with a document written in court for this purpose (*Cobbett v. Kilminster*, *supra*).

(*n*) *Wilson v. Thornbury* (1874), L. R. 17 Eq. 517.

(*o*) *Mansell v. Clements* (1874), L. R. 9 Q. P. 139, where a witness was allowed to state, in answer to a question by the judge, that he should not have taken a house but for the house agent's card to view; *R. v. King*, [1897] 1 Q. B. 211, C. C. R. (opinion of witness as to meaning of an alleged false pretence made to him); compare *Hardwick v. Coleman* (1859), 1 F. & F. 531; *R. v. Dale* (1836), 7 C. & P. 352; *Wilson v. Wilson* (1872), L. R. 2 P. & D. 435. But the opinion of a witness as to the motives of another is inadmissible (*Townsend v. Moore*, [1905] P. 66, C. A.).

(*p*) *Boote v. Blundell* (1815), 19 Ves. 494; *Knight v. Young* (1813), 2 Ves. & B. 184.

(*q*) *Greenslade v. Dare* (1855), 20 Beav. 284; *Wright v. Tatham* (1838), 5 Cl. & Fin. 670, II. L.

And in certain other cases a witness is allowed to state his opinion, where it is scarcely possible to do more than draw inferences of fact from appearances or surrounding circumstances, as, for example, as to a person's age (*r*), or the affection existing between one person and another (*s*).

SECT. 10.
Evidence
of Opinion
and Belief.

Part VI.—Evidence out of Court.

SECT. 1.—How Obtained.

821. Evidence may be taken out of court for use at a trial, by the examination out of court of witnesses who, because they are resident beyond the jurisdiction or for other reasons, are unable to attend the trial; by affidavit (*t*); and by interrogatories (*a*). Evidence out of court.

822. The examination of witnesses in any cause or matter may be ordered to be taken under a commission, or before an examiner, or by means of a mandamus to an Indian or colonial court, or by letters of request addressed to a foreign, or Indian, or colonial court (*b*). Methods.

SECT. 2.—Examination of Witnesses.

SUB-SECT. 1.—Commission.

823. An order may be obtained in the High Court for the examination on commission of a witness or witnesses who is or are out of the jurisdiction of the English courts (*c*). Commission.

(*r*) See p. 482, *ante*.

(*s*) *Trelawney v. Colman* (1817), 2 Stark. 191.

(*t*) See pp. 620 *et seq.*, *post*.

(*a*) See, generally, title DISCOVERY ETC., Vol. XI., pp. 92—113.

(*b*) R. S. O., Ord. 37, rr. 1, 5, 6A. The procedure is not applicable to an arbitration, except where reference to arbitration is compulsory (*Judicature Act*, 1873 (36 & 37 Vict. c. 66), s. 100; *Re Shaw and Ronaldson*, [1892] 1 Q. B. 91; *Re Mysore West Gold Mining Co.* (1889), 42 Ch. D. 535). As to mandamus, see *East India Company Act*, 1772 (13 Geo. 3, c. 63); *East India Company Act*, 1784 (24 Geo. 3, c. 25), ss. 78, 79; *East India Company Act*, 1786 (26 Geo. 3, c. 57), s. 28; *Evidence on Commission Act*, 1831 (1 Will. 4, c. 22). As to taking evidence abroad in criminal cases, see title CRIMINAL LAW AND PROCEDURE, Vol. IX., p. 387.

(*c*) R. S. C., Ord. 37, r. 1, App. K, Forms 35c, 36, 37. For the form of writ, see App. J, Form 13. Commissions were originally issued to examine witnesses on written interrogatories. According to the form given in App. K, Form 37 (known as the "Long Order"), two commissioners are appointed, one for each party, but this form is rarely used, and the more common practice is to appoint one commissioner. An official referee may order a commission (*Hayward v. Mutual Reserve Association*, [1891] 2 Q. B. 236). As to the jurisdiction in bankruptcy to order the examination of witnesses before a commissioner or examiner, see *Bankruptcy Act*, 1883 (46 & 47 Vict. c. 52), ss. 105, 127 (5); *Bankruptcy Rules*, rr. 66, 68; *Re Drucker* (No. 2), *Ex parte Basden*, [1902] 2 K. B. 210. As to the jurisdiction in the winding up of companies, see title COMPANIES, Vol. V., p. 559. As to divorce, see *Matrimonial Causes Act*, 1857 (20 & 21 Vict. c. 85), s. 46; and title HUSBAND AND WIFE. As to the jurisdiction in a county court, see *County Court Rules*, 1903, 1904, Ord. 18, r. 18; *County Court Form 132*; and title COUNTY COURTS, Vol. VIII., p. 516. As to the mayor's court, see *Mayor's Court of London Procedure Act*, 1857 (20 & 21 Vict. c. clvii.), ss. 24, 26; and title MAYOR'S COURT. As to local courts, see *Borough and Local Courts of Record Act*, 1872 (35 & 36 Vict. c. 86), Sched., s. 10:

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824. Where a writ of mandamus or commission is, or letters of request (*d*) are, issued to a foreign court, the members of that court, or persons appointed by them, fulfil the functions of commissioners. More often the functions of commissioners are performed by persons directly appointed by order of the High Court (*e*).

SUB-SECT. 2.—*Examiners.*

Examiners.

825. The procedure under a commission is cumbrous and expensive, and, in modern practice, the examination of witnesses before an examiner has taken its place (*f*). An order may be made for the examination of witnesses out of court before an examiner either within or without the jurisdiction (*g*).

If the witnesses are within the jurisdiction, the examination generally takes place before one of the examiners of the court (*h*). The examiners of the court are barristers of not less than three years' standing, appointed by the Lord Chancellor to act as such for a period not exceeding five years (*i*). The examinations to be taken before the examiners of the court are distributed among them by rotation (*k*). If the court or a judge directs, an examination of witnesses can be taken before a particular examiner (*l*), or even before a special examiner, who is not one of the examiners of the court (*m*).

Witnesses out of the jurisdiction may be examined either before one of the examiners of the court or before a special examiner (*n*).

and title *Courts*, Vol. IX., p. 129. Commissions were formerly issued to foreign or colonial courts, but the practice now is to issue letters of request instead, see p. 611, *post*.

(*d*) See R. S. C., Ord. 37, r. 6A, and App. K, Form 37b.

(*e*) R. S. C., Ord. 37, r. 5; see App. K, Forms 36, 37, and App. J, Form 13.

(*f*) The Supreme Court Rules have no application to proceedings in divorce (R. S. C., Ord. 68, r. 1). There appears to be no jurisdiction to order the examination of witnesses out of the jurisdiction before a special examiner in divorce proceedings. See Hume-Williams and Macklin, *Taking of Evidence on Commission*, 2nd ed., p. 83.

(*g*) R. S. C., Ord. 37, rr. 1, 5.

(*h*) *Ibid.*, r. 39; *Bute (Marquess) v. James* (1886), 33 Ch. D. 157. As to the procedure, see R. S. C., Ord. 37, rr. 7–20, 41–52.

(*i*) *Ibid.*, r. 40.

(*k*) *Ibid.*, r. 41. When the examiner next in rotation is unable to take the examination, the next in rotation is to replace him (*ibid.*, r. 48).

(*l*) *Ibid.*, r. 49.

(*m*) *Ibid.*, r. 39. A special examiner might be appointed where it would be extravagant to send down an examiner of the court; see *Baddeley v. Bailey*, [1893] W. N. 56. In *Bute (Marquess) v. James*, *supra*, a special examiner was refused even though the examiner of the court would require the assistance of a Welsh interpreter.

(*n*) R. S. C., Ord. 37, rr. 5, 39; App. K, Form 37c. It is desirable that the name of the special examiner should be stated in the application (*Doe d. Thorn v. Phillips* (1831), 1 Dowl. 56). See, as to the appointment of special examiners to take evidence abroad, *Crofts v. Middleton* (1852), 9 Hare, App., xviii.; *Rawlins v. Wickham* (1858), 4 Jur. (N. S.) 990; *Edwards v. Spaight* (1862), 2 John. & H. 617; *London Bank of Mexico and South America v. Hart* (1868), L. R. 6 Eq. 467. The mere fact that witnesses are known to, or even intimately connected with, a person of credit will not prevent his being appointed as special examiner (*Ongley v. Hill* (1874), 22 W. R. 817). A shorthand writer ought not to be appointed as examiner or commissioner (*Bicknell v. Bicknell*, [1908] W. N. 97, C. A.), and a solicitor in the cause must in no case be appointed; see *Fricker v.*

SUB-SECT. 3.—*Mandamus.*

SECT. 2.

Examina-
tion of
Witnesses.

Mandamus.

826. The King's Bench Division of the High Court has power to issue writs in the nature of a mandamus or commission to the judges of the High Court in India, and to any judge of any colony in the King's dominions, to hold any court for the examination of witnesses, when evidence is required for the purpose of a trial in England (o).

SUB-SECT. 4.—*Letters of Request.*Letters of
request.

827. When it is desired to have witnesses examined before a foreign, Indian, or colonial court, the usual practice now is to apply for letters of request to examine them instead of a commission (p). Letters of request must also be used in those countries which do not permit the administration of an oath within their jurisdiction by anyone except one of their officials (q). As regards Indian and colonial courts, the proceeding by letters of request is simpler than proceeding by mandamus. In either case the court to which the letters of request are addressed may appoint some fit person to take the examination (r).

SECT. 3.—*When Examination out of Court will be Ordered.*

828. Orders are made for the examination (s) of witnesses at any place (t), whether within or without the jurisdiction, where

When order
made.

Moore (1730), Bunb. 289; *Re Selwyn* (G. M.) (1779), Dick. 563; *Sayer v. Wagstaff* (1842), 12 L. J. (Ct.) 35 (new commission issued owing to misconduct of commissioner). In a county court, the person appointed examiner may be the registrar of the court in the district in which the witness resides (County Court Rules, Ord. 18, r. 19; see, generally, rr. 18—32). A commissioner or examiner appointed to examine witnesses in a foreign country has no means of compelling the attendance of witnesses before him. In countries which are within the British dominions, but are outside the jurisdiction of the English courts, the attendance of witnesses before a commissioner or examiner is enforced by the procedure prescribed in the Evidence by Commission Act, 1843 (6 & 7 Vict. c. 82), s. 5; Evidence by Commission Act, 1859 (22 Vict. c. 20), s. 1, amended by Evidence by Commission Act, 1885 (48 & 49 Vict. c. 74).

(o) East India Company Act, 1772 (13 Geo. 3, c. 63), ss. 40, 44; Evidence on Commission Act, 1831 (1 Will. 4, c. 22), s. 1; *Wilson v. Wilson* (1883), 9 P. D. 8. Mandamus to examine witnesses is now rarely if ever used, see *thereon* Chitty's Archbold's Practice, 14th ed., pp. 555 *et seq.* As to taking evidence in the British possessions outside Great Britain in criminal cases, see title CRIMINAL LAW AND PROCEDURE, Vol. IX., p. 387. Except under certain statutes relating to British possessions abroad (see last references), and under the Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), or possibly by consent in cases of misdemeanour (see title CRIMINAL LAW AND PROCEDURE, Vol. IX., p. 387), there is no power to order the examination of witnesses out of court in criminal cases (*R. v. Upton St. Leonards* (Inhabitants) (1847), 10 Q. B. 827). As to the taking of a deposition of a witness who is dangerously ill in a criminal case, see title CRIMINAL LAW AND PROCEDURE, Vol. IX., p. 327.

(p) R. S. C., Ord. 37, r. 6A; App. K, Forms 37A and 37B.

(q) See Hume-Williams and Macklin, Taking of Evidence on Commission, 2nd ed., p. 58.

(r) See R. S. C., App. K, Form 37B.

(s) "Examination" includes cross-examination of a witness who has made an affidavit (*Rawlins v. Wickham* (1858), 4 Jur. (N. S.) 990; *Concha v. Concha* (1886), 11 App. Cas. 541).

(t) E.g., at the witness's residence in case of illness (*Re Bradbrook, Ex parte Hawkins* (1889), 23 Q. B. D. 226, C. A.).

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tion
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the court deems it necessary for the purposes of justice (*u*), that is, in the interest of all the parties to the litigation (*v*). The question whether an order should be made is one for the discretion of the court, but this discretion is the subject of review (*w*).

Before making the order, the court must be satisfied that there is a question to be tried (*a*), that the application is *bonâ fide* (*b*), and that there are material witnesses (*c*), to be examined. It is a recognised, though not a rigid, rule of practice that the name of one at least of the witnesses whom it is proposed to examine must be made known to the court and stated in the order (*d*).

Practice,

Special considerations, in addition to the above, will influence the court in its decision as to the necessity of making an order according as the persons to be examined are within or without the jurisdiction. The facts of the existence of which the court requires to be satisfied should be proved by affidavit (*e*). The court may impose such terms upon the applicant as appear to it to be just (*f*).

At what
stage orders
may be made.

The examination of witnesses out of court may be ordered even

(*u*) R. S. C., Ord. 37, r. 5.

(*v*) *Berdan v. Greenwood* (1880), 20 Ch. D. 764, n., C. A., per BAGGALLAY, L.J., at p. 765. The question of expense is one factor, but only a factor, in influencing the decision of the court (*Baddley v. Bailey*, [1893] W. N. 56; compare *Macaulay v. Glass* (1902), 47 Sol. Jo. 71). If it is adjudged that it was reasonable to examine witnesses *de bene esse* the costs of the examination will be allowed, even if the deposition is not used at the trial (*Bartlett v. Higgins*, [1901] 2 K. B. 230, C. A., approving *Delarogue v. Oxenholme & Co.*, [1883] W. N. 227).

(*w*) *Berdan v. Greenwood*, *supra*, per BAGGALLAY, L.J., at p. 767; compare *Coch v. Allcock & Co.* (1888), 21 Q. B. D. 1, 178, C. A., per Lord ESHER, M.R., at p. 181; see *Butterfield v. Financial News* (1889), 5 T. L. R. 279, C. A.

(*a*) *Re Boyse, Crofton v. Crofton* (1882), 20 Ch. D. 760, per FRY, J., at p. 771.

(*b*) See *Berdan v. Greenwood*, *supra*; *Re Boyse, Crofton v. Crofton*, *supra*; and *Ross v. Woodford*, [1894] 1 Ch. 38. The court may in its discretion impose terms on the applicant (R. S. C., Ord. 37, r. 5; see *Dalton v. Lloyd* (1835), 1 Gale, 102).

(*c*) It is not enough to show that it is probable that a person can give useful evidence (*Lane v. Bagshaw* (1855), 16 C. B. 576), but the materiality of the evidence of persons in whose presence the facts alleged in the pleadings had taken place was assumed (*Baddley v. Gilmore* (1836), 1 M. & W. 55). A solicitor's affidavit may be enough to show that witnesses are necessary (*Healy v. Young* (1846), 2 C. B. 702). When the examination is to be at a great distance it is as a rule necessary to show that the evidence is admissible (*Lloyd v. Key* (1834), 3 Dowl. 253).

(*d*) *Howard v. Dulau & Co.* (1895), 11 T. L. R. 451, C. A., where the court refused to accept the excuse that the witnesses might be spirited away if their names were made known; compare *Dimond v. Vallance* (1839), 7 Dowl. 590; *Gunter v. M'Tear* (1836), 1 M. & W. 201; *Cow v. Kinnerley* (1844), 6 Man. & G. 981 (names dispensed with on payment of money into court); *M'Hardy v. Hitchcock* (1848), 11 Beav. 93; *Warner v. Mosses* (1880), 16 Ch. D. 100, C. A.; *Nadin v. Bassett* (1883), 25 Ch. D. 21, C. A., per COTTON, L.J., at p. 29; *Langen v. Tate* (1883), 24 Ch. D. 522, C. A.

(*e*) This may be shown by the party applying, his solicitor, or his solicitor's clerk (*M'Hardy v. Hitchcock* (1848), 11 Beav. 93).

(*f*) R. S. C., Ord. 37, r. 5; County Court Rules, Ord. 18, r. 18; *Dalton v. Lloyd* (1835), 1 Gale, 102 (applicant, defendant, ordered to bring into court the amount claimed); *Sheppard v. Dalbiac* (1885), 30 Sol. Jo. 46 (applicant, defendant, ordered to pay costs of summons in any event, and give security for costs of commission, because the application was made nearly three months after notice of trial).

before issue has been joined (*g*), where justice requires that this course should be taken. A party must not be dilatory in applying for the examination (*h*).

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The application should be made by summons, though under special circumstances the order may be made upon an *ex parte* application, but only at the applicant's risk of its being discharged upon sufficient grounds (*i*).

As a general rule an order will not be made for a witness to be examined *ex parte*, though a case might possibly arise where it would not be absolutely necessary that both parties should attend (*j*).

Where evidence is taken under a commission or letters of request, it may be ordered to be taken by written interrogatories (*k*) or *vivâ voce*.

Interroga-
tories.

SUB-SECT. 1.—*Witnesses within the Jurisdiction.*

829. An order may be made for the examination of a witness within the jurisdiction either because of the advanced age of the witness (*l*), or because the witness is dangerously ill (*m*), or in such a precarious state of health that he cannot attend the trial with safety (*n*), or is going abroad on a *bonâ fide* voyage or journey of necessity (*o*).

Witnesses
within the
jurisdiction

In criminal cases the dangerous illness of a witness resident within the jurisdiction is a ground for taking his depositions out of court (*p*).

SUB-SECT. 2.—*Witnesses Abroad.*

830. The power of the court to order the examination of witnesses extends to places without the jurisdiction (*q*). The

Extent of
power.

(*q*) *Braun v. Mollett* (1855), 16 C. B. 514; compare *Finney v. Beesley* (1851), 17 Q. B. 86; and *Elin v. Wilson* (1883), 75 L. T. Jo. 47 (witness going abroad); *Mondel v. Steele* (1841), 8 M. & W. 300. Similarly in the Probate, Divorce, and Admiralty Division leave will, in urgent cases, be given to send a commission abroad before the citation has been served (*Valentine v. Valentine*, [1901] P. 283; *Gribbon v. Gribbon* (1908), 24 T. L. R. 160). The practice in divorce cases is regulated by the Matrimonial Causes Rules, rr. 132–137.

(*h*) *Stewart v. Gladstone* (1877), 7 Ch. D. 391 (commission refused owing to dilatoriness of applicant); compare *Sheppard v. Dalbiac* (1885), 30 Sol. Jo. 46.

(*i*) *Bidder v. Bridges* (1884), 26 Ch. D. 1, C. A.; compare *Turner Pneumatic Tyre Co. v. Dunlop Pneumatic Tyre Co.* (1897), 75 L. T. 651.

(*j*) *E.g.*, where a witness is in imminent danger of death (see *Warner v. Mosses* (1880), 16 Ch. D. 100, C. A., *per* JESSEL, M.R., at p. 103).

(*k*) See R. S. C., Ord. 37, rr. 6, 6A, App. K, Form 37 ("Long Order"), paras. 2, 8, 10; Form 37B. For a full treatment of interrogatories, see title DISCOVERY ETC., Vol. XI., pp. 92–113.

(*l*) *Crammond v. Thompson* (1895), 11 T. L. R. 572 (witnesses over 70); *Bidder v. Bridges*, *supra*.

(*m*) *Warner v. Mosses*, *supra*; *Davis v. Lowndes* (1838), 7 Dowl. 107 (nature of complaint must be stated). Where a witness's evidence had been rejected at the trial, the Court of Appeal allowed it to be taken before a special examiner upon proof that the witness was dangerously ill (*Treasury Solicitor v. White* (1886), 55 L. J. T. 79, C. A.).

(*n*) *Pond v. Dimes* (1833), 2 Dowl. 730. As to pregnancy, see *Abraham v. Newton* (1832), 8 Bing. 274; *R. v. Stephenson* (1862), L. & C. 165, C. C. R.

(*o*) *Bellamy v. Jones* (1802), 8 Vos. 31; *Pirie v. Iron* (1832), 8 Bing. 143; *Curruthers v. Graham* (1841), 9 Dowl. 947; *Fischer v. Uahn* (1863), 13 C. B. (N. S.) 659; *Braun v. Mollett*, *supra*.

(*p*) Indictable Offences Act, 1848 (11 & 12 Vict. c. 42), s. 17, and Criminal Law Amendment Act, 1867 (30 & 31 Vict. c. 35), ss. 6, 7; see title CRIMINAL LAW AND PROCEDURE, Vol. IX., pp. 327, 328.

(*q*) *Duckett (Bart.) v. Williams* (1851), 1 Cr. & J. 510; *Crofts v. Middleton*

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granting of an order for the examination of witnesses abroad is a matter of discretion (*r*), though in ordinary cases the order will be made upon an affidavit by the party applying to the effect that the evidence of the persons whom he seeks to examine is material (*s*), and that they cannot conveniently be brought to England (*t*). An order will not be made if, in the opinion of the court, it is essential that the witness should be cross-examined at the trial (*u*).

Where letters of request (*v*) in lieu of a commission are applied for, the applicant is required to satisfy the court of the facts of which proof is required before the order is made (*a*).

The court may order that the subject-matter of the action be sent out of the jurisdiction in order that it may be identified by the witnesses (*b*).

Witness
abroad.

The court may order the examination of a party residing abroad. But whereas a foreign defendant is *prima facie* entitled to have evidence, including his own, taken at the place where he resides (*c*),

(1852), 9 Hare, App., xviii.; *Fischer v. Ingataray* (1858), E. B. & E. 321 (commission issued to foreign court as a court and not as individuals in order to comply with foreign law); *Rawlins v. Wickham* (1858), 4 Jur. (n. s.) 990; *Edwards v. Spaight* (special examiners appointed to cross-examine witness abroad); *London Bank of Mexico and South America v. Hart* (1868), L. R. 6 Eq. 467; *Nadin v. Bassett* (1883), 25 Ch. D. 21, C. A.; *Armour v. Walker* (1883), 25 Ch. D. 673, C. A.; *Coch v. Allcock & Co.* (1888), 21 Q. B. D. 1, 178, C. A.; compare *Lawson v. Vacuum Brake Co.* (1881), 27 Ch. D. 137, C. A.; *Emanuel v. Soltykoff* (1892), 8 T. L. R. 331, C. A.; *Lewis v. Kingsbury* (1888), 4 T. L. R. 639, C. A., affirming 4 T. L. R. 626; *Fraser v. Nevins, Welsh & Co.* (1888), 4 T. L. R. 448, C. A.

(*r*) *Butterfield v. Financial News* (1889), 5 T. L. R. 279, C. A. The exercise of this discretion is the subject of review by the Court of Appeal (*Berdan v. Greenwood* (1880), 20 Ch. D. 764, n., C. A., per BAGGALLAY, L.J., at p. 767).

(*s*) *Armour v. Walker*, *supra*; *Langen v. Tate* (1883), 21 Ch. D. 522, C. A.; *Nadin v. Bassett*, *supra*; *Coch v. Allcock & Co.*, *supra*; *The Parisian* (1887), 13 P. D. 16; *Emanuel v. Soltykoff*, *supra*. In the case of criminal proceedings in the King's Bench Division for offences committed in India (see East India Company Act, 1772 (13 Geo. 3, c. 63), s. 4) the Attorney-General's statement that the evidence of a person in India is necessary is sufficient, without affidavit, to support a rule to order the Indian court to take his evidence (*R. v. Douglas* (1812), 2 Dowd. (n. s.) 416; *R. v. Douglas* (1846), 16 L. J. (q. b.) 417; compare *R. v. Jones* (1806), 8 East, 31).

(*t*) *Lawson v. Vacuum Brake Co.*, *supra*; *Langen v. Tate*, *supra*. The mere fact that the witness is in the employ of the party applying does not prevent the order being made (*Coch v. Allcock & Co.*, *supra*). An application to examine witnesses abroad as to foreign law will not be granted unless it is shown that the evidence cannot be obtained in this country (*The M. Mozham* (1876), 1 P. D. 107, C. A.).

(*u*) *Berdan v. Greenwood*, *supra*; *Re Boyse*, *Crofton v. Crofton* (1882), 20 Ch. D. 760; *Keeley v. Wakley* (1893), 9 T. L. R. 571 (libel).

(*v*) See p. 611, *ante*.

(*a*) The evidence to be obtained must be material (*Ehrmann v. Ehrmann*, [1896] 2 Ch. 611, C. A.). Letters of request will not be granted in addition to a commission, but may be granted although a special examiner has been appointed to take evidence abroad (*Mason and Barry, Ltd. v. Comptoir d'Escompte* (1890), 38 W. R. 685). Letters of request will not be issued, in a case where no witnesses are to be examined, solely for the purpose of obtaining inspection of documents (*Cape Copper Co. v. Comptoir d'Escompte de Paris* (1890), 38 W. R. 763).

(*b*) *Chaplin v. Puttick*, [1898] 2 Q. B. 160, C. A.; see Chitty's Forms, 13th ed., No. 14.

(*c*) *New v. Burns* (1894), 64 L. J. (q. b.) 104, C. A., approving *Ross v. Woodford*, [1894] 1 Ch. 38; *Hunt v. Roberts* (1892), 9 T. L. R. 92; *Hartmont v. Daly* (1896), 12 T. L. R. 170, C. A.

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a plaintiff who applies for his examination out of court is required to make out a strong *prima facie* case in support of his application, and is not entitled to succeed in the absence of a strong affidavit made by himself showing why he cannot attend the trial and why the order should be made (*d*). An order is more readily granted to a plaintiff who is within the jurisdiction to take the evidence of other plaintiffs who are remaining abroad (*e*).

A second order for examination will only be issued upon substantial grounds and in exceptional cases (*f*).

The examination of witnesses resident in a hostile country may be ordered if it is shown to the court to be just and practicable (*g*). Witness in hostile country.

SECT. 4.—*Taking the Evidence.*

831. When writs of mandamus or commissions are issued to the judges in India, the colonies, or other places in His Majesty's dominions, those judges have the same powers of enforcing the attendance and examination of witnesses as they would have in the trial of an action in their own courts (*h*), and have also power to order the examination in the manner and form directed by such commission or other process (*i*), and where a commission, mandamus, order, or request is addressed to any such judge in a civil proceeding, he may nominate some fit person to take the examination, or in a criminal proceeding the court to which a mandamus or order is addressed, or the chief judge thereof, may nominate a judge or magistrate to take the required deposition or examination (*k*). Taking the evidence.

Where one or more commissioners are appointed by order of the court, the mode in which the examination is to be taken is prescribed in the writ of commission (*l*).

When a person is ordered by the court to give evidence (*m*) or to produce documents (*n*) before an examiner appointed by the court, wilful disobedience of the order is contempt of court (*n*).

(*d*) *Fischer v. Hahn* (1808), 13 C. B. (N. S.) 659; *Castelli v. Groom* (1852), 18 Q. B. 490; *Light v. Anticosti Island (Governor & Co.)* (1888), 58 L. T. 25; see *Nadin v. Bassett* (1883), 25 Ch. D. 21, C. A., *per* COTTON, J.J., at p. 29; *Berdan v. Greenwood* (1880), 20 Ch. D. 764, C. A.; *Coch v. Allcock & Co.* (1888), 21 Q. B. D. 1, 178, C. A., *per* Lord ESHER, M.R., at p. 181; *Macaulay v. Glass* (1902), 47 Sol. Jo. 71.

(*e*) *Banque Franco-Egyptienne v. Lutscher* (1879), 41 L. T. 468.

(*f*) *Crowther v. Nelson* (1891), 7 T. L. R. 653; see *Western Bank of New York v. Koppel* (1892), 8 T. L. R. 36, 286, C. A.

(*g*) *Oppenheimer v. Robinson South African Banking Co.* (1900), *Times*, 31st January and 31st May, C. A.; compare *Barrick v. Duba* (1855), 16 C. B. 492; see also — *v. Romney* (1745), 1 Amb. 61; *Cahill v. Shepherd* (1806), 12 Ves. 335.

(*h*) See p. 577, *ante*, and statutes there cited; Evidence on Commission Act, 1831 (1 Will. 4, c. 22), s. 2; and Debtors (Ireland) Act, 1840 (3 & 4 Vict. c. 105), s. 67.

(*i*) Evidence by Commission Act, 1859 (22 Vict. c. 20).

(*k*) Evidence by Commission Act, 1885 (48 & 49 Vict. c. 74).

(*l*) See R. S. C., App. J, Form 13. Where a commission to take evidence abroad is issued to a single commissioner, it should authorise him to administer an oath to himself (*Wilson v. de Coulon* (1883), 22 Ch. D. 841).

(*m*) R. S. C., Ord. 37, r. 5.

(*n*) *Ibid.*, r. 7; County Court Rules, Ord. 18, r. 20.

(*a*) Witnesses within the jurisdiction should, except in the case of an officer of

SECT. 4.

Taking the Evidence.

Documents necessary.

The examination.

Persons required to attend before a duly appointed examiner are entitled to the same privileges as to conduct money and expenses as witnesses at the trial (b).

The person appointed by the court as examiner must be furnished by the party applying for the examination with a copy of the writ and pleadings, if any, or with such documents as are necessary to inform him of the question at issue (c).

832. The examiner has power to administer oaths (d). The evidence is to be taken according to the ordinary rules of examination, cross-examination, and re-examination (e), subject to any special directions which may be given by the court (f).

The examiner's duty is to write down the witnesses' statements, not as a rule in the form of question and answer. These statements must be signed by the witnesses, or, if a witness refuse to sign, by the examiner himself (g). They form the depositions, to which the examiner appends his signature (h).

If objection be taken to any question (i), the examiner should state his opinion as to its admissibility and make a note of the objection and of his statement, but he has no power to decide whether the question is admissible (k).

the court (*Re General Financial Bank*, [1888] W. N. 47), be summoned by *subpoena* (R. S. C., Ord. 37, r. 20; *Stuart v. Balkis Co.* (1884), 53 L. J. (OIL) 791). If a person refuses to attend, after receiving a *subpoena*, the court, upon a report from the examiner, will order such person to attend at his own expense and to pay the costs of the application (R. S. C., Ord. 37, rr. 8, 13, 15). For form of order, see Chitty's Forms, 13th ed., p. 293, No. 14; compare County Court Rules, Ord. 18, r. 26. If he still refuses, he may be attached (R. S. C., Ord. 37, r. 8; compare *Hennegal v. Evance* (1806), 12 Ves. 201). A witness refusing to answer may be committed for contempt of court (*Ex parte Fernandez* (1861), 10 C. B. (N. S.) 3; compare *Shurrock v. Lillie* (1888), 4 T. L. R. 355; *Carew v. Carew*, [1891] P. 360; R. S. C., Ord. 37, r. 8; County Court Rules, Ord. 18, r. 21). If he attend without a *subpoena* and refuse to answer, the court may order him to answer (*Cutler v. Wright*, [1890] W. N. 28).

(b) R. S. C., Ord. 37, r. 9; County Court Rules, Ord. 18, r. 22; see R. S. C., Ord. 65, r. 27 (9); and title PRACTICE AND PROCEDURE; compare *Wentworth v. Lloyd* (No. 2) (1865), 34 Beav. 455.

(c) R. S. C., Ord. 37, r. 10; compare County Court Rules, Ord. 18, r. 23.

(d) *Ibid.*, r. 19; compare County Court Rules, Ord. 18, r. 32.

(e) *Ibid.*, r. 11; compare County Court Rules, Ord. 18, r. 24.

(f) *Ibid.*, rr. 21, 22, 23; see *Re Doré Gallery* (1890), 38 W. R. 491, where NORTH, J., intimated to the examiner his opinion that applicant's witnesses should be cross-examined first.

(g) R. S. C., Ord. 37, r. 12. It is not essential that the evidence should be taken down in the examiner's own handwriting (*Bolton v. Bolton* (1876), 2 Ch. D. 217). Signature by the examiner of a shorthand transcript is not strictly in accordance with the rule (see *Re Doré Gallery* (1890), 88 L. T. Jo. 397); but this course may be taken if the parties agree (*The Knutsford*, [1891] P. 219). On the question of the costs of the shorthand writer, see *Re Hilleary and Taylor* (1887), 36 Ch. D. 262, 267, O. A. In commercial cases a shorthand writer is frequently employed to take down and transcribe the evidence.

(h) R. S. C., Ord. 37, r. 16; compare County Court Rules, Ord. 18, r. 25.

(i) Unless objection is taken at the examination, it cannot subsequently be taken (*Robinson v. Davies* (1879), 5 Q. B. D. 26).

(k) *Buckley v. Cooke* (1854), 1 K. & J. 29. An examiner ought not to refuse to allow any question to be put unless it is palpably inadmissible (*Surr v. Walmsley* (1866), L. R. 2 Eq. 439).

When a witness objects to answer, the validity of his objection is referred to the court, and the witness may be ordered to pay the costs occasioned by his refusal (*l*).

SECT. 4.
Taking the
Evidence.

Although the parties and their legal representatives have a right to be present at the examination (*m*), the room in which the examination is held is not a public court (*n*).

833. Where the examination is taken before one of the examiners of the court, he must be notified of the order for an examination in the manner provided by the Rules of the Supreme Court (*o*). It then becomes his duty to give an appointment in writing for the examination (*p*), and notice must be given to all parties by the party prosecuting the order, in the manner provided (*q*). The examiner has power to adjourn the examination *de die in diem*, and to recall witnesses (*r*). The examiner may, by consent of all parties, take the evidence of others than those named in the order (*s*).

Notification
of examiner.

The party prosecuting the order is primarily liable for the fees and expenses of an examiner of the court, and may be ordered by the court to pay them upon the application of the examiner. Such an order is made without prejudice to any question on taxation as to the party by whom the costs should be borne (*a*).

Fees.

SECT. 5.—Return and Use of the Evidence.

834. Where evidence is taken in accordance with a writ of commission or mandamus issued to a British court abroad, the return of the commission is to be made in the manner provided by statute (*b*).

Return of
the evidence

Where evidence is taken by a commissioner or commissioners in accordance with a writ of commission issued by order of the High Court, the return of the commission is to be made in accordance with the directions in the writ of commission (*c*).

Where evidence is taken before an examiner in accordance with

(*l*) R. S. C., Ord. 37, rr. 14, 15; County Court Rules, Ord. 18, rr. 27, 28.

(*m*) R. S. C., Ord. 37, r. 11; County Court Rules, Ord. 18, r. 24. A solicitor's clerk may be heard before an examiner (*Vimbo v. Meadowcroft* (1901), 46 Sol. Jo. 2). The fees of one counsel only will be allowed on taxation (*Hallows v. Fernie* (1867), 16 W. R. 175).

(*n*) *Re Western of Canada Oil, Lands, and Works Co.* (1877), 6 Ch. D. 109; compare *Wright v. Wilkin* (1878), 6 W. R. 643; and see p. 593, *ante*.

(*o*) R. S. C., Ord. 37, r. 43.

(*p*) It is not always left to the examiner's discretion to fix a time. The time may be limited (see *Gedye v. Pelling*, [1892] W. N. 41).

(*q*) R. S. C., Ord. 37, rr. 44, 45.

(*r*) The consent of the witness to any adjournment is not necessary (*Re Metropolitan (Brush) Electric Light and Power Co., Ex parte Offor* (1884), 54 L. J. (CH.) 253).

(*s*) R. S. C., Ord. 37, r. 46.

(*a*) *Ibid.*, r. 50. As to the fees of examiner, see *ibid.*, rr. 51, 51A, and App.; and see *Linley v. Houlder* (1903), 88 L. T. 829, C. A.

(*b*) East India Company Act, 1772 (13 Geo. 3, c. 63), s. 40; Evidence on Commission Act, 1831 (1 Will. 4, c. 22).

(*c*) See R. S. C., App. J, Form 13.

SECT. 5.
Return and
Use of the
Evidence.

the Rules of the Supreme Court, the original depositions (*d*), authenticated by the signature of the examiner (*e*), must be transmitted by him to the Central Office and there filed (*f*).

Depositions made before issue joined are not to be received at the trial, unless within one month after issue joined (or a longer period if allowed by the court) notice in writing of his intention has been given by the party intending to use them to the opposite party (*g*).

Discretion of
court in
admitting
the evidence.

835. If it appears at the trial that, in spite of objection, evidence contained in the depositions has been wrongly admitted, the court will, in its discretion, deal with the depositions accordingly (*h*).

Depositions may not (apart from consent) be given in evidence unless the court is satisfied (1) that the deponent is dead, or (2) that he is beyond the jurisdiction (*i*), or (3) that he is unable from sickness (*k*) or infirmity to attend the trial (*l*).

The court will presume, in favour of the admissibility of depositions, that examiners have discharged their duties correctly (*m*).

A commission is not invalidated merely because the court to which it was addressed has been slightly misdescribed (*n*).

SECT. 6.—Interlocutory Proceedings—Evidence by Affidavit.

Evidence by
affidavit.

836. Evidence may be given by affidavit on any motion, petition or summons (*o*), but the court may on the application of either

(*d*) It is not sufficient to send copies (*Clay v. Stephenson* (1835), 3 Ad. & El. 807; compare *R. v. Douglas* (1845), 1 Car. & Kir. 670).

(*e*) The court will not necessarily refuse to file depositions because the examiner has omitted to sign them (*Stephens v. Wanklin*, *Stephens v. Sulway* (1854), 19 Beav. 585). If the examiner dies without signing the depositions, the court may order them to be filed (*Felthouse v. Bailey* (1866), 14 W. R. 827; *Bryson v. Warwick and Birmingham Canal Co.* (1853), 1 W. R. 124).

(*f*) R. S. C., Ord. 37, r. 16. See, as to time for return of depositions, *Clark v. Gull* (1854), 1 K. & J. 19; compare *Maple v. Stephenson*, [1888] W. N. 62.

(*g*) R. S. C., Ord. 37, r. 24.

(*h*) *Lumley v. Gye* (1854), 3 F. & B. 114; see *Hutchinson v. Bernard* (1836), 2 Mood. & R. 1.

(*i*) See form of "Long Order" for commission, R. S. C., App. K, Form 37, para. 10; and Chitty's Forms, 13th ed., 301, No. 33. Evidence of absence must be given by a person who speaks from his own knowledge (*Robinson v. Murkis* (1811), 2 Mood. & R. 375). As to evidence of absence, see *Fulcomer v. Hanson* (1808), 1 Camp. 171, 172; *Curruthers v. Graham* (1841), Car. & M. 5; *Varicas v. French* (1849), 2 Car. & Kir. 1008.

(*k*) The illness need not necessarily be an incurable one (*Beaufort (Duke) v. Crawshay* (1866), L. R. 1 C. P. 699).

(*l*) R. S. C., Ord. 37, rr. 5, 18. An order to examine witnesses *de bene esse* should not state that their depositions may be given in evidence at the trial, for they may be capable of being examined at the trial (*Burton v. North Staffordshire Rail. Co.* (1887), 35 W. R. 536).

(*m*) Thus, where it had been ordered that witnesses should be examined separately, it was presumed that this had been done, though the return was silent on the point (*Simms v. Henderson* (1848), 11 Q. B. 1015). It is doubtful whether the court will presume commissioners to have taken the oath (*Irving v. Branfill* (1841), 12 Sim. 334). As to the presumption, see also *Atkins v. Palmer* (1821), 4 B. & Ald. 377; *Greville v. Stulz* (1817), 11 Q. B. 997; *Hitchins v. Hitchins* (1866), L. R. 1 P. & D. 153; *Grill v. General Iron Screw Collier Co.* (1866), L. R. 1 C. P. 600; *Hodges v. Cobb* (1867), L. R. 2 Q. B. 452; *Richards, Tweedy & Co. v. Hough* (1882), 51 L. J. (q. b.) 361.

(*n*) *Wilson v. Wilson* (1883), 9 P. D. 8, C. A.

(*o*) R. S. C., Ord. 38, r. 1; *Beaney v. Elliott*, [1886] W. N. 99 (affidavit used

party order the attendance of a deponent for cross-examination (*p*). This rule applies only to affidavits as to questions of fact which the court has at the time jurisdiction to decide, and does not apply to an affidavit verifying the name of the partners in a plaintiff's firm (*q*). It applies to a foreigner making an affidavit (*r*).

The court has a discretion to refuse to order the attendance of a witness for cross-examination (*a*), and will in general refuse to make such an order under this rule on an affidavit showing cause against a garnishee order *nisi* (*b*).

The court may refuse to act on an affidavit where it is not possible to cross-examine (*c*).

A party intending to use an affidavit in an application in chambers in the Chancery Division must give notice to the other parties concerned (*d*).

All affidavits previously read in court upon any proceedings may be used before the judge in chambers (*e*).

Any alterations in an account verified by affidavit to be left at chambers must be initialled by the officer before whom the affidavit is sworn (*f*), and documents referred to by affidavit are not to be annexed to the affidavit, but are to be referred to as exhibits (*g*).

When a judge in the Chancery Division has heard a case in chambers, he will not receive further evidence in court on a motion to discharge the order made in chambers (*h*), nor can evidence be filed, after the time which has been fixed for filing evidence has elapsed, without special leave (*i*).

SECT. 6.
Inter-
locutory
Proceedings
—Evidence
by Affidavit.

on further consideration as to costs); *Evans v. Lewis* (1860), 2 L. T. 559 (but not an affidavit merely as to the conduct of the parties).

(*p*) R. S. C., Ord. 38, r. 1. When a motion is ordered to stand over to the hearing there can be no cross-examination on an affidavit used on the motion (*Singer v. Ainsley* (1871), L. R. 13 Eq. 401).

(*q*) *Abrahams & Co. v. Dunlop Pneumatic Tyre Co.*, [1905] 1 K. B. 46, C. A. See also *Re Hardwick*, *Boswell v. Hardwick* (1907), 123 L. T. Jo. 322, and Practice Note, [1907] W. N. 180.

(*r*) *Strauss v. Goldschmidt* (1892), 8 T. L. R. 239.

(*a*) *La Trinidad, Ltd. v. Browne*, [1887] W. N. 208; *Strauss v. Goldschmidt*, *supra*. As to the court or officer before whom the cross-examination is to be conducted, see *Lumb v. Osburn*, [1884] W. N. 218, and *Pye v. Pye*, [1885] W. N. 174; *Lusmore v. Gordon* (1890), 7 T. L. R. 150.

(*b*) *Jeffris v. Tomlinson* (1886), 3 T. L. R. 193.

(*c*) *Shea v. Green* (1880), 2 T. L. R. 533. An interim order may be made pending cross-examination (*Lewis v. James* (1886), 32 Ch. D. 326, 331), or even in an exceptional case an order for committal (*Wordsworth v. Sugden* (No. 2) (1888), 32 Sol. Jo. 743).

(*d*) R. S. C., Ord. 38, r. 20. See *Downing v. Falmouth United Sewerage Board* (1887), 37 Ch. D. 234, 242, 243, C. A.

(*e*) R. S. C., Ord. 38, r. 21. Under R. S. C., Ord. 37, r. 25, evidence taken at the trial may be used in any subsequent proceedings in the same cause, and on *ex parte* applications evidence in another cause may, by leave of the court, be read (R. S. C., Ord. 37, r. 3).

(*f*) R. S. C., Ord. 38, r. 22.

(*g*) As to the right to inspection of exhibits, see *Re Hinchliffe (a Person of Unsound Mind), Deceased*, [1895] 1 Ch. 117, C. A., *per* A. L. SMITH, L.J., at p. 120; and *Sloane v. Britain Steamship Co.*, [1897] 1 K. B. 185, C. A.

(*h*) *Re Munns and Longden* (1884), 32 W. R. 675; *Re Marsden's Estate* (1889), 40 Ch. D. 475.

(*i*) *Re Chifferiel, Chifferiel v. Watson* (1888), 36 W. R. 806.

SECT. 7.

Trial on
Affidavits.

Trial on
affidavit by
consent.

SECT. 7.—Trial on Affidavits.

SUB-SECT. 1.—By Consent.

837. At the trial of any action or at any assessment of damages, the evidence may be taken by affidavit, provided that there has been an agreement between the solicitors of all parties that it shall be so taken (*j*). This agreement must be a formal consent in writing (*k*), and need not apply to the taking of the whole of the evidence (*l*). The court has no power to order that the evidence be taken in this manner (*m*), though a party who unreasonably withholds his consent may be ordered to pay the costs of the motion to have the evidence taken by affidavit (*n*).

In the case of infants or persons of unsound mind, the consent may be given by a guardian *ad litem* (*o*), and where the guardian *ad litem* of an infant gives his consent the leave of the court is not necessary (*p*).

Unless the agreement states that the evidence shall be taken by affidavit only, a witness present in court for the purpose of being cross-examined on his affidavit may give fresh evidence on behalf of the party for whom he has made the affidavit (*q*).

A consent that the evidence shall be taken by affidavit is equivalent to an agreement that the action shall be tried by a judge without a jury (*r*).

Power of
court to
refuse such
evidence.

838. The court, if it considers the affidavit unsatisfactory, has power to exclude affidavit evidence altogether, and to direct that the same shall not be used, but that witnesses shall be examined orally at the trial (*s*).

Where, after the agreement has been made, a party is for good cause unable to obtain affidavit evidence, the proper course is to take out a summons to be relieved from the agreement. The court will, in a proper case, order that a reluctant witness be examined *vivâ voce* at the trial, or will, at the option of the other party, discharge the agreement and direct that all the evidence be taken *vivâ voce* (*t*).

An applicant is at liberty to read the respondent's affidavits notwithstanding the objection that on his own affidavits no case is made requiring an answer (*a*).

(*j*) R. S. C., Ord. 37, r. 1.

(*k*) *New Westminster Brewery Co. v. Hannah* (1875), 1 Ch. D. 278.

(*l*) *Miller v. Dwyer* (1891), 27 L. R. Ir. 510.

(*m*) *Gardiner v. Hardy*, [1876] W. N. 153.

(*n*) *Patterson v. Wouler* (1876), 2 Ch. D. 586.

(*o*) *Knatchbull v. Fowle* (1876), 1 Ch. D. 604; *Piggott v. Toogood*, [1904] W. N. 130; see *Lawson v. Quare* (1887), 32 Sol. Jo. 24, where CHITTY, J., held that in certain cases it was not right that counsel on behalf of infants should agree that an action should be tried on affidavit evidence.

(*p*) *Fryer v. Wiseman* (1876), 45 L. J. (CH.) 199.

(*q*) *Glossop v. Heston and Isleworth Local Board* (1878), 47 L. J. (CH.) 536.

(*r*) *Brooke v. Wigg* (1878), 8 Ch. D. 510, C. A.

(*s*) *Lovell v. Wallis* (1883), 53 L. J. (CH.) 494.

(*t*) *Warner v. Mosses* (1880), 16 Ch. D. 100, C. A.; and see *Winfield v. Shoolbred*, [1880] W. N. 192.

(*a*) *Re Margetson and Jones*, [1897] 2 Ch. 314, 317, 319.

SECT. 7.
Trial on Affidavits.
 Practice.

839. In the absence of any special agreement between the parties or of any direction of the court, the plaintiff must file his affidavits and deliver a list of them to the defendant or his solicitor within fourteen days after the consent for taking evidence by affidavit has been given (*b*). The defendant is then allowed fourteen days within which to deliver a list of his affidavits (*c*). Within a further seven days the plaintiff must deliver a list of his affidavits in reply, which can only deal with matters strictly in reply (*d*). If affidavits filed by the plaintiff in reply are not confined to matters strictly in reply, the court will not regard them, or it may give leave to the defendant to answer them (*e*).

A party desiring the production of a deponent for cross-examination at the trial may, within fourteen days next after the end of the time allowed for filing affidavits in reply, serve upon the party on whose behalf the deponent has made the affidavit a notice requiring the production of the deponent at the trial (*f*).

Requiring presence of deponent at trial

The notice must be for the production of the deponent on the occasion, whatever it is, on which the inquiry and hearing and determination are to take place, and the affidavit is to be used (*g*).

It is doubtful whether this rule applies in the case of a witness who is resident beyond the jurisdiction (*h*). In Admiralty references, however, a deponent who is a party to the action, and is resident abroad, may be required by the registrar to attend in this country for cross-examination (*i*).

Where notice is given and a witness is not produced, his affidavit cannot be used as evidence unless by the special leave of the court or a judge (*k*). This penalty, however, does not relieve a party from the obligation of attending at his own expense where a *subpœna* has been issued (*l*).

840. The fact that a deponent does not appear before an examiner to be cross-examined is no ground for taking his evidence off the file before the hearing (*m*).

Non-appearance of deponent.

Leave to cross-examine will not be granted until the affidavit evidence is complete (*n*). A judge in chambers may refuse to

(*b*) R. S. C., Ord. 38, r. 25.

(*c*) *Ibid.*, r. 26.

(*d*) *Ibid.*, r. 27. This order, however, has not altered the practice which has always prevailed in the Court of Chancery of allowing a plaintiff to file affidavits in reply which bring forward additional witnesses (*Peacock v. Harper* (1877), 7 Ch. D. 648; and see *Adair v. Young* (1879), 40 L. T. 61; and *Roe v. Davies* (1876), 2 Ch. D. 729).

(*e*) *Gilbert v. Comedy Opera Co.* (1880), 16 Ch. D. 594.

(*f*) R. S. C., Ord. 38, r. 28.

(*g*) *Concha v. Concha* (1886), 11 App. Cas. 541.

(*h*) *De Mora v. Concha* (1886), 32 Ch. D. 133, C. A., per BOWEN, L.J., at p. 143; affirmed *sub nom. Concha v. Concha*, *supra*; and see per Lord HERSCHELL, L.C., at p. 559.

(*i*) *The Parisian* (1887), 13 P. D. 16.

(*k*) R. S. C., Ord. 38, r. 28.

(*l*) *Re Baker, Connell v. Baker* (1885), 29 Ch. D. 711; R. S. C., Ord. 37, r. 20.

(*m*) *Meyrick v. James* (1877), 46 L. J. (CH.) 579.

(*n*) *Muir v. Kirby* (1887), 32 Sol. Jo. 139.

SECT. 7.

Trial on Affidavits.

No power of withdrawal.

Cross-examination.

allow a party to adduce further evidence after the evidence has been completed and that party has cross-examined (o).

A person, whether a party to the cause or not, who has made an affidavit, cannot withdraw the affidavit when cross-examination is threatened (p).

A deponent can be cross-examined under this rule, even where the affidavit has not been used by the party who filed it (q).

The party who produces a deponent for cross-examination is not entitled to demand the expenses thereof from the party requiring the production (r), even in the case of the cross-examination of a deponent not at the trial of the action, but before a master in chambers (s).

A party can compel the attendance of a deponent for cross-examination by *subpœna* (t).

Where evidence is taken by affidavit, the affidavits must be printed, and notice of trial must be given at the same time after the close of the evidence as in other cases is provided after the close of the pleadings (a). Further affidavits may, however, be printed with the consent of all interested parties, or by order of the court or a judge (a), and evidence filed after notice of trial may, when taken under a judge's order, be used at the trial (b).

Default actions in rem; Admiralty references.

841. In default actions *in rem*, and in references in Admiralty actions, evidence may be given by affidavit (c), but it is in the discretion of the registrar to refuse to give weight to such evidence until after cross-examination of a deponent on his affidavit, and a deponent resident abroad may, if a party to the action, be required to attend in this country for cross-examination (d). In actions of limitation of liability, where the defendant only puts the plaintiff to proof of his case, without raising any special defence, the practice is for the entire evidence to be given on affidavit; and in other contested Admiralty actions certain matters are in practice proved by affidavit (e).

SUB-SECT. 2.—*By Order of Court.*

Power of court to order evidence by affidavit.

842. The court or a judge may for sufficient reason order that any particular fact or facts may be proved by affidavit, or that the

(o) *Re Davies, Issard v. Lambert* (1890), 44 Ch. D. 253, C. A.

(p) *Re Quartz Hill etc. Co., Ex parte Young* (1882), 21 Ch. D. 642, C. A.; *Clarke v. Law* (1855), 2 K. & J. 28; see also *Pike v. Dickinson* (1873), 21 W. R. 862, and *Re Sykes's Trusts* (1862), 2 John. & H. 415.

(q) *Re Ottaway, Ex parte Child* (1882), 20 Ch. D. 126, C. A., per JESSEL, M.R., at p. 127.

(r) R. S. O., Ord. 38, r. 28.

(s) *Backhouse v. Atcock* (1885), 28 Ch. D. 669; and see *Re Baker, Connell v. Baker* (1885), 29 Ch. D. 711, *Mansel v. Clanricarde* (1885), 54 L. J. (CH.) 982, and *Re Working Men's Mutual Society* (1882), 21 Ch. D. 831.

(t) R. S. O., Ord. 38, r. 29. As to *subpœna* generally, see p. 577, *ante*.

(a) *Ibid.*, r. 30. This order does not apply, in the Probate, Divorce, and Admiralty Division, to default actions *in rem*, or to references in actions, or to actions for limitation of liability, unless the court or a judge shall otherwise order.

(b) *Waring v. Lacey* (1876), 24 W. R. 318.

(c) R. S. O., Ord. 37, r. 2; and see title ADMIRALTY, Vol. I., p. 119.

(d) *The Parisian* (1887), 13 P. D. 16.

(e) See title ADMIRALTY, Vol. I., p. 110.

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**Trial on
 Affidavits.**

affidavit of any witness may be read at the hearing or trial, on such conditions as may be thought reasonable (*f*). The rule relates only to the trial of an action, and on a motion for judgment the court has no power to order that the evidence be taken by affidavit (*g*).

The order may be made at any time; thus, in administration actions, the court has power, if it thinks fit, to receive affidavit evidence on further consideration after the chief clerk has made his certificate (*h*).

Again, where there has been no judgment in an action, but merely an order in chambers for accounts, the court, on further consideration, may allow an affidavit to be read which has not been before the chief clerk (*i*).

The rule as to proving facts by affidavit only applies to the proof of isolated facts, and the court will not allow execution and attestation of a will to be proved by affidavit, even where none of the parties cited have appeared (*k*), though where it appears that every effort to trace the attesting witnesses of a will has failed, an affidavit made by one of them may be admitted as secondary evidence of execution (*l*).

The following are instances where the court has made an order allowing the proof of isolated facts by affidavit:—

(1) In a suit for revocation of probate the court allowed an affidavit made by one of the attesting witnesses eight years previously to be admitted, it having appeared that every effort had been made to find the witness (*m*).

(2) At a trial on *virâ voce* evidence an affidavit filed on an interlocutory motion was admitted, although the deponent was since deceased, and had not been cross-examined (*n*).

(3) The court ordered that the evidence of two witnesses resident in New South Wales should be taken on affidavit in an assessment of damages by a master (*o*).

843. Where it appears to the court or judge that the other party *bonâ fide* desires the production of a witness for cross-examination, and that such witness can be produced, no order will be made authorising the taking of the evidence of such witness on affidavit (*p*).

Examples.

When order will be refused.

(*f*) R. S. C., Ord. 37, r. 1.

(*g*) *Ellis v. Robbins* (1881), 50 L. J. (CH.) 512.

(*h*) *May v. Newton* (1887), 34 Ch. D. 347; and see *Re Revill, Leigh v. Rumney* (1886), 55 L. T. 542, where on further consideration of an administration action an affidavit was allowed to be read which referred to the evidence of one of the parties between judgment and further consideration, but not one as to conduct of party before the action.

(*i*) *Re Michael, Dessau v. Lewin*, [1885] W. N. 104; 52 L. T. 609.

(*k*) *Cook v. Tomlinson* (1876), 24 W. R. 851.

(*l*) *Hayes v. Willis* (1906), 75 L. J. (P.) 86. In *Drewitt v. Drewitt* (1888), 58 L. T. 684, an affidavit made under similar circumstances was allowed to be read on the ground that the witness was engaged in giving evidence in another case.

(*m*) *Gornall v. Mason* (1887), 12 P. D. 142.

(*n*) *Elias v. Griffith* (1877), 46 L. J. (CH.) 806.

(*o*) *Macdonald v. Antelme, Patterson & Co.*, [1884] W. N. 72.

(*p*) R. S. C., Ord. 37, r. 1.

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Affidavits.

This provision is in accordance with the general rule that evidence is not admissible against a party unless that party has the opportunity of testing it by cross-examination (*q*); nor does the fact that an affidavit has been used on an interlocutory application give any right to read it at the trial (*r*).

SUB-SECT. 3.—In County Court.

Evidence
in county
courts.

844. Evidence in the county court must ordinarily be given *vivâ voce*, and even where evidence is required or permitted to be taken by affidavit, such evidence must nevertheless be taken orally on oath if the court, on any application at or before the trial, so directs. But the judge may at any time, for sufficient reason, order that any particular fact or facts may be proved by affidavit, on such conditions as he may think reasonable (*a*).

Where, however, a party *bonâ fide* desires the production of a witness for cross-examination, and such witness can be produced, the judge will not order his evidence to be given by affidavit (*b*).

Notice of intention to use affidavits at the trial may be given, subject to compliance with the conditions imposed (*c*).

The judge may, if he thinks fit, on the hearing of a judgment summons, admit as evidence the affidavit of a judgment creditor or debtor who does not reside within the district of the court where the summons is heard (*d*).

In proceedings under the Trustee Relief Acts, the Trustee Acts (other than proceedings under s. 42 of the Trustee Act, 1893), or relating to the maintenance or advancement of infants, or under the Settled Land Acts, 1882 to 1890, or the Guardianship of Infants Act, 1886, all facts are to be proved by affidavit, unless the judge otherwise directs (*e*).

Admiralty
references.

845. On an assessment of damages in Admiralty references, evidence may be given by affidavit where a witness resides not less than ten miles from the registrar's office, or in any other case by consent of the parties (*f*). The adverse party, however, has the right to require a deponent to attend the reference for cross-examination (*f*). The cross-examining party will be liable to pay the costs of the attendance if the registrar considers that it was unnecessarily called for (*f*).

(*q*) See *Allen v. Allen*, [1894] P. 248, C. A., *per* LORES, L.J., at p. 253.

(*r*) *Perkins v. Slater* (1875), 1 Ch. D. 83; *Blackburn Union v. Brooks* (1877), 7 Ch. D. 68. In bankruptcy proceedings evidence is generally given by affidavit, but deponents may be cross-examined on their affidavits by notice (*Re Ottaway, Ex parte Child* (1882), 20 Ch. D. 126, C. A.). As to Admiralty actions, see R. S. C., Ord. 38, rr. 28, 30, and *The Parisian* (1887), 13 P. D. 16.

(*a*) County Court Rules, Ord. 18, r. 1; and title COUNTRY COURTS, Vol. VIII., p. 531.

(*b*) County Court Rules, Ord. 18, r. 2. This rule corresponds to R. S. C., Ord. 37, r. 1; see pp. 609 *et seq.*, *ante*.

(*c*) See title COUNTRY COURTS, Vol. VIII., p. 531.

(*d*) County Court Rules, Ord. 25, r. 37.

(*e*) County Court Rules, Ord. 38, r. 5. This rule applies to applications as to funds in court (County Court Rules, Ord. 38, r. 23).

(*f*) County Court Rules, Ord. 39, r. 100.

SECT. 8.—*Form and Contents of Affidavits.*SECT. 8.
Form and
Contents of
Affidavits.
Form.

846. Affidavits are to be drawn up in the first person (*g*), and divided into paragraphs numbered consecutively, each of which, as far as possible, must be confined to a distinct portion of the subject. Every affidavit must be written or printed bookwise (*h*). No costs are to be allowed in respect of an affidavit which substantially departs from the rule (*i*).

Every affidavit must be intitled in the cause or matter in which it is sworn, but the names of the first plaintiff and defendant are sufficient where there are more than one; and the costs of any prolixity are to be disallowed by the taxing officer (*k*).

Every affidavit must state the description and true place of abode of the deponent, and where there is more than one deponent the names of each must be inserted (*l*).

An affidavit in a contemplated action should be intitled both in the contemplated action and in the matter of the Judicature Acts (*m*).

847. Affidavits must deal only with facts which the witness can prove of his own knowledge, except on interlocutory applications, where statements as to a deponent's belief are admitted, provided the grounds of such belief are stated, but not otherwise (*n*). An

Must deal
with facts.

(*g*) An affidavit made in the third person sworn in the United States, where it is the practice so to swear them, was allowed to be filed in *Blamey v. Blamey*, [1902] W. N. 138, following *Re Husband* (1865), 12 L. T. 303.

(*h*) R. S. C., Ord. 38, r. 7. For formal parts of an affidavit, see Daniell's Chancery Forms, 5th ed., pp. 3–5; Chitty's Forms, 13th ed., p. 744. As to commencement of affidavit, see *Phillips v. Prentice* (1813), 2 Hare, 542; *Re Newton* (1860), 2 De G. F. & J. 3, C. A.; *Allen v. Taylor* (1870), L. R. 10 Eq. 62.

(*i*) R. S. C., Ord. 38, r. 7. The court has power to receive defective affidavits under Ord. 38, r. 14; see *Harlock v. Ashberry* (1883), 28 Sol. Jo. 26; *Eddowes v. Argentine Loan and Agency Co.* (1890), 59 L. J. (ex.) 392, C. A.; *Gates v. Buckland* (1864), 13 W. R. 67; *Re Heymann, Ex parte Heymann* (1872), 7 Ch. App. 488; *Dunn v. Yearley*, [1874] W. N. 158; *Re London Asphalt Co.* (1907), 23 T. L. R. 406; *Underdown v. Stannard*, [1871] W. N. 171; *Pearson v. Wilcox* (1853), 10 Hare, App., xxxv.

(*k*) R. S. C., Ord. 38, r. 2; see *Mackenzie v. Mackenzie* (1852), 5 De G. & Sm. 338; *Salvidge v. Triton* (1869), 29 L. T. 300; *Blamey v. Blamey*, *supra*; *Hurves v. Bamford* (1839), 9 Sim. 653; *Re Vartey Iron Works Wesleyan Chapel* (1853), 10 Hare, App., xxxvii.; *Fisher v. Coffey* (1855), 1 Jur. (N. S.) 956; *Underdown v. Stannard*, *supra*; *Whiting v. Bassett* (1872), L. R. 14 Eq. 70. As to affidavit verifying a statutory declaration made abroad, see Practice Note, [1907] W. N. 180, and *Re Hardwick, Roswell v. Hardwick* (1907), 123 L. T. Jo. 322.

(*l*) R. S. C., Ord. 38, rr. 8, 9. If affidavit of all deponents is taken at one time it is sufficient to state that it was sworn by each of the "above-named" deponents. As to affidavits by parties to the action, see *Crockett v. Bishton* (1815), 2 Madd. 446. As to the description of the deponent, see a Filing Department Notice (dated December 4th, 1902), and *Re Orde* (1883), 24 Ch. D. 271, C. A.; *Re Horwood* (1886), 55 L. T. 373, C. A.; *Re Dodsworth, Spence v. Dodsworth*, [1891] 1 Ch. 657.

(*m*) *Young v. Brussey* (1875), 1 Ch. D. 277.

(*n*) R. S. C., Ord. 38, r. 3; *Re New Callao Co.* (1882), 30 W. R. 647; *Re Young (J. L.) Manufacturing Co., Ltd.*, [1900] 2 Ch. 753, C. A. An attested copy of a document may be exhibited as affording grounds for belief, although no evidence is adduced to account for non-production of the original (*Spencer v. Bailey* (1892), 93 L. T. Jo. 223).

SECT. 8.
Form and
Contents of
Affidavits.

affidavit of information and belief must state the source of information and belief (o).

For the purpose of this rule, those applications only are considered interlocutory which do not decide the rights of the parties, but are made for the purpose of keeping things *in statu quo* till the rights can be decided, or for the purpose of obtaining some direction of the court as to the conduct of the cause (p).

The costs of affidavits containing unnecessary matters of hearsay or argumentative matter, or copies of or extracts from documents (q), are to be paid by the party filing the same (r).

The court has an inherent right to take an affidavit off the file for prolixity (s).

The court may order any matter which is scandalous to be struck out from any affidavit, and may order the costs of the application to be paid as between solicitor and client (a).

Corrections
etc.

Affidavits containing any interlineation, alteration, or erasure cannot, as a rule, be read without leave of the court, unless the alterations are initialed by the officer taking the affidavit (b).

Form of
jurat.

Unless a commissioner to administer oaths expresses the time when and the place where he takes an affidavit, it will not be permitted to be filed or enrolled without the leave of the court or a judge (c). A commissioner must also express the time when and the place where he does any other act incident to his office (d). He should state his title as commissioner (e).

(o) *Re Young (J. L.) Manufacturing Co., Ltd.*, [1900] 2 Ch. 753, C. A.; *Quartz Hill Consolidated Gold Mining Co. v. Beall* (1882), 20 Ch. D. 501, C. A.; see also *Bonnard v. Perryman*, [1891] 2 Ch. 269, 287, 288, C. A.; *Lumley v. Osborne*, [1901] 1 K. B. 532; *Bidder v. Bridges* (1881), 26 Ch. D. 1, C. A.

(p) *Gilbert v. Endeau* (1878), 9 Ch. D. 259, 268, 269, C. A.; and see *Bird v. Lake* (1863), 1 Hon. & M. 111. In *Re Anthony Burrell Pearce & Co., Daig v. Anthony Burrell Pearce & Co., Re Same, Groos v. Same*, [1899] 2 Ch. 50, an affidavit founded on statements of an informant who might have been subpoenaed was not allowed; see also *Re Palmes, Palmes v. R.*, [1901] W. N. 116, and Practice Note, [1876] W. N. 59. As to affidavit evidence on a motion for judgment when there is an infant defendant, see *Cheek v. Chick*, [1910] W. N. 37. As to an affidavit verifying a cause of action under R. S. C., Ord. 14, r. 1, see *Lagos v. Gruenwaldt*, [1910] 1 K. B. 41, and compare *Churgwin v. Russell* (1910), *Times*, 20th October.

(q) *Hirst v. Procter*, [1882] W. N. 12.

(r) R. S. C., Ord. 38, r. 3.

(s) *Walker v. Poole* (1882), 21 Ch. D. 835; *Hill v. Hart-Davis* (1881), 26 Ch. D. 470, C. A.

(a) R. S. C., Ord. 38, r. 11. For cases where affidavits were ordered to be taken off the file, see *Goddard v. Parr* (1855), 24 L. J. (CH.) 783; *Kernick v. Kernick* (1864), 12 W. R. 335; *Osmaston v. Land Financiers Association*, [1878] W. N. 101. As to expunging such matter as is deemed scandalous, see *Warner v. Mosses*, [1881] W. N. 69, C. A.; *Cracknell v. Janson* (1879), 11 Ch. D. 1, C. A., per FRY, J., at p. 13; *Re Jessopp*, [1910] W. N. 128 (matter irrelevant, but not scandalous, cannot be struck out).

(b) R. S. C., Ord. 38, r. 12; see *Gill v. Gillard* (1852), 9 Hare, App., xvi. A master in the King's Bench Division has no jurisdiction to initial an affidavit sworn in an action in the Chancery Division (*Re Cloake* (1891), 61 L. J. (CH.) 69).

(c) R. S. C., Ord. 38, r. 5.

(d) *Ibid.*

(e) *Re Chapman, Ex parte Johnson* (1884), 26 Ch. D. 338, C. A. Other cases dealing with irregularities in the jurat are *R. v. Bloxham (Inhabitants)* (1814), 8 Jur. 1117; *Eddowes v. Argentine Loan and Agency Co.* (1890), 59 L. J. (CH.) 392, C. A.

The parties cannot waive irregularities in the form of a jurat (*f*), but in a case where the place of swearing is omitted the court may possibly assume that the place was within the area in which the notary before whom it was taken was certified to have jurisdiction, and the irregularity may be overlooked (*g*).

SECT. 8.
Form and
Contents of
Affidavits.

Where an affidavit is sworn by a blind or illiterate person, the officer taking the affidavit must certify that it was read over in his presence to the deponent, and that the latter seemed perfectly to understand it, and made his signature in the presence of the officer (*h*). It is not sufficient to prove that the affidavit was read over to the witness by the person who prepared it, and that the witness appeared to understand it (*i*).

Affidavit of
blind or
illiterate
person.

SECT. 9.—Who may take Affidavits.

848. Affidavits may be sworn in England before a judge, district registrar, commissioner to administer oaths, or certain other officers empowered by statute or rule to administer oaths (*k*).

Who may
take
affidavits.

The following officers are empowered to administer oaths in matters in the Supreme Court:—(1) Every master and first or second class clerk in the filing and record department of the Central Office (*l*); (2) chancery masters (*m*); (3) taxing officers (*n*); (4) district registrars (*o*); (5) officers of the court or other persons directed to take the examination of any person or witness (*p*); (6) arbitrators and umpires (*q*); (7) commissioners to administer oaths (*r*); (8) commissioners appointed under the Commissioners for Oaths Acts, 1889, 1890, 1891 (*s*); (9) first and second class clerks in the bills of sale department (*t*); (10) first and second class clerks in the Crown Office (*a*).

An officer of the court or other person directed to take the examination of any witness or person may administer an oath (*b*).

(*f*) *Pilkington v. Hunsworth* (1835), 1 Y. & C. (EX.) 612.

(*g*) *Mack v. Ward* (1853), 10 Hare, App., i.

(*h*) R. S. C., Ord. 38, r. 13; see *Fernyhough v. Naylor* (1875), 23 W. R. 228; — *v. Christopher* (1841), 11 Sim. 409. The attestation by a master is evidence that the deponent was regularly sworn, and that the signature is his signature (*R. v. Benson* (1810), 2 Chimp. 508).

(*i*) *Re Longstaffe, Blenkarn v. Longstaffe* (1884), 54 L. J. (CH.) 516; but see *Verner v. Cochran* (1889), 23 L. R. Ir. 422. As to a deponent who could not sign or make a mark, see *R. v. Holloway* (1901), 65 J. P. 712.

(*k*) R. S. C., Ord. 38, r. 4.

(*l*) R. S. C., Ord. 61, r. 5.

(*m*) R. S. C., Ord. 55, r. 16. Chancery masters were formerly styled chief clerks.

(*n*) R. S. C., Ord. 65, r. 27 (25).

(*o*) Judicature Act, 1873 (36 & 37 Vict. c. 66), s. 62; R. S. C., Ord. 35, r. 6.

(*p*) R. S. C., Ord. 37, r. 19; see Commissioners for Oaths Act, 1889 (52 & 53 Vict. c. 10), s. 2.

(*q*) Arbitration Act, 1889 (52 & 53 Vict. c. 49), s. 7 (a).

(*r*) Judicature Act, 1873 (36 & 37 Vict. c. 66), ss. 77, 82, 84.

(*s*) 52 & 53 Vict. c. 10; 53 & 54 Vict. c. 7; 54 & 55 Vict. c. 50.

(*t*) Bills of Sale Acts Rules, r. 12.

(*a*) Crown Office Rules, 1906, r. 7.

(*b*) R. S. C., Ord. 37, r. 19. As to the appointment of commissioners, see Commissioners for Oaths Act, 1889 (52 & 53 Vict. c. 10), ss. 1, 2; Judicature

SECT. 9.

**Who may
take
Affidavits.**

Solicitor to
parties to
an action.

No affidavit is sufficient if sworn before the party on whose behalf the affidavit is to be used, or before his solicitor or his solicitor's agent, correspondent, clerk, or partner (c), even where the affidavit is sworn before one of the partners of the country firm of solicitors in a case where the name of the London solicitors appears alone on the record (d), or where an affidavit is sworn before a country solicitor who is the "correspondent" of the party's London solicitors (e).

An affidavit of the execution of a bill of sale sworn before the solicitor for the grantor has been held to be insufficient (f).

Affidavit
made out
of the
jurisdiction.

849. In places out of the jurisdiction of the court, which are under the dominion of His Majesty, affidavits may be sworn and taken before any judge, court, notary public, or person authorised to administer oaths in the place where the affidavit is taken (g).

In foreign parts, out of His Majesty's dominions, affidavits may be sworn before any of His Majesty's consuls or vice-consuls (h), and any person having authority to administer an oath in a place out of His Majesty's dominions may take an affidavit required to be used in England (i).

Act, 1873 (36 & 37 Vict. c. 66), ss. 77, 82, 84. As to the duration of the commission, see *Ward v. Gamgee* (1891), 65 L. T. 610; *Shrapnel v. Gamgee* (1891), 8 T. L. R. 9. By the Oaths Act, 1909 (9 Edw. 7, c. 39), s. 3, the word "officer" in that Act means and includes any and every person duly authorised to administer oaths.

(c) R. S. C., Ord. 38, rr. 16, 17; *Re Hogan* (1754), 3 Atk. 813; *Wood v. Harpur* (1840), 3 Beav. 290; *Hopkin v. Hopkin* (1853), 10 Hare, App., ii.; *Bourke v. Davis* (1889), 44 Ch. D. 110, per KAY, J., at p. 126. By the Commissioners for Oaths Act, 1889 (52 & 53 Vict. c. 10), s. 1 (3), a commissioner is forbidden to administer an oath in any proceeding in which he is solicitor to any of the parties, or in which he is interested.

(d) *Northumberland (Duke) v. Todd* (1878), 7 Ch. D. 777.

(e) *Parkinson v. Crawshaw*, [1894] W. N. 85; see also *Foster v. Harvey* (No. 1) (1863), 11 W. R. 899; *Re Gregg*, *Re Prance* (1869), L. R. 9 Eq. 137.

(f) *Baker v. Ambrose*, [1896] 2 Q. B. 372.

(g) R. S. C., Ord. 38, r. 6.

(h) *Ibid.* The Commissioners for Oaths Act, 1889 (52 & 53 Vict. c. 10), s. 6, enacts that an affidavit sworn in a foreign place before any of the following officials shall be as effectual as if duly sworn in the United Kingdom:—British ambassadors, envoys, ministers, chargés d'affaires, secretaries of an embassy or legation, consuls-general, consuls, vice-consuls, acting consuls, pro-consuls, consular agents. Acting consuls-general, acting vice-consuls, and acting consular agents are added by the Commissioners for Oaths Act, 1891 (54 & 55 Vict. c. 50), s. 2.

(i) Commissioners for Oaths Act, 1889 (52 & 53 Vict. c. 10), s. 3. As to the application of this Act to bankruptcy affidavits, see *Re Magee, Ex parte Magee* (1885), 15 Q. B. D. 332. As to the necessity for an affidavit verifying the signature of a foreign magistrate, and as to the authority of such magistrate, see *Omeally v. Newell* (1807), 8 East 364; *Haggitt v. Iniff* (1854), 5 De G. M. & G. 910, C. A.; *Re Earl's Trust* (1858), 4 K. & J. 300, C. A.; *Mayne v. Butler* (1864), 13 W. R. 128; *Levitt v. Levitt* (1865), 2 Hem. & M. 626; *Hayward v. Stephens* (1866), 36 L. J. (CH.) 135; *Re Kenah's Trusts* (1867), 15 W. R. 781; *Lees v. Lees*, [1868] W. N. 268; *Re Davis's Trusts* (1869), L. R. 8 Eq. 98; *Cooke v. Wilby* (1884), 25 Ch. D. 769; *De Leon v. Hubbard*, [1883] W. N. 197; *Brittlebank v. Smith* (1884), 50 L. T. 491; *Cooper v. Moon*, [1884] W. N. 78; *Sharpe v. Jackson* (1904), 39 L. J. 400; *Re London Asphalt Co.* (1907), 23 T. L. R. 406 (an affidavit sworn in Germany before a notary whose signature was attested by the seal of the British Consulate was allowed to be used, although the attestation did not state that the notary was qualified to administer oaths).

In India affidavits may be sworn before any judge or official of a High Court, or local court empowered by that court to administer oaths, or any magistrate, commanding officer of any military station occupied by His Majesty's troops, or notary public (*k*).

SECT. 9.
Who may
take
Affidavits.

India.

SECT. 10.—*Filing and Office Copies of Affidavits.*

850. Every affidavit used in the Supreme Court must be filed, and must have indorsed on it a note showing on whose behalf it is filed; no affidavit may be filed or used without such note, except by the direction of the court (*l*).

Filing
affidavits.

With the exception of affidavits used in Admiralty and Probate actions, or in proceedings on the Crown side of the King's Bench Division, or in a district registry (in which cases affidavits are filed in the Admiralty or Probate registries, or the Crown Office Department or in the registry, as the case may be), every affidavit used must be filed in the Central Office (*m*).

It is the duty of the solicitor to the party who has sworn and used an affidavit to cause it to be filed, and where affidavits are used in chambers before being filed there is an undertaking, express or implied, that they shall be filed (*n*).

Using
unfiled
affidavits.

On *ex parte* applications unfiled affidavits are allowed to be read, on an undertaking that they shall be filed, but an unfiled affidavit of service of notice of motion cannot be read, where the defendant does not appear (*o*).

An order made *ex parte* in court will not, except by the leave of the court or a judge, be of any force unless the affidavit on which the application was made was produced or filed at the time of making the motion (*p*).

Where a special time is limited for filing affidavits, no affidavit filed after that time may be used except by leave of the court (*q*).

Affidavits are not allowed to be taken out of a district registry or

(*k*) Stringer's Oaths and Affirmations, 3rd ed., p. 51.

(*l*) R. S. C., Ord. 38, r. 10.

(*m*) *Ibid.* Affidavits used on the revenue side are filed in the King's Remembrancer's Department, Room 176. The place of filing is the Filing and Record Department, Rooms 84 and 86. Affidavits for use on appeal should be filed with the officer of the division of the High Court from which the appeal comes (*Watts v. Watts* (1876), 45 L. J. (CH.) 658, C. A.).

(*n*) *Taylor v. Gates* (1895), 72 L. T. 436, C. A., *per LINDLEY, L.J.*, at p. 437. Where an infant appears by his guardian *ad litem*, R. S. C., Ord. 16, rr. 18, 19, provide for the filing of an affidavit by the solicitor.

(*o*) *Farrer v. Sykes* (1874), 43 L. J. (CH.) 392.

(*p*) R. S. C., Ord. 38, r. 19; and see *Re Abbott's Trade-mark* (1904), 48 Sol. Jo. 351; and *Re King & Co.'s Trade-mark*, [1892] 2 Ch. 462, C. A. As to time for filing affidavits for use at trial, see R. S. C., Ord. 38, rr. 25—27. When a summons has been adjourned into court, evidence filed after the time fixed in chambers for filing evidence cannot be used without special leave; where no time had been fixed, evidence filed after the adjournment into court was admitted (*Re Chiffertel, Chiffertel v. Watson* (1888), 58 L. T. 877). In references in Admiralty actions the claim and affidavits must be filed within twelve days from the day when the order for the reference is made; twelve days are then allowed for filing counter affidavits, six days only being allowed for any further affidavits (R. S. C., Ord. 56, rr. 2, 3).

(*q*) R. S. C., Ord. 38, r. 18.

SECT. 10.
Filing and
Office
Copies of
Affidavits.

out of the Central Office without the order of a judge, district registrar, or master (r).

A deposition of a witness filed for one purpose in proceedings in bankruptcy may be used against him as an admission in any other proceeding in the same bankruptcy (s).

In cases where an original affidavit is allowed to be used, it must be stamped with a proper filing stamp and must, when used, be delivered to the proper officer, who shall send it to be filed.

Office copies.

Office copies of affidavits may always be used where the original has been filed and the copy duly authenticated (t).

The parties must produce office copies of the affidavits they intend to read (a). The office copy should be produced by the party on whose behalf the affidavit was filed (a), except in the case of affidavits filed by a claimant or creditor in an administration action (b).

In cases in which an original affidavit can be used it is not necessary to take an office copy (c), nor is an office copy of an affidavit of documents necessary (d).

SECT. 11.—Action for Perpetuation of Testimony.

Actions to
perpetuate
testimony.

851. Actions to perpetuate testimony may be brought by any persons who would, under the circumstances alleged by them to exist, become entitled to any honour, title, dignity, office, or estate on the happening of some future event (e).

SECT. 12.—Evidence for Use before Foreign Tribunals.

Evidence
for use
before
foreign
tribunals.

852. Facilities are afforded by statute (f) for taking evidence in His Majesty's dominions in relation to civil and criminal matters for use before foreign tribunals.

Where it is made to appear to the court that any tribunal of competent jurisdiction in a foreign country before which any civil or commercial matter or any criminal matter not of a political character is pending is desirous of obtaining the testimony of any witness within the jurisdiction of the court, the court may, on the *ex parte* application (g) of a person duly authorised by the foreign

(r) R. S. C., Ord. 35, r. 22; R. S. C., Ord. 61, r. 28.

(s) *Re Cooper, Ex parte Hull* (1882), 19 Ch. D. 580, C. A.

(t) R. S. C., Ord. 38, r. 15.

(a) R. S. C., Ord. 66, r. 7 (f), (g).

(b) *Marshall v. National Provincial Bank of England* (1892), 61 L. J. (CH.) 463, 466. As to the proper method of preparing office copies, see *Coleman v. Coleman*, [1905] W. N. 160.

(c) R. S. C., Ord. 65, r. 27 (53).

(d) *Ibid.*, r. 27 (54).

(e) R. S. C., Ord. 37, r. 35; see title EQUIT, p. 44, *ante*.

(f) Foreign Tribunals Evidence Act, 1856 (19 & 20 Vict. c. 113), which applies only to civil and commercial matters. Its provisions are extended to criminal matters, other than those of a political character, by the Extradition Act, 1870 (33 & 34 Vict. c. 52), s. 24.

(g) The order for examination of the witness may be obtained *ex parte* from a master in a civil matter, and from the judge in chambers in a criminal matter, upon an affidavit of the matters required by s. 1 of the Foreign Tribunals

tribunal, make such order as is necessary for the obtaining of the evidence of the witness (*h*).

The court may direct that the examination be taken in the manner requested by, or stated to be in accordance with the practice of, the foreign court for which the evidence is being obtained (*i*).

SECT. 12.
Evidence
for Use
before
Foreign
Tribunals.

Evidence Act, 1856 (19 & 20 Vict. c. 113), to be made to appear. As to what evidence of such matters is sufficient, see *Simpson v. Hazard*, [1887] W. N. 115. The application is in certain cases made by the solicitor to the Treasury (R. S. C., Ord. 37, r. 60).

(*h*) Foreign Tribunals Evidence Act, 1856 (19 & 20 Vict. c. 113), ss. 1, 2; Extradition Act, 1870 (33 & 34 Vict. c. 52), s. 24; R. S. C., Ord. 37, r. 51. As to the form of order, the person before whom the examination is to be held, and the manner in which the examination is to be certified and forwarded, see R. S. C., Ord. 37, rr. 55—57.

(*i*) R. S. C., Ord. 37, r. 58. The Foreign Tribunals Evidence Act, 1856 (19 & 20 Vict. c. 113), s. 3, authorises the taking of evidence on oath by persons acting as examiners under any order made in pursuance of the Act; s. 4 provides for the obtaining by a witness of his expenses; s. 5 entitles a witness to refuse to answer incriminating questions and any other questions which he would be entitled to refuse to answer in a cause pending in the court which has ordered his examination. R. S. C., Ord. 37, rr. 54—58, apply to applications under the Evidence by Commission Act, 1859 (22 Vict. c. 20) (R. S. C., Ord. 37, r. 59).

EXAMINERS.

See COURTS; EVIDENCE; PRACTICE AND PROCEDURE

EXCHANGE.

See COMPULSORY PURCHASE OF LAND AND COMPENSATION; REAL PROPERTY AND CHATTELS REAL; STOCK EXCHANGE.

EXCHEQUER.

See CONSTITUTIONAL LAW ; REVENUE.

EXCHEQUER BILLS.

See BILLS OF EXCHANGE ETC.

EXCISE.

See INTOXICATING LIQUORS ; REVENUE.

EXCOMMUNICATION.

See ECCLESIASTICAL LAW.

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